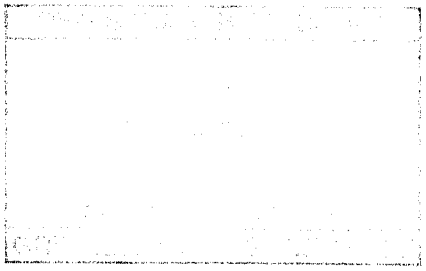
IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 12016/98

In the matter between:



STOCKS HOTELS & RESORTS (CAPE) (PROPRIETARY) LIMITED — Applicant

and

THE WESTERN CAPE GAMBLING AND RACING BOARD — First Respondent

TRANSNET PENSION FUND — Second Respondent

JUDGMENT DELIVERED THIS 26TH DAY OF OCTOBER, 1998

LOUW, J: The question which arises in this application is whether applicant, who has applied for a casino licence under the provisions of the Western Cape Gambling law, No.4 of1996 ("the Gambling Law"), is disqualified from obtaining or being granted such a licence by virtue of the provision of section 29(f) of the Gambling Law.

The relevant part of section 29(f) provides that when

> *"... any legal entity in respect of which the State, or any organ of the State or any organisation with which the state is concerned has any financial interest, except as*

far as taxes are concerned, in any gambling activity ..."

such entity shall be disqualified from obtaining or being granted a licence.

The second respondent, the Transnet Pension Fund, which has been established with legal personality in terms of section 2 of the Transnet Pension Fund Act, No. 62 of 1990 holds 26% of the shares in a company, Stocks Hotels & Resorts Holdings (Pty) Ltd ("Holdings"), which in turn holds 54,5% of the shares in another company, Stocks Hotels & Resorts Limited ("Limited"). This is a public company listed on the Johannesburg Stock Exchange. The balance of the shares in Limited are held by various investors on the Stock Exchange. Limited holds 100% of the shares in Stocks Hotels & Resorts (Cape) Holdings (Pty) Ltd ("Cape Holdings") which company in turn, holds 100% of the shares in applicant.

First respondent, the Western Cape Gambling and Racing Board, ("the Board"), which has been established by section 2 of the Gambling Law, is given the power to consider and grant applications for licences under the Gambling Law. On 30 June, 1998, the Board advised the applicant that it had procured the opinion of senior counsel which is to the effect that the applicant is disqualified in terms of section 29(f) of the Gambling Law from obtaining or being granted a licence

"... by reason of the shareholding of the Transnet Pension Fund in the said applicant".

The Board suggested that the applicant seek "a declaratory order ... to address this situation".

The applicant now applies for an order declaring that it is not, by reason of the provision of section 29(f), disqualified from obtaining or being granted a casino licence by the Board.

The Board has not given notice of its intention to oppose the application and second respondent abides the decision of the Court.

There are competing applicants for the casino licence. They have all been given notice by the Board of the relief being sought by the applicant and they do not appear to oppose the relief sought.

Mr E M du Toit, who with **Mr Joseph** appeared for the applicant submitted that applicant should be granted the declarator sought for two reasons: First that on a proper construction of section 29(f), the second respondent is not "the State, or any organ of the State or any organisation with which the State is concerned". Secondly, that in any event, second respondent's shareholding in Holdings does not constitute "any financial interest, except as far as taxes are concerned, in any gambling activity".

Second respondent is clearly not "the State". It is a pension fund which exists and operates wholly for its members, the employees of Transnet Limited. It is not part of the "central institutions of public administration" (**Baxter: Administrative Law,** p.95) and it is not an institution which

*" is under a duty to act in the public interest and not simply to its own private advantage". (**Baxter, op cit.** P.100)*

I turn to the question whether second respondent is an "organ of the State" within the meaning of section 29(f).

The concept "organ of State" as used in section 7(1) of the interim constitution (Act 200 of 1993), was considered in **Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others**, 1996(3) SA 800 (T) at 810 F-G where **van Dijkhorst, J**, in disapproving of the wider meaning given to the concept in **Baloro and Others v University of Bophuthatswana and Others**, (1995(4) SA 197 (B), formulated the test as follows:

"The concept as used in section 7(1) of the constitution must be limited to institutions which are an intrinsic part of government -i.e. part of the public service or consisting of governmental appointees at all levels of government - national, provincial, regional and local - and those institutions outside the public service which are controlled by the State - i.e. where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such extent that it is effectively in control. In short, the test is whether the State is in control."

and at 809G-H concluded

"An 'organ of State' ('Staatsorgaan') is an institutional body by means of which the State governs ...

An organ of State is not an agent of the State; it is part of government (at any of its levels)".

In the **Baloro** case, it was held that the university is an organ of State under

section 7(1) and that it is therefore subject to the application of Chapter 3 of the interim constitution.

In **Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n Ander**, 1997(8) BCLR 1066 (T), **Cameron, J** held that the **Transvaal Munisipale Pensioenfonds** was an "organ of State" within the meaning of section 7(1) of the interim constitution.

Cameron, J came to this conclusion after applying the "control test" in the **Directory Advertising** case "met 'n mate van soepelheid en aanpasbaarheid" and after analysing the statutes of the pension fund in the following terms":

> *"Dit is natuurlik die geval dat die eerste respondent beheer en regeer word kragtens sy statute. 'n Betragting van die statute toon dat hulle op hul beurt voorsiening maak vir 'n bestuurskomitee aan wie die beheer van die fonds uitdruklik deur die statute toevertrou word. Die bestuurskomitee word deur lede van die eerste respondent verkies. Die komitee het verdere wye magte wat die bevoegdheid selfs insluit om die eerste respondent te ontbind. Dit is verder die geval dat die eerste respondent sy oorsprong in 'n ordonnansie het en dat hy tot stand gekom het deur 'n wetgewende handeling deur die administrateur."* (At 1073J-1074A)

and holding that the pension fund's existence was a subsiduary one:

> *"Ten eerste is die eerste respondent ingestel vir werknemers wat in die diens van die Staat staan. Ten tweede kan sy statute slegs met die goedkeuring van 'n uitvoerende staatsfunksionaris (die Premier) gewysig word, en ten derde is die uitsluitlike doel van die eerste respondent se bestaan om aan te sluit by en diensvoordele te verskaf by die diens van staatsamptenare".*

Cameron, J concludes that

> *"Die eerste respondent wel aan die beheertoets voldoen. Die eerste respondent is onder die beheer van die Staat, nie slegs in die sin dat die bestaansvoorwaardes in sy statute alleen gewysig kan word deur staatsgoedkeuring nie, maar ook in die sin dat sy bestaan 'n newebestaan is. Sonder die Staat het die eerste respondent geen bestaan nie".* (at 1074C-E)

In **Mistry v Interim National Medical and Dental Council of South Africa and Others**, 1997(7) BCLR 933 (D), **Booysen, J** concluded with reference to the **Directory Advertising** case, that the first respondent was not an organ of State within the ambit of section 7(1) of the interim constitution. He held (and **McLaren, J** agreed) that

> *"...regard must be had to a number of circumstances including the functions and purpose of the body, the degree to which a functionary of the State such as a cabinet minister plays a role in the discharge by the statutory body of its duties and functions, as well as its independence generally".* (at 947D-E)

These judgments all concern the interpretation of the concept "organ of State" found in section 7(1) of the interim constitution and relate to the question whether Chapter 3 of the constitution is applicable to bodies such as a university, a pension fund, and the Medical and Dental Council. Specific principles of interpretation, such as are found in section 35 of the interim constitution, are applicable to the interpretation of the concept "organ of State" in section 7(1) read with the definition in section 233(1)(ix), which provides that organs of State include "any statutory body or functionary". An interpretation which is appropriate in the context of the interim constitution, therefore does not necessarily apply to the Gambling Law, the provisions of which are not in **pari materia** with those of the interim constitution.

The authors of **Constitutional Law of South Africa**, pp10-25 **et seq** discuss various aspects of the proper interpretation of section 7(1) in the context of the

applicability of Chapter 3 of the interim constitution.

They point out that generally

> *"...where the government delegates power to another body or person to enact or to enforce coercive laws which subject members of the public to punishment, Chapter 3 will apply. This prevents the legislature from assigning to others powers that the legislature itself could not legitimately wield".*

The authors then set out three tests

> *"Though this list may not be exhaustive, the primary litmus tests for determining whether a particular entity or actor is statutory body or functionary are the government control test, the government entity test, and the government function test".*

Regarding the "control test", the authors say:

> *"At a minimum, a government control test entails that it is not enough for a body to have been created by statute to warrant application of the constitution. To state the inquiry more positively, a government control test would likely hold that in order to subject a body to the constitutional standards the court must answer affirmatively one of the following two questions: Is the body part of one of the three branches of government? If not, does the government retain 'direct' control over the body in question?*
>
> *The control test is permissive. It is designed to allow institutions created and supported by government to operate without fear of constitutional sanctions".* (at p10-26)

The "government entity" test is a wider test, it appears:

> *"Does the entity perform tasks pursuant to some form of statutory authority? Is the task performed in furtherance of some government objective? Such a test ensures that state-created and state-funded bodies that serve State objectives cannot be insulated from constitutional review.*

Finally, the "government function" test, the ambit of which is even wider:

> *"Again the court might wish to ask two questions. First, is the actor exercising power normally associated with government? Secondly, does the actor possess the* ***indicia*** *of government? This test makes the exercise of power, and not simply the form of that power, the starting point for constitutional analysis. Where a private*

body exercises powers normally associated with government, where the exercise of such powers curtails or suppresses our fundamental freedoms, and where the government acquiesces in the exercise of such power, then a court that is concerned with the substance of our freedom, and not merely its form, may feel justified in subjecting such bodies to constitutional scrutiny".

The purpose of the above discussion of the concept of an "organ of State" is to ascertain the actions of which entities should be held properly to be subject to the constitutional limits set out in the bill of rights contained in Chapter 3 of the interim constitution. In interpreting the concept "organ of State" in the Gambling Law, one must start from the context of that Law and also consider its object and purpose.

Since the government control test appears to be the preferred test (even in a constitutional setting) adopted by our courts, it is appropriate to consider the degree of control which the State has over the pension fund.

Transnet Ltd., for the benefit of whose employees the Fund was established, is a trading company which is wholly owned by the State.

Section 2 of the Transnet Pension Fund Act, No. 62 of 1990 provides for the establishment of the Fund. Section 5 of this Act provides that control and management of the pension fund shall be governed by the Rules of the Fund and that the Rules shall be published by the Minister of Mineral and Energy Affairs and Public Enterprises (the Minister) after having obtained the concurrence of the Minister of Finance. The Rules may be amended by the Board of Trustees of the

Fund, subject to the approval of the Minister, acting with the concurrence of the Minister of Finance.

The Rules of the Fund were published by the Minister under Government Notice R2355 on 1 October, 1990, and provides that:

(a) The object of the Fund is to provide benefits for members and beneficiaries of the Fund;

(b) that the Fund shall be controlled by a Board of Trustees, which is made up as follows:

(I) (E)ach trade union may appoint a member and an alternate;

(ii) the Managing Director of Transnet Limited shall appoint a Chairman for the Board and a number of members and their alternates equal to the aggregate number of members and alternates, respectively, appointed by the trade unions; and

(c) that the duty of the Chairman, members and alternates towards the Fund shall be of a fiduciary nature and that they shall, when acting in such capacities, seek only the benefit of the fund, its members, pensioners and other beneficiaries, to the exclusion of all other considerations or objectives.

(d) POWERS OF THE BOARD

(1) The Board may, with the approval of the Managing Director and the Minister, acting in concurrence with the Minister of Finance -

(aa) amend the rules;

(bb) prescribe the manner in which the award of benefits shall be considered by the Fund; and

(cc) take any action (including the control of the finances and the administration of the Fund) not specifically provided for in the Rules, that may be necessary to achieve the objects of the Fund.

(2) The board appoints an Investment Committee which consists of -

(i) the Chairman of the Board;

(ii) a member of the personnel of an employer, engaged in the administration of the Fund and nominated by the Chairman of the Board;

(iii) two members of the Fund nominated by those members of the Board appointed by the managing director of Transnet.

(iv) one member from among the members appointed by the trade unions, nominated by such members.

(3) The Investment Committee shall subject to the requirements stipulated in the Pension Funds Act, 1956, and the regulations promulgated thereunder in connection with the investment of

money, invest or cause to be invested the monies of the fund not immediately required for current expenses, to the best advantage of the Fund.

Such control as there is by Transnet and the State is limited to -

(1) the appointment of the Chairman of the Board of Trustees by the managing director of Transnet who also appoints an equal number of Board members as are appointed by representatives of trade unions; and

(2) the Board exercising its powers (including the power to amend the Rules of the fund) with the approval of the managing director of Transnet and the Minister, with the concurrence of the Minister of Finance.

The State, through the Ministers therefore does have some control over the functions of the Fund, but the effect of the control is limited by the nature of the functions of the Fund, the primary object of which is to provide benefits for members and beneficiaries of the Fund. The Board appoints an investment committee which invests and causes to be invested the monies of the Fund to the best advantage of the Fund. The State plays no role in the decisions of the investment committee. Neither the State nor any organ of State derives any benefit whatsoever from the Fund. The investments of the Fund, including the

26% shareholding in Holdings, are made independently of the State or any organ thereof.

The Rules of the Fund and the provisions of the Transnet Pension Fund Act do not suggest that the Fund is part of government in the sense that it is part of the public service or that it is an instrinsic part of government. It is not controlled by the State in the sense that the majority of the members of its Board are appointed by the State. The Fund does not exercise a governmental function, nor are the functions of the Fund, or the exercise of such functions, prescribed by the State to the extent that it can be said that the State is in control of the Fund. The Rules do provide that the Board carries out its powers with approval of the Minister, acting in concurrence with the Minister of Finance, but neither the Rules nor the Act require that the Fund carry out tasks in furtherance of some government objective. It is not a body by means of which the State governs.

Having regard to these considerations, I am of the view that the Fund is not an "organ of State" as meant in section 29(f) of the Gambling Law.

I turn now to the question whether it can be said that the Fund is "an organisation with which the State is concerned".

The terms used by the legislature are of wide connotation. The Oxford English Dictionary gives as one of the meanings of "concerned"-

"To be in a relation of practical connection with; to have to do with; to have a share in; to be engaged in, with".

Prima facie, the legislature seeks to exclude the State as such, any organ of the State, as well as any other body or organisation with which the State is involved in any manner whatsoever, from having a financial interest in gambling activities.

In **MAK Mediterranee SARL v The Fund Constituting the Proceedings of the Judicial Sale of the MC Thunder,** 1994(3) SA 599 (C), **Scott, J,** as he then was, said the following regarding the expressions "arising out of", "relating to", "in respect of", "in the nature of" and "in regard to":

" It seems to me that expressions of the kind referred to above are not readily capable of precise definitions, and have meanings which by their very nature are less than definite. When it becomes necessary, therefore, to determine the limits of the relationships which they may be employed to describe, particularly in what may be considered as borderline cases, it is inevitable, I think, that particular regard will have to be had to the context in which they are used in the statutory provision in question as well as other indications, whether in the statutes or otherwise, which may present themselves". (At 606 F-G)

In **Jaga v Dönges,** 1950(4) at 662, it is said -

"...the context... is not limited for the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background";

and at 664 -

"Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and ***vice versa,*** *the less clear*

it is the greater the part that is likely to be played by the context".

I turn first to Chapter IV of the Gambling Law, which deals with licencing and approval. Section 26 read with section 2(2) of the Gambling Law reiterates the limited right to gambling for which it provides. Section 27 sets out all the kinds of licences which may be granted by the Western Cape Gambling and Racing Board. Section 28 provides that a limited class of person qualifies to be awarded a licence to conduct gambling. Section 29, in turn sets out those entities and persons who may not participate in the conduct of gambling. Persons excluded include any person who does not qualify as stipulated in section 28, political office-bearers, the spouse of certain disqualified persons and any legal entity in respect of which the State, an organ of the State or any organisation with which the State is concerned has any financial interest in any gambling activity. Section 30 further extends the disqualification to obtain a gambling licence to persons having certain direct or indirect interests. It introduces the notion of "the power to exercise a significant influence over the gambling business" of another.

From these sections one can infer that the legislature had in mind, on the one hand, the granting of limited gambling rights to suitable persons, and, on the other hand, the exclusion of persons who are not suitable for reasons of dishonesty, political office, insolvency, etc., as well as, generally, any State financial interest in any gambling activity. The Law does, however, not indicate the ambit of the

exclusion contained in the words "any organisation with which the State is involved".

To ascertain the meaning to be given to those words and to ascertain what limitation, if any, is intended to the wide conotation thereof, regard must be had to factors outside the Gambling Law. To the extent that it is necessary to establish the mischief aimed at by the legislature, regard may be had to the report of a judicial commission of enquiry - see in this regard **Westinghouse Brake and Equipment v Bilger Engineering,** 1986(2) SA 555 (A) at 562D-563A, **Attorney-General, Eastern Cape v Blom & Others,** 1988(4) SA 645 (A) 668H-669F and **S v Makwanyana & Another,** 1995(3) SA 391 (CC) at 404-407.

The Lotteries and Gambling Board was appointed in 1994 in terms of section 3 of the Lotteries and Gambling Board Act No. 210 of 1993. In terms of this Act the Board was requested to report to Government on the advisability of allowing lotteries and gambling in South Africa. The investigations of this Board shortly preceeded the passing of the National Gambling Act, No. 33 of 1996 and of the Western Cape Gambling Law. In its interim report of October, 1994, the Board suggested that gambling in South Africa should proceed from certain fundamental principles, one of which is that

> *"...governments should not have ownership, control, management of or shareholding in other forms of lotteries or gambling activities"*

(the form of gambling which is excluded by the words "other forms" is a national state lottery).

In Chapter 4 of its final report of March, 1995, the Board sets out what it considers to be certain "principles for gambling in South Africa", which the government "must strictly adhere to in policy and legislation". The Board stated that -

> *"...gambling... should be strictly controlled, well regulated and effectively policed"*

and that

> *"... justice, fairness and equity in the system can only be served if the utmost good faith, transparency and frankness prevails".*

Dealing with the principle of protection of gamblers, the Board confirmed that -

> *"... policy and legislation... should proceed on the premise that control structures, regulatory measures, rules and other standards should primarily be aimed at the protection of the gambler ... his good faith and trust and his positive perception of the industry should be protected in policy and Law".*

Concerning the principles of "Transparency, Honesty, and Integrity" it is stated that -

> *"... the gambling industry world wide ... is invariably associated with crimes, abuse, manipulation, favouritism and many other negative aspects. It is, therefore, incumbent on the policy-makers, legislature and the industry to avoid the development of such a perception in gamblers' eyes and the public".*

Turning specifically to government involvement in the gambling industry, the Board reconfirmed that -

> *"... the government's involvement in other lotteries, gaming and wagering should be excluded. Its functions should be limited to authorisation, control and regulation for the purpose of maintaining law, order and fairness in the industry".*

And further stated:

> *"In some (countries) the government owns, controls, and regulates every facet of the*

industry. Information reveals that such jurisdiction has a higher vulnerability to corruption, bribery and abuse ... "

and that therefore,

"... apart from the National Lottery, both central and provincial governments should have no involvement in all other forms of gambling apart from the control thereof by legislation".

Finally, the Board recommended that

"...legislation shall exclude central and provincial governments and parastatal bodies from holding shares or other forms of power in the gambling industry excluding the national lottery".

Having regard to the "principles of gambling" which underlie the recommendation of the Lotteries and Gambling Board, as well as the recommendation itself, it seems clear that a fundamental principle is that the involvement of Government in any form in which it can exercise an influence over any gambling operation, or which could be in conflict, real or perceived, with the duty of the Government to institute measures to adequately and fairly authorise, control and regulate the gambling industry, or which might open the door to corruption, bribery and abuse, should be excluded.

The recommendation of the Board in regard to government involvement appears to be reflected in section 13(1) of the National Gambling Act, No. 33 of 1996, which provides:

"Subject to the provisions of this Act, gambling in the Republic shall be regulated in accordance with the following principles:

(a) ...

(f) the State or any organ of the State or any organisation with which the State

is concerned shall from 10 May 1999, apart from taxes and levies, not have any financial interest in any gambling activity: Provided that any provincial licencing authority considering an application for a licence contemplated in paragraph (j) before 10 May 1999 shall disregard such financial interest held by the State, such organ of the State or organisation ...".

Paragraph (j) relates to casino licences.

The proviso to paragraph (f) of Section 13(1) of the National Gambling Act is clearly intended to cater for the situation which existed in the former TBVC states prior to the new gambling dispensation in South Africa. As a result of investments made by agencies of some of these "homeland" governments in Sun International, certain provincial government agencies still held shares in Sun International who was lawfully conducting gambling in these "states". This provision allows these provincial governments time to divest themselves of their shareholding in Sun International. See in this regard **Brand: Gambling Laws of South Africa**, p1-5.

Parliament in section 13(1) of the National Gambling Act laid down the principles in accordance with which gambling shall be regulated in the Republic. Section 29(f) of the Western Cape Gambling Law applies one of these principles (the exclusion of the Government from having a financial interest in gambling) by disqualifying certain legal entities (and not the Government **per se**) from obtaining or being granted a casino licence. The entities so disqualified are any legal entities <u>in respect of which</u>

(1) the State,

(2) any organ of the State, or

(3) any organisation with which the State is concerned,

has any financial interest ... in any gambling activity. .

Mr du Toit submitted that the words "any organisation with which the State is concerned "should not be read in isolation but that, in accordance with the **maxim noscitur a sociis,** it should be construed in context and **eiusdem generis** with the preceding words "State or any organ of the State" in section 29(f) of the Gambling Law and therefore, that the words do not refer to any body with which the State has a little, or occasionally, to do with. In the context, he submitted it implies an organisation forming part of the State or a body over which the State has some, probably significant, control. The State, through the Ministers and Transnet, through its managing director, do have some control over the appointment of Board members of the Fund and over the exercise of its powers by the Fund, but that control is limited, both in itself and by the nature of the functions of the Board. He submitted that the State can thus hardly be said to be effectively in control of the Fund or to be in a position to influence the gambling operations to be conducted by the applicant.

The use of the words "concerned with" however, implies more than just a relationship involving control. It includes the State being engaged in or with an organisation, having to do with the organisation or having some practical connection with the organisation.

The object and purpose of the Fund is to provide benefits for its members and beneficiaries, being the employees of Transnet Ltd, a company which is wholly owned by the State. The State, through the ministers involved and with whose approval and concurrence the Board of Trustees of the Fund carries out its functions, is engaged with the Fund in providing these benefits to Transnet employees. There is, however limited the control it has may be, a relationship of practical connection between the State and the Fund. Such connection and control is sufficiently direct and close to conclude that, having regard to the object and purpose of the legislation, the Fund is "an organisation with which the State is concerned" within the meaning of section 29(f) of the Gambling Law.

I turn to the question whether the Fund would, "in respect of" the applicant have "any financial interest ... in any gambling activity ..." by reasons of its 26% shareholding in Holdings. The words "any financial interest" used in section 29(f) are wide. It is not easy to establish its limitations.

Financial interest is defined in section 1(18) of the Gambling Law as:

> *"...in relation to a company or corporation, means -*
>
> *(a) having a right or entitlement to share in profits or revenue;*
>
> *(b) being the holder of any real right in respect of any property of the company or corporation;*
>
> *(c) being the owner or holder of a real or personal right in any property used by the company or corporation in conducting its gambling business; or*
>
> *(d) having a direct or an indirect interest in the voting shares of the company or having an interest in a close corporation".*

Mr du Toit pointed out that the prohibition is against having any financial interest in "any gambling activity" and not against having such interest in any company, organisation or institution carrying on "any gambling activity". A distinction must therefore be drawn, he submitted, between having "any financial interest" in, for instance, a company itself on the one hand, and having "any financial interest" in the business (gambling activity) of a company, on the other hand. He submitted that while it may be said that the Fund has a financial interest in the applicant, it does not follow that the Fund has a financial interest in the business (gambling activity) of the applicant.

In **Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another,** 1962(1) SA 458 (A) the meaning to be given to "financial interest in a business" found in section 166(v) of the Liquor Act, No. 30 of 1928, was considered. The effect of section 166(v), broadly speaking was that certain classes of persons were prohibited from having a financial interest in certain kinds of licenced liquor businesses. The question which arose was whether S.A. Breweries Ltd directly or indirectly acquired a financial interest in the licenced businesses of Stellenbosch Farmers' Winery Ltd when it acquired 98% of all the shares of the Stellenbosch Farmers' Wine Trust Ltd, which company's only business was the holding of the shares in its wholly owned subsiduary, Stellenbosch Farmers' Winery Ltd. It was held in the court **a quo**, and on appeal, that a person who acquires shares in a company or in any other company which is by shareholding on its part linked with the former company, either directly or

through an intermediate shareholding company or companies, acquires "a financial interest" within the meaning of section 166(v) in any business conducted by such company.

In coming to the aforesaid conclusion, **de Villiers, AJ** in the court **a quo** quoted the following passage from the judgment of **Curlewis, J** in **Rex v McLachlan** 1915 TPD 34 at 41 which deals with the interpretation of the words "interested in a business":

> *"In my opinion 'interest' means financial or pecuniary interest, the interest of a person who has some share or participation in either the profits or losses, or in both the profits and losses of a business, or in the takings or sales of the business. I think it refers to a person who has a pecuniary interest in the trade carried on there".*

These views were approved of on appeal in the **Stellenbosch Farmers' Winery** case (at 471, in the minority judgment, per **Hoexter, ACJ**). At 476H-477A, **Wessels AJA** (in the majority judgment) said that the words "financial interest in a business"

> *"...may properly be used to describe or define the relationship between a person and the business in question where he is so circumstanced with respect to it that his financial position is affected by it either beneficially or detrimentally."*

And that the use of words "in" and "acquired" in the section:

> *"...indicated that the legislature intended penalising a transaction where the person's interest results from something in the nature of a right or title which relates his own financial position to that of the business in such a manner that the fluctuating fortunes thereof affect him either beneficially or detrimentally".*

In the course the majority judgment, **Wessels, AJA** at 483 A-B pointed out that a financial interest in a business need not involve any control over the business concerned.

The reasoning set out in the **Stellenbosch Farmers' Winery** case is in my view applicable to this case. I do not therefore agree with the distinction which **Mr du Toit** has sought to draw in this case between a financial interest in the business of a company as opposed to such an interest in the company itself.

The apparent object and purpose of the provisions of section 29(f) is to exclude the State, in any form, from exercising an influence over the gambling activities of another entity and thus to exclude possible fraud, corruption, bribery and abuse. In addition, it is the function of the State to authorise and control the gambling industry with the purpose of maintaining law, order and fairness in such industry. Having regard to these functions of the State, I am of the view that the words "financial interest in any gambling activity" should be read to include the case where such interest derives from shareholding in a company, either directly, or through intermediate companies, which carries on gambling activities. This is so whether or not such shareholding gives rise to any form of control over the gambling activities carried on. It is the mere holding of a financial interest of this nature by the State, an organ of State or by an organisation with which the State is concerned, in the gambling activities of a legal entity, which leads to the disqualification of such entity from acquiring a casino license. The reason is that in such a case, there would be conflict between the duty of the State to control and regulate the gambling industry and the financial interest which the State, any organ of State or any organisation with which the State is concerned has in such gambling activities to be carried on by the entity seeking a casino licence.

It follows that the Fund does have a "financial interest" within the meaning of section 29(f), in the proposed gambling activities of the applicant. This could result in a conflict, real or perceived, between the State's duties of control and regulation of the gambling industry and the financial interest of the Fund, being a body with which the State is "concerned". One of the objects of the provision under consideration is to exclude this conflict between duty and interest. It does so by disqualifying the applicant, being an entity in respect of which the Fund, an organisation with which the State is concerned, has a financial interest in the very activity the State has a duty to control and regulate.

It follows that the application for the declaratory order sought by the applicant cannot succeed.

The application for the declaratory order sought by the applicant is dismissed.

.....

W J LOUW