

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

Case No.: 402/2007
Date delivered: 3 April 2008

In the matter between:

EKUPHUMLENI RESORT (PTY) LTD	1 st Applicant
ELONWABENI RESORTS (PTY) LTD	2 nd Applicant
and	
THE EASTERN CAPE GAMBLING AND BETTING BOARD	1 st Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM IN THE EASTERN CAPE PROVINCIAL GOVERNMENT	2 nd Respondent
CLIFTON DUNES INVESTMENTS 224 (PTY) LTD t/a LUKANJI LEISURE	3 rd Respondent
PEERMONT GLOBAL QUEENSTOWN (PTY) LTD	4 th Respondent
PEERMONT GLOBAL MTHATHA (PTY) LTD	5 th Respondent

J U D G M E N T

LEACH, J:

[1] The Eastern Cape Gambling and Betting Act 5 of 1997 ("the Act") provides for control over gambling and betting, and for matters connected therewith, in the Eastern Cape Province. The first respondent is a juristic person established under s 3 of the Act and is known as the Eastern Cape Gambling and Betting Board (for convenience, I intend in this judgment to refer to it as "the Board"). Under s 4 of the Act, the Board has certain powers, including the power to invite applications for licences in terms of the Act and to consider and dispose of such

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applications as well as to grant, renew, amend, refuse, suspend or revoke
gambling licences.¹ In particular, it has the authority to grant casino licences.

[2] The Eastern Cape has been divided into five geographic zones for licencing purposes. No more than one casino licence may be issued for each zone. Although casinos licences were previously granted in respect of zones 1, 2 and 5, no such licence had been issued in respect of either zones 3 or 4 until, early in 2006, when the first respondent called for proposals in respect thereto. This set in motion a train of events which culminated on 3 November 2006 when the first respondent awarded a casino licence to the third respondent for zone 3 and to the fourth respondent in respect of zone 4.

[3] Both of the applicants, had submitted bids for these licences and had expended considerable sums of money in doing so. Dissatisfied with the award to the third and fourth respondents, they launched legal proceedings seeking an order reviewing and setting aside first respondent's decision in that regard. This has led to voluminous papers being filed of record, although I understand they are presently far from complete.

[4] It is common cause that under the provisions of Uniform Court Rule 53(1)(b), the first respondent was obliged to make a record of the proceedings available. It appears from the papers that there have been various difficulties in putting together a set of the papers to be construed as the record for purposes of the review. Fortunately, it is not necessary to deal with these problems for

¹ Section 4.1 c (i)(ii)(iii) of the Act

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present purposes as the dispute at hand falls within a narrow compass, namely, whether the Board is entitled to censor certain of the documents which is common cause should form part of the record.

[5] The documents at the heart of this dispute are the score sheets which the individual members of the Board completed in the course of adjudicating upon the competing bids it received for the casino licences for zones 3 and 4. As I understand it, the bidders were called upon to address different issues in submitting their bids, and the individual members of the Board each allocated a mark in respect of the representations made in respect of the various issues so addressed. In doing so, they used a standardized score sheet. Although each member recorded his or her own individual scores, their combined scoring was converted mathematically into a final decision of the Board itself. The individual scoring of a particular member of the Board may therefore have had a significant effect upon the ultimate outcome of the Board's final award.

[6] Each score sheet contains the name of the member of the Board who used it to assess each bid, and it is therefore possible to know how each member of the Board scored the bid of each applicant. It is conceded that these score sheets are relevant documents which should form part of the record in the review. However, in the copies of the score sheets that the Board has made available for this purpose, the name of individual Board member has been expunged and replaced with a capital letter. For example, some of the score sheets are marked "A" while others are marked with a different letter. All of

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those marked by a particular letter were scored by the same member of the Board, but the actual identity of that person has not been disclosed.

[7] The applicants object to this, contending they are entitled to know which individual members of the Board scored each particular score sheet. As against that, the Board contends that while it is prepared to bundle separately all the score sheets completed by each individual member in respect of the various bids, the actual identity of the person who scored each sheet is unnecessary and will in fact cause prejudice if disclosed. The applicants therefore launched these proceedings to resolve this impasse. Only the Board (the first respondent) opposed the relief they sought.

[8] As a starting point, it is necessary to bear in mind that in order to facilitate the review of administrative orders, Rule 53 was designed as a means to have the relevant evidential material placed before court.² Its purpose is not to protect the decision maker but to facilitate applications for review, and it confers a real benefit on an applicant "*which he may enjoy if and to the extent needed in his particular circumstances*".³ As was stated by Kriegler AJA in **Jockey Club of South Africa v Forbes**.⁴

"Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to

² See **S v Baleka & Others** 1986 (1) SA 361 (T) at 397 – 398 quoted with approval in **Jockey Club of South Africa v Forbes** 1993 (1) SA 649 (A) at 661H-I.

³ The **Jockey Club** case, *supra* at 662G.

⁴ *Supra* at 660.

supplement his founding affidavit. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record. In terms of para (b) of subrule (1) the official concerned is obliged to forward the record to the Registrar and to notify the applicant that he has done so. Subrule (3) then affords the applicant access to the record. (It also obliges him to make certified copies of the relevant part thereof available to the Court and his opponents. The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.) More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an interlocutory application, to 'amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.' Subrule (5) in turn regulates the procedure to be adopted by prospective opponents and the succeeding subrules import the usual procedure under Rule 6 for the filing of the applicant's reply and for set down."

[9] As is apparent from this, while there may be no merit in the premise that the whole record of proceedings has to be furnished is respective of whether or not it is relevant to the review, in order for the Rule to fulfill its purpose ensuring that all relevant evidential material is placed before court, it is self-evident that all portions of a record relevant to the decision in question should be made available.⁵ And in considering the question of relevance, it is important to bear in mind that there is now a constitutional obligation for reasons to be given for administrative decisions which must be justifiable as rational and reasonably sustainable. If there is no rational link between the decision and the reasons, it leads to the conclusion that the decision was taken unreasonably, irrationally or arbitrarily,⁶ and that it should therefore be set aside.⁷

[10] Essentially, the Board in this matter contends that the applicants are not entitled to know how the individual members of the Board scored the various

⁵ **Muller & Another v The Master & Others** 1991 (2) SA 217 (N) at 220D-E.

⁶ **Afrisun Mpumalanga (Pty) Ltd v Kunene NO & Others** 1999 (2) SA 599 (T) at 629 – 630 and the authorities there cited.

⁷ *Cf.* **Radio Pretoria v Chairperson ICASA and Another** 2008 (2) SA 164 (SCA).

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competing bids placed before them whereas the applicant contends otherwise. In considering the various arguments in regard to this issue, it is necessary at all times to bear in mind that the Board is charged under s 16(1) of the Act to "*function in a transparent and open manner*", a phrase which indicates that nothing is to be concealed and that its functions should be "*exposed to general view or knowledge*".⁸ Furthermore, under s 32 of the Constitution, every person has the right of access to any information held either by the State or by another person that is required for the exercise or protection of any right. It is not without significance that in **Van Niekerk v City Council of Pretoria**,⁹ commenting upon s 23 of the Interim Constitution which was in similar, albeit not identical terms, Cameron J said:

"In my view, section 23 entails that public authorities are no longer permitted to 'play possum' with members of the public where the rights of the latter are at stake. Discovery procedures and common law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in section 23, is to subordinate the organs of State, including municipal authorities, to a new regimen of openness and fair dealing with the public. That the disclosure of the report may be inconvenient and even embarrassing to the respondent may be accepted; and under the common law regime of discovery and privilege its resistance to disclosure may for this reason have been well warranted. That does not justify attenuating the impact of section 23. On the contrary: it is precisely for that reason that section 23 has conferred upon the applicant the right nevertheless to obtain it.

This interpretation does not deprive public authorities of all defences, tactics or strategies. But a public authority must have a good rationale for refusing to supply a member of the public with information such as a report in this case. The present circumstances in my view offer no such rationale."¹⁰

⁸ See the **Afrisun** case, *supra* at 631A-C.

⁹ [1997] 1 All SA 305 (T) at 315.

¹⁰ This passage was cited with approval in **MEC for Roads & Public Works, Eastern Cape & Another v Intertrade Two (Pty) Ltd** 2006 (5) SA 1 (SCA) at para [21].

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[11] Before turning to consider whether there is any good reason for the Board not to disclose how its individual members scored the different bids, there is one further issue to be mentioned. The applicants' objection to the removal of the names of the individual members from the scoring sheet precipitated a flurry of correspondence between the attorneys for each side, during which the Board offered to disclose the identity of the scorer of each score sheet to the applicants' attorney on condition he kept this information confidential to himself and did not disclose it to the applicants. Not surprisingly, in my view, the applicants' attorney would have none of this and rejected the offer. In its opposing papers in the present application, the Board repeated this offer which was once more rejected.

[12] The Board's proposal to make information available to an attorney on condition that he does not disclose it to his clients, is truly preposterous. The relationship between an attorney and his client has to be frank and open, and the client is entitled to expect his attorney to discuss with him all available information which might be relevant to the case at hand. This could not be achieved if the attorney was prohibited from disclosing information to his client which might have a material bearing upon the outcome of the matter. If, for example, the Board's disclosure to the applicants' attorney showed that one of the members of the Board was probably biased against the applicants, the attorney can hardly be expected to keep that from his clients, to their prejudice. After all, an attorney is expected to act to the benefit of the person employing him for his professional expertise. Very wisely, *Mr Buchanan*, who appeared on

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behalf of the Board did not seek to persuade me that it had been proper to volunteer this information to the applicants' attorney on a confidential basis.

[13] The essential issue is whether the information the applicant seeks is relevant to the review or not. In seeking to avoid disclosing it, the Board contends that it is not relevant for the applicant to know who scored each score sheet and that the identification of its members by alphabetical letter in place of their names will enable the applicants, without any difficulty, to undertake a comparison of how the different Board members scored the different bids. It therefore denied that its censoring of the score sheets would cause the applicants any prejudice.

[14] There is, in my view, no merit in this argument. Under s 5 of the Act, the eight members of the Board have different skills and represent different stakeholders. If the identity of each scorer is known, the applicant would be able to identify who such person was representing or what particular expertise such member was called to bring to the table, and in light of that knowledge assess the rationality or otherwise of that person's scoring of the different bids. If, for example, the score sheets completed by the particular member who has been appointed by virtue by his/her knowledge and active involvement in the tourism industry¹¹ allocated very low marks to a candidate whose bid clearly would have been of the most benefit to the tourism industry, it might well justify the inference that the person concerned had been biased against that particular bid. This is just one particular example which readily springs to mind, but it does not need

¹¹ As required by s 5(1)(c).

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much imagination to think of numerous other examples in which the identity of the scorer would become relevant. Nevertheless, it does illustrate the importance in the assessment of whether the members of the Board took rational and arbitrary decisions of knowing how the individual members of the Board, scored the different bids. This cannot be achieved if the score sheets concerned are merely identified by a letter of the alphabet. In my view, the evaluation of the rationality or otherwise of the Board's decision will therefore be compromised unless the identities of the individual scorers is disclosed.

[15] The Board, however, contends that if the individual scores of the individual members become a matter of public record and debate, its integrity may be compromised as the disclosure of how the individual members of the Board voted *"will inevitably lead to speculation amongst members of the public and indeed amongst applicants who submit applications for consideration by the Board"*. This contention lacks any merit. Disclosure will hardly lead to speculation as to how the members of the Board voted. Indeed, it will inevitably lead to the very opposite, namely, that everyone will know how the individual members of the Board voted. And if the Board is indeed expected to function in an open and transparent manner as required by s 16(1) of the Act, there can be nothing wrong with the public learning how the members of the Board exercised their votes.

[16] The Board also suggests that the disclosure of the voting by the individual members may have the unfortunate result that such members will be *"targeted"* in the sense that they might be singled out for particular attention in respect of

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various individual aspects which the Board has to consider in arriving at its decision. In amplification of this, *Mr Buchanan* argued for the Board that if it became known that a particular member of the Board placed particular emphasis on an issue, potential bidders knowing that to be the case might pertinently address that issue in their proposals, thereby gaining an unfair advantage. But if it is known that a particular aspect requires to be pertinently addressed, what harm can there be in a bidder dealing with that issue in detail? Again, I suggest that query must be answered in the negative.

[17] The Board then mentions that lobbying of its members inevitably occurs both prior to and during the time that applications for licences are being considered, and while it does not suggest that this occurs necessarily in a corrupt manner, it states that the position of the individual Board members will become untenable if their scoring should become a matter of public record and debate. Again, this seems to me to be no reason not to disclose the scoring of the individual members. On the contrary, if such lobbying does occur, there is all the more reason for the scoring to be disclosed and to become a matter of public record so as to ensure the integrity of the process. How else would one know whether the lobbying of a particular member has affected his or her vote? Disclosure will therefore assist in removing perceptions of improper influence, rather than create them.

[18] The Board further submits that it has to date maintained an enviable reputation of being not only being unbiased and evenhanded but of having been seen to be such, and suggests that it would be most unfortunate, and not in the

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public interest, for individual Board members to be perceived to aligned or biased against the applicants. While I accept it would be most unfortunate if the score sheets do show that individual Board members were in fact aligned or biased against the applicants, but if that is so it is certainly not in the public interest for their bias not to be disclosed. On the contrary, if the voting shows that there was bias, it is in the public interest that it be disclosed. As a public body, the Board is to be held accountable. In this regard the respondents' stance that there is no direct attack taken against individual Board members is not in fact correct as the applicants do allege that the scoring can only be explained if there was bias against them. Whether there was bias can only be properly established if the votes of the individual members who comprise the Board are identified.

[19] In the light of these considerations, one is left wondering why the Board is being so coy. If the individual votes which the Board members cast do not give rise to any inference of bias or dishonest conduct on their part, no harm can be suffered if the voting is made public knowledge. Indeed it will form part of an open and transparent process and will assist, the respondents in formulating plausible answering affidavits. If, on the other hand, the information which the applicants seek, once disclosed, leads to an inference of bias or shows that there was an irrational and arbitrary decision taken, it is in the public interest of that information to become a matter of public knowledge.¹²

¹² Compare in this regard the observations of Marais J (as he then was) in **Protea Assurance Co Ltd v Waverley Agencies CC and Others** 1994 (3) SA 247 (C) at 249E-F.

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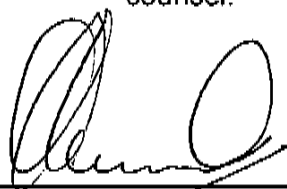
[20] The Board is a public body created to serve the public's interest, but which is to be held accountable for its actions. It is charged, both under the Act and the Constitution, to perform its functions openly and transparently and to reach decisions which are not irrational or arbitrary. Its functioning will in my view be enhanced, rather than impeded, if it deals with the review in the present matter frankly and openly, and that it can only do if it discloses the material information which the applicants seek. To seek to avoid disclosure does it no credit. It seeks, for no good reason, not to deal openly and fairly with the applicants, despite its constitutional obligation to do so.

[21] I have therefore decided that the Board is clearly obliged to provide the information brought by the applicants in this application which must therefore succeed, with costs. It was agreed that the costs of a postponement on 20 September 2007 should be costs in the cause. It was also correctly common cause that the employment of two counsel was a justifiable expense.

[22] In the result I make the following order:

- (a) The first respondent is directed to disclose the names of the members of the Eastern Cape Gambling and Betting Board on each and every score sheet delivered in terms of items 8.1 to 8.5 of the supplementary record delivered during May 2007.

(b) That the first respondent pay the costs of this application, such costs to include the costs of the postponement on 20 September 2007 as well as the costs attendant upon the employment of two counsel.

 3/4/2008

L.E. LEACH
JUDGE OF THE HIGH COURT