THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 525/2003
Reportable

In the matter between

LONDON CLUBS INTERNATIONAL (OVERSEAS) INVESTMENTS (PTY) LTD	Appellant
and	
THE FREE STATE GAMBLING AND RACING BOARD	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL: FINANCE AND EXPENDITURE AND ECONOMIC AFFAIRS: FREE STATE PROVINCIAL GOVERNMENT	Second Respondent
GOLDEN FLAMINGO RESORT (PTY) LTD	Third Respondent
INCITICORP (PTY) LTD	Fourth Respondent
VAAL RIVER CASINO (PTY) LTD	Fifth Respondent

Coram**:** Howie P, Zulman, Cameron, Nugent et Van Heerden JJA

Heard: 3 March 2005

Delivered: 31 March 2005

Summary: ***Free State Gambling and Racing Act 6 of 1996 – interpretation of s 93(4) – whether responsible Member of the Executive Council entitled to exercise powers and perform functions of Free State Gambling and Racing Board after expiry of terms of office of Board's initial members and before appointment of new members – if not, whether Appellant entitled to declaratory relief sought in the court below***

JUDGMENT

NUGENT & VAN HEERDEN JJA:

Introduction

[1] There are two main issues in this appeal: firstly, whether the second respondent, the Member of the Executive Council: Finance, Expenditure and Economic Affairs: Free State Provincial Government (the MEC), was entitled, in terms of s 93(4) of the Free State Gambling and Racing Act 6 of 1996 (the Act), to exercise and perform the powers and functions of the first respondent, the Free State Gambling and Racing Board (the Board), after the expiry of the terms of office of the Board's initial appointed members and before the appointment of new members. If not, then the second question to be answered is whether the appellant, London Clubs International (Overseas) Investments (Pty) Ltd (LCI), was entitled to the declaratory relief sought by it in the court below.

Background

[2] The Board is a juristic person established in terms of s 2 of the Act, its existence as such dating from the commencement of the Act on 31 May 1996. The first members of the Board were appointed by the MEC[1] with

[1] In terms of s 4 of the Act.

effect from 19 March 1998 and their respective terms of office expired simultaneously three years later on 18 March 2001.[2]

[3] Pursuant to s 13(1)*(j)*(ii) of the then National Gambling Act 33 of 1996,[3] the Free State Province could grant a maximum of four casino licences. The Board invited applications for casino licences for zones 2, 3 and 4 (the Northern, Eastern and Goldfield zones) in the Free State Province by notices published in terms of s 30(1) of the Act in the Provincial Gazette on 8 December 2000 and in the Sunday Times on 10 December 2000. In response to this invitation, LCI obtained a copy of the Request for Proposal (the RFP) from the Board against payment of the fee of R5 700. The RFP contained a 'Schedule of critical dates (Timetable)' which, in terms of para 1.11, provided 'the anticipated timing of adjudication of the Free State Casino Development Project'. The Board's right to amend or deviate from the schedule of dates was expressly reserved. The date originally stipulated in the schedule as the 'deadline for submission of detailed proposals and notice of application' was 14 March 2001. On 30 January 2001 this deadline was extended by the Board to 6

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[2] In terms of s 4(3) of the Act, membership of the Board includes the Chief Executive Officer (the CEO) by virtue of his or her office. The CEO is appointed by the MEC, after consultation with the Board (s 10(1)*(a)*), and his or her term of office is not limited, unlike that of a Board member appointed under s 4(1), whose term of office is determined by the MEC, but may not exceed three years (s 7).

[3] Repealed in its entirety by the National Gambling Act 7 of 2004, s 45 of which now governs the maximum number of casino licences that may be granted in the Republic and in each province.

April 2001 and the schedule of critical dates was revised accordingly. Notice of this extension was subsequently given by the CEO (by letter dated 5 February 2001) to all 'applicants', including LCI, who were subsequently furnished with copies of the revised schedule.

[4] The terms of office of all the first appointed members of the Board expired on 18 March 2001. On 29 March 2001, in response to a request from the CEO of the Board dated 28 March 2001, the MEC purported to approve a further extension to 11 May 2001 of the deadline for the submission of applications for casino licences. Notice of this further extension was given by the CEO to all 'applicants' (including LCI), by letter dated 29 March 2001, and such applicants were thereafter furnished with copies of the further revised schedule of dates. At that time, no new members had been appointed to the Board. (We were advised after the hearing of this appeal that new members were only appointed with effect from 21 June 2002, that their respective terms of office all expired on 20 June 2004, and that no new appointments have been made since then.)

[5] In a letter dated 9 May 2001, which made specific reference to s 93(4) of the Act, attorneys representing a company by the name of Golden Letsema Investments (Pty) Ltd (Golden Letsema), a joint venture

consortium of which LCI is apparently one of the shareholders,[4] advised the CEO that –

'It is … our submission that neither the Chief Executive Officer as delegated authority, nor the Member of the Executive [Council], has the jurisdiction in the absence of a Board, to proceed to exercise the functions of the Board and that any actions in the absence of the Board, will be void.'

[6] Thereafter, in response to a written request dated 19 September 2001 addressed to him by Golden Letsema's attorneys, the CEO confirmed in writing on 2 October 2001 that the terms of office of the appointed members of the first Board expired on 18 March 2001, and that no specific powers relating to the casino licensing process had been delegated by the Board to the CEO before that date. The CEO further informed the attorneys that 'section 93(4) of the Free State Gambling and Racing Act, 1996 provides for a transitional arrangement pending the appointment of the Board.'

[7] Neither LCI, nor any one of Golden Flamingo Resort (Pty) Ltd (Golden Flamingo), Inciticorp (Pty) Ltd (Inciticorp) and Vaal River Casino (Pty) Ltd (Vaal River), met the last deadline (6 April 2001) set by the

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[4] In earlier correspondence between Golden Letsema's attorneys and the CEO, LCI was identified as the manager/operator of the casino in respect of which Golden Letsema intended to apply for a Free State casino licence.

Board before the expiry of the terms of office of its appointed members. LCI also did not submit an application for a casino licence before 11 May 2001 (the deadline as further extended by the MEC), while Golden Flamingo, Inciticorp and Vaal River all did so.

[8] On 13 May 2002, LCI brought an application in the Free State High Court against the Board for a declaratory order in the following terms:

'The extension granted on or approximately the 29th March 2001 by the Chief Executive Officer of the Respondent [the Board] …as well as the revised Timetable…extending the closing date for the submission of detailed proposals and notices of application for the award of a casino licence in the Free State Casino Development Project until the 11th May 2001, be declared *ultra vires* the authority of the said Chief Executive Officer, and accordingly null and void'.

[9] The MEC, Golden Flamingo, Inciticorp and Vaal River were subsequently joined as the second, third, fourth and fifth respondents. At the hearing of the application in the court below, the order referred to above was amended, at LCI's request, to read as follows:

'The extension granted on or about 29 March 2001 by the second respondent [the MEC], as well as the approval on or about 29 March 2001 of the revised timetable by the second respondent, extending the closing date for the submission of detailed proposals and notices of application for the award of casino licences in the Free State Casino Development Project until 11 May 2001 be declared *ultra vires* the authority of the second respondent and accordingly null and void'.

[10] Section 93(4) of the Act, on which the respondents relied, amongst other things, in opposing LCI's application, reads as follows:

'Notwithstanding anything to the contrary contained in this Act, the responsible Member[5] may exercise and perform the powers and functions of the board, excluding the granting of any licence, until such time as the board has been appointed in terms of section 4(1).'

[11] The court *a quo* (Wright J) held that s 93(4) of the Act was to be construed as applying to *any* appointment to membership of the Board, and not only to the first appointment of Board members. On that interpretation of s 93(4), he held that the MEC was authorised, in terms thereof, to perform the powers and functions of the Board in the period between the expiry of the terms of offices of its original members and the appointment of new members. The MEC's decision to approve a further extension of the

[5] The member of the Executive Council of the Province responsible for the administration of the Act, in this case the second respondent (s 1).

deadline for the submission of detailed proposals and notices of application until 11 May 2001 was, therefore, not *ultra vires* the Act, as was contended by LCI. Wright J also held that there had been an excessive and unreasonable delay on the part of LCI in bringing the application, without any application for condonation or extension having been made by LCI. The learned judge held that each of those two findings was fatal to LCI's application, which application he therefore dismissed with costs. He made no finding in respect of LCI's *locus standi,* which was also in issue. It is against that judgment that the present appeal, with the leave of the court below, is directed.

Interpretation of section 93(4)

[12] The Board was constituted by the Act as a juristic person having six members[6] (unless the MEC increases the membership to a maximum of ten in terms of s 4(1)*(f)*).

[13] The Board, thus constituted, came into being when the Act commenced on 31 May 1996, though it had no capacity to function until appointments to office were made. To make those appointments – each for

[6] Five members provided for in s 4(1)*(a)–(e)* and the Chief Executive Officer who is a member *ex officio* in terms of s 4(3).

a period determined by the MEC but not exceeding three years[7] – an elaborate process was to be followed.[8] The same process is to be followed when filling casual vacancies (vacancies that arise otherwise than by the effluxion of time)[9] in the membership of the Board.

[14] The Board functions through resolutions passed by its members at meetings. Its capacity to pass resolutions is not dependent upon a full complement of members being in office.[10] But it does depend, in practice, upon whether there are sufficient members in office to constitute a quorum at meetings of the Board.

[15] In terms of s 15(3) a quorum is constituted by 'a majority of the members of the board'. That is a reference to the membership of the Board as it is constituted by the Act, as distinct from the holders of that office from time to time.[11]

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[7] Section 7.
[8] The process is provided for in s 6.
[9] See *Words and Phrases Legally Defined* 3 ed (1988) Volume 1 pp 230-231.
[10] Section 15(5) permits it to act validly notwithstanding vacancies in its membership.
[11] Cf *Newhaven Local Board v Newhaven School Board* 1885 30 Ch. 350 (CA) in relation to legislation in similar terms. That distinction between the juristic membership of the body and those who are appointed to hold that office from time to time is similarly recognised in Tables A (arts 77 and 78) and B (arts 75 and 77) to Schedule 1 of the Companies Act (the standard form Articles for a public and a private company respectively) relating to a quorum for meetings of directors. See, too, s 8.24(a) of the Revised Model Business Corporation Act 1984 (United States), summarized in *Words and Phrases Legally Defined: Supplement 2004* p 572. It is also a construction of s 15(3) that gives effect to the apparent objective of the Act – which is that the regulation of gambling should be entrusted to a multi-disciplined board – and accords with the language used throughout the Act.

[16] The regime created by the Act succeeded various legislative regimes that were in existence immediately before, but came to an end upon, its commencement, making it necessary to provide for a transition. The legislation that was repealed was the Horse-Racing and Betting Ordinance 12 of 1956 (Orange Free State), the Horse-Racing and Betting Ordinance 8 of 1977 (Orange Free State), the Casino Act 19 of 1977 (Bophutatswana), and the Gaming and Betting Act 39 of 1989 (Bophutatswana), insofar as they applied to the Free State province.

[17] That transition is provided for in s 93. Subsection (1) provides for the continued validity of casino licences issued under the repealed legislation. Subsection (2)*(a)* provides for the continued validity of applications made under the repealed legislation. Subsection (2)*(b)* provides for the continued validity of licences and authorities issued under the repealed legislation. Subsection (2)*(c)* provides for the continued validity of rules and regulations made under the repealed legislation. Subsection (2)*(d)* provides for the continued validity of anything done in terms of the repealed legislation. Subsection (3) provides for the vesting in the Board upon commencement of the Act of all assets, liabilities, rights and obligations of a board established in terms of the repealed legislation. The

provisions of the final subsection, subsec 93(4), are set out in para [10] above.

[18] Subsection 93(3) was probably intended to refer to the Totalisator Agency Board (Orange Free State) established in terms of the powers conferred upon the Administrator by s 9(2)*(a)* of the Horse-Racing and Betting Ordinance 1956 (Orange Free State), the Orange Free State Racing and Betting Board established in terms of s 11A of the Horse-Racing and Betting Ordinance 1977 (Orange Free State), the Liquor Board contemplated by the Casino Act 1977 (Bophutatswana) (at least insofar as it regulated casino gambling pursuant to that Act),[12] and perhaps to other boards as well.[13]

[19] No doubt there was a plethora of licences and authorities, rules and regulations, and applications and acts, which regulated gambling at the time the Act commenced, created in terms of, and depending for their validity upon, the repealed legislation. No doubt there were also assets and liabilities that vested in the boards that regulated gambling at that time. Clearly the purpose of s 93 was to ensure that that regulating framework

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[12] The Liquor Board was not established 'in terms of' the Casino Act, but rather in terms of the Intoxicating Liquor Act 36 of 1980 (Bophutatswana), but it had responsibility for various aspects of casino gambling pursuant to the Casino Act.

[13] The repealed Gambling and Betting Act 1989 (Bophutatswana) is not available in the library of this Court.

remained intact, and those assets and liabilities could be administered, during the hiatus between the repeal of the former legislation and appointments being made to membership of the newly-created Board.

[20] That s 93(4) serves that purpose – by authorising the MEC to exercise the powers and functions of the Board during that period – is plain and is not in dispute. What is in dispute is whether the purpose of the subsection was exhausted once the initial appointments were made.

[21] Contrary to the view of the court *a quo*, in our view the purpose of the subsection was indeed exhausted and it had no further application once the Board first became capable of functioning (by appointments being made to its membership). It would be unusual for a section that, in terms, deals in all its subsections with the inevitable hiatus caused by the transition from one legislative regime to another, to provide, in addition, in one of those subsections (and then rather obliquely) for the consequences of a possible hiatus of a quite different kind – the hiatus between the board losing all its appointed members and fresh appointments being made. It is unlikely that such an hiatus was ever contemplated by the legislature. Moreover, the language that is used in the subsection ('…until such time as the board has been appointed in terms of section 4(1)') lends itself to meaning that once the act contemplated by that section – appointments

being made to membership of the Board – has occurred, the subsection has no further application. That would be in keeping with the transitional purpose of the section as a whole.

[22] If the subsection were to be construed as applying equally to the loss of office of all those appointed to the membership of the Board – the construction advanced by the respondents – a number of anomalies would arise.

[23] Members of the Board might lose office in various ways. They lose office when their terms of appointment expire (which might occur simultaneously for all the appointed members or in various permutations), which would require the MEC to again exercise the power conferred on him by s 4(1) to make fresh appointments. They might also lose office – either simultaneously or in various permutations – by other means that result in casual vacancies, which are to be filled by the MEC exercising the power conferred on him by s 8. The question that comes to mind is why the statute would confer authority upon the MEC to assume the functions of the Board when its appointed membership is depleted by expiry of their terms of office (and then only when it occurs simultaneously for them all) and not when its appointed membership is depleted by the occurrence of a series of casual vacancies? One asks, as well, what is to happen when, at a

time that casual vacancies exist, the remaining appointed members lose office by the effluxion of time, for then any new complement of members will be appointed only partly in terms of s 4(1) and partly in terms of s 8?

[24] That all points to a further anomaly of a more radical kind. We have already expressed the view that the board becomes incapacitated in practice when the number of members in office falls below four (or six if the MEC has made appointments in terms of s 4(1)*(f)*) which is a quorum for a meeting of the Board. On the construction advanced by the respondents the MEC does not step in to perform the functions of the Board in terms of s 93(4) when the Board becomes incapacitated by the loss of a quorum (bearing in mind that there remain in office 'appointments to the board in terms s 4(1)') but only when the appointed membership of the Board is altogether depleted. That would be absurd and could never have been intended, because total depletion has no significance in itself for the Board's capacity to perform its functions. (It falls to be remedied by the MEC's making new appointments, not by his or her acting as the Board.) Of course, if the section were to be read as authorising the MEC to act whenever the Board becomes incapacitated, it would require the language of the section to be rewritten materially.

[25] Naturally, that absurdity would not arise if a quorum might be as little as one – a construction of s 15(3) that equates its juridical membership with the persons who hold that office from time to time, which in our view is not correct – because then the depletion of the Board would coincide with the loss of a quorum. But in the circumstances of the present case that construction would in any event produce the same end result. Membership of the Board includes the CEO by virtue of his or her office (s 4(3)). There is no suggestion in the present case that the CEO has ever been out of office and all the indications are to the contrary. The CEO alone constituted not only the full complement of members in office at the material time, but also, on that construction of s 15(3), a quorum capable of conducting the affairs of the Board, notwithstanding that there were no appointed members.[14] If that is so, it is difficult to see how s 93(4) could have come into play. Unless it is also to be suggested that s 93(4) comes into play only when the appointed membership (by which we mean appointments made in terms of s 4(1)) is depleted – a construction that is difficult to arrive at linguistically. But that, too, would produce the further anomaly that both the sole remaining member (the CEO) and the MEC would each

[14] Section 15(5) provides for the validity of acts notwithstanding a vacancy of the Board, which must include more than one vacancy if further absurdities are to be avoided.

simultaneously be vested with the functions of the Board, which is equally absurd.

[26] We prefer a construction of s 93(4) that accords with the ordinary meaning of the language when seen in its context. The apparent objective of the Act is to place the gambling industry under the control of a multi-disciplined and independent board. Moreover the subsection in issue appears amongst a series of subsections that all, in terms, contemplate the transition from one legislative regime to the next. Viewed within the context of the overall purpose of the Act, and in the context of its location within that series of subsections, subsec 93(4) is plainly limited to the hiatus that is inevitable in the legislative transition. That hiatus ends once the newly created board is capable of functioning as the language of the subsection itself suggests.

[27] On that construction the Board would indeed be incapable of functioning if there are insufficient members in office to constitute a quorum but we do not find that to be anomalous. First, that need never happen, other than in rare and unforeseen circumstances, if the Act is properly administered, which the legislature must surely have had in mind. In terms of s 195(1) of the Constitution, the basic values and principles governing public administration include accountability (s 195(1)*(f)*) and the

promotion of the efficient, economic and effective use of resources (s 195(1)*(b)*). These values and principles, as well as the duty to perform constitutional obligations diligently and without delay,[15] govern the performance by the MEC of all his powers and functions.[16] Proper administration of the Act by the MEC surely requires timeous action in the appointment of new members so as to ensure the continued ability of the Board to function (which has thus far not been a feature of the administration of the affairs of this Board).

[28] Secondly, the disruption that might occur if at any stage there were insufficient members of the Board in office to constitute a quorum can largely be avoided by managerial foresight – provision is capable of being made for continued administration by delegation.[17] And, as for those functions that are not capable of being delegated because they have been entrusted to the Board itself, it seems to accord fully with the apparent objective of the Act that performance of those functions should not devolve upon anyone else, but should be held in abeyance until the Board is reconstituted.

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[15] Section 237 of the Consitution.
[16] Section 133 of the Constitution.
[17] Section 10(4)(a) of the Act.

[29] In our view the proper meaning of s 93(4) is that the MEC assumes the functions of the Board – meaning the administration of the regime that ended when the Act commenced – only until the Board is first constituted in practice by appointments being made to its membership. That accords with its ordinary language and with the context within which it occurs. It follows that as regards the extension of the deadline to 11 May 2001 the MEC had no authority to assume the functions of the Board. His decision to do so was not a valid decision of the Board and thus has no legal consequence.

Declaratory relief sought by LCI

[30] LCI was aware by no later than 9 May 2001 that the deadline had been extended by either the CEO or the MEC. It must also have been aware by about 2 October 2001 – when it received a response to its query whether the CEO had extended the deadline under delegated authority – that it was the MEC who had done so in reliance upon s 93(4). The application for declaratory relief was launched some seven months thereafter.

[31] We have already pointed out that the learned judge in the court *a quo* was of the view that the application was not brought within a reasonable time and that it fell to be dismissed on those grounds alone. In

support of that finding we were referred by counsel for the respondents to *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad,* [18] *Hermannsburg Mission v Sugar Industry Central Board,*[19] and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie*.[20]

[32] Those cases concerned applications for judicial review, a remedy that is described in the opening paragraph of Rose Innes: *Judicial Review of Administrative Tribunals in South Africa*, as follows: [21]

'Judicial review in our law and practice is a remedy … afforded exclusively to the Supreme Court whenever the proceedings of inferior courts of law and of administrative officials, tribunals and authorities have been irregular or illegal, and whereby such proceedings may be corrected and set aside at the instance of any person whose interests have been prejudicially affected by those proceedings.'

[33] In proceedings for judicial review a court is called upon to consider not only whether the administrative act in issue was invalid in law but also whether it ought to be set aside in fact, for as pointed out by this Court in *Oudekraal Estates (Pty) Ltd v City of Cape Town,*[22] our law has always

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[18] 1978 (1) SA 13 (A).
[19] 1981 (4) SA 278 (N).
[20] 1986 (2) SA 57 (A).
[21] Page 1. The remedy is defined more comprehensively at p 20. See, too, the provisions of Rule 53.
[22] 2004 (6) SA 222 (SCA) para 26.

recognised that even an unlawful administrative act is capable of producing valid consequences for so long as the unlawful act is not set aside.

[34] It is in the context of the remedy of judicial review that the courts have developed the rule concerning delay that is now sought to be relied upon, and the reason for the courts having done so is plain. The setting aside of an invalid administrative act has the potential to unravel a series of subsequent acts that might have been performed on the strength of the invalid act. Thus a court that is called upon to set aside an invalid act (which is within its discretion to grant or to withhold) will in exercising its discretion take account of delay so as to avoid the disruptive consequences that might occur if the act is set aside. The consequence of withholding that relief on account of delay is that the administrative act, though invalid in law, is 'validated' in its effect,[23] with the result that subsequent acts that were performed on the strength of it will remain legally intact. That is why, when weighing the question whether the lapse of time should preclude a court from setting aside an administrative act, delay is not decisive by itself. What is more important is the extent to which it might have been acted upon subsequently.[24]

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[23] *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C, cited in *Oudekraal Estates* para 27.
[24] *Oudekraal Estates* para 46.

[35] The rule is no more than a pragmatic response by the courts to the disruption that might occur if an invalid administrative act is set aside. Section 7(1)*(b)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which is confined to proceedings for judicial review, is similarly the legislature's response to the potential disruption that might occur if administrative acts are set aside.

[36] These are not proceedings for judicial review either in form or in substance. No decision of the Board is said to be invalid or sought to be set aside. Nor is the MEC's decision, by itself, relevant to the issue of casino licences. It is relevant only insofar as the Board adopts the decision as its own, and acts upon it accordingly, in which case the Board's decision to do so might be capable of being reviewed and set aside. It is precisely because the appellant alleges that the MEC's decision is not a decision of the Board that it has sought declaratory relief. The declaratory order that is sought does no more than declare, in effect, that the decision of the MEC is not a decision of the Board (although the prayer may not be elegantly phrased). It does not purport to review or set aside any act of the Board, nor any act of the MEC, but merely to declare that the MEC's act is not that of the Board and therefore has no legal consequence.

[37] The rule against delay, dictated as it is by the nature of judicial review, is not transposable, without more, to proceedings for declaratory relief of the kind that is before us.[25] (Until the Board adopted the MEC's decision as its own and acted upon it accordingly, which had not occurred by the time the application was launched, nor could it have done so, bearing in mind that its membership had not been reconstituted, there were no consequences that might be affected by the invalidity). Delay might be a factor that a court will take into account in appropriate cases when exercising its discretion to grant or withhold declaratory relief, but even then it is doubtful that delay, by itself, will be material if no consequences have followed from the delay. We do not think that delay has been material to the exercise of the discretion to grant or withhold the declaratory relief that was sought.

The discretion to grant declaratory relief

[38] At common law declarations of rights without consequent relief were not granted by our courts. As pointed out by Innes CJ in *Geldenhuys and Neethling v Beuthin*:[26]

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[25] In *Lion Match Co Ltd v Paper Printing Wood & Allied Workers' Union* 2001 (4) SA 149 (SCA), the declaratory relief that was sought had the effect of relief that might otherwise have been sought in proceedings for judicial review (see the orders sought at 153E-F).
[26] 1918 AD 425 at 441.

'…Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.'

[39] That restriction upon the powers of the courts was eased by s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, which confers a discretion upon a court to grant declaratory relief notwithstanding that the applicant cannot claim any relief consequential upon the declaration. The discretion that was conferred to grant or withhold such relief seeks to guard against the courts being used as a source of legal advice. Thus it has often been said that although an existing dispute is not a prerequisite for the exercise of its discretion,[27] a court should not grant declaratory relief where the question that is raised is hypothetical, abstract and academic.

[40] Although the Board had not yet adopted the MEC's decision as its own by the time the application was launched (had it done so the act of the Board in adopting the decision might then, as we have said, itself have been liable to be reviewed and set aside), it is apparent from the Board's

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[27] *Ex parte Nell* 1963 (1) SA 754 (A).

opposition to the proceedings that there is a real prospect that it will do so when its membership is reconstituted. In those circumstances the declaration that is sought serves not merely a hypothetical, abstract or academic purpose, but one that is necessary to avoid the Board's possible future action being liable to be set aside if it were to adopt the MEC's decision.

Locus standi

[41] There is one further matter that the court *a quo* found unnecessary to traverse and that can be dealt with briefly. It was submitted by the respondents that LCI had insufficient interest in the matter to accord it *locus standi* to bring these proceedings. We do not agree. LCI was a potential applicant for one or more of the casino licences with a direct interest in the process being conducted according to law and we would not non-suit it on those grounds.

Costs

[42] The appeal must accordingly succeed and the order of the court *a quo* falls to be reversed. (The order we intend making amends the prayer that was sought in the notice of motion to avoid uncertainty as to its effect.)

There is no reason why the costs of the appeal, and of the application, should not follow the result in each case.

[43] We have pointed out that in the court *a quo* the Board was initially cited alone. It opposed the application. Subsequently the MEC, Golden Flamingo and Inciticorp were joined by the court *a quo* as the second, third and fourth respondents respectively. None of those parties filed affidavits in opposition to the application but the learned judge in the court *a quo* recorded that Golden Flamingo was represented before him to oppose it. A simultaneous application to join Vaal River as the fifth respondent was at first postponed. The fate of that application does not appear from the record but it must have been granted because Vaal River subsequently filed affidavits opposing the application and was represented at the hearing in the court *a quo*. The Board, Golden Flamingo and Vaal River thus all opposed the application and ought to pay the costs of those proceedings.

[44] The Board, the MEC, and Vaal River were the only parties to oppose this appeal and the costs of the appeal are to be borne by them.

Order

1. The appeal is upheld with costs, which are to be paid by the first, second and fifth respondents jointly and severally, the one paying the others to be absolved.

2. The order of the court *a quo* is set aside and the following is substituted:

'(a) It is declared that the second respondent's decision to extend the closing date for the submission of detailed proposals and notices of application for the award of casino licences in the Free State Casino Development Project until 11 May 2001 was not a valid decision of the Board and thus has no legal consequence.

(b) The applicant's costs are to be paid by the first, third and fifth respondents jointly and severally, the one paying the others to be absolved.'

R W NUGENT & B J VAN HEERDEN
JUDGES OF APPEAL

CONCUR:

HOWIE P
ZULMAN JA
CAMERON JA