

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

- (1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED: YES


.....
SIGNATURE

31/08/2021

.....
DATE

CASE NO: A46/2020

In the matter between:

ITHUBA HOLDINGS (PTY) LTD

Appellant

and

LOTTOSTAR (PTY) LTD

First Respondent

MPUMALANGA GAMING BOARD

Second Respondent

BETTING WORLD (PTY) LTD

Third Respondent

NATIONAL LOTTERIES COMMISSION

Fourth Respondent

JUDGMENT

Coram: **MASHILE J** et **ROELOFSE AJ**:

PROCEDURAL ISSUE

[1] This is a full Court appeal following the Supreme Court of Appeal (“SCA”) granting the Appellant (“Ithuba”) leave to appeal to this court. The appeal was heard on 11 June 2021 by the court constituted by Mashile J, Sigogo and Roelofse AJJ. On 31 July 2021, sadly Sigogo AJ passed away due to COVID-19 complications leaving a vacancy amongst the members of the Court.

[2] Section 14(5) of the Superior Courts Act 10 of 2013 (“Superior Courts Act”) makes a provision for instances where a vacancy amongst the members of a court arises prior to the finalisation of a judgment. It provides:

“If, at any stage during the hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must—

(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or

(b) if the remaining judges do not constitute such a majority, or if only one judge remains, be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.”

[3] Roelofse AJ and I remained and constituted the majority of judges before whom the appeal could have commenced. Notwithstanding the provisions of section

14(5) of the Superior Courts Act, the views of the parties were sought. The First (“Lottostar”) did not wish to make any submissions. Ithuba, the Second Respondent (“the Board”) and the Fourth Respondent (“the Commission”) informed the court that they had no objection if Roelofse AJ and I delivered the judgment. The third respondent (“Betting World”) proffered no views. The Court resolved to proceed to consider the matter and to deliver this judgment.

INTRODUCTION

- [4] Mphahlele J, as she then was and sitting as a court of first instance, dismissed an application for a declaratory order and interdictory relief brought by the Commission and Ithuba against Lottostar. The Court *a quo* upheld one of the *points in limine* raised by the Board. In view of its conclusion on the *point in limine*, the Court *a quo* probably considered it unnecessary to proceed to adjudicate over the remaining *point in limine* and the merits of the matter. Ithuba applied for leave to appeal. The Court *a quo* refused leave. Ithuba petitioned the SCA hence this appeal is with leave of the SCA to the Full Court.
- [5] The *point in limine* upheld by the Court *a quo*¹ concerns the requirement found in Section 41(3) of the Constitution of the Republic of South Africa 1996 (the Constitution”), which provides that Organs of State involved in intergovernmental disputes must make every reasonable effort to settle them by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before approaching courts to resolve them. In terms of Section 41(4) if a court is not satisfied that the Organs of State involved had adhered to the provisions of Section 41(3) prior to approaching a court, it is entitled to send the dispute back to the parties concerned to try to resolve their controversy in line with the dispute resolution mechanisms prescribed in the Intergovernmental Relations Framework Act, 13 of 2005 (“the Framework Act”).

¹ The other preliminary defence was one of non-joinder.

- [6] The provisions of Section 41 of the Constitution find expression in the Framework Act. Principally, the Court *a quo* held that Ithuba, although not an Organ of State, fulfils and discharges duties of the Commission, which it characterised as an organ of State. As such, reasoned the Court *a quo*, Ithuba was basically an extension of the Commission. The dispute being between Ithuba and the Board, amongst others, observance of the provisions of Section 41(3) of the Constitution and the Framework Act was mandatory. As a result of the finding, the Court *a quo* directed the parties to endeavour to resolve the dispute as contemplated in Section 41(3) of the Constitution and the Framework Act.
- [7] In consequence of the finding of the Court *a quo* as aforesaid and lack of consideration of the other issues that were before it, the matters that were before the Court *a quo* persisted before this Court and require its attention. Tersely, these are: firstly, whether or not the Appellant is an Organ of State for the purpose of section 41 of the Constitution and the Framework Act; secondly, whether or not the dispute between the parties is an intergovernmental dispute; thirdly, whether or not the issue of non-joinder arise; and fourthly, whether or not the First Respondent's business activities, insofar as it accepts bets on the outcome of any lottery, are unlawful.
- [8] On the day of hearing of the appeal, the Court had to make an immediate decision on two options. The first option was to adjudicate over the *point in limine* and depending on whether or not the appeal was upheld, remit the matter to the Court *a quo* to hear the other issues. The second option was to hear the *point in limine* together with the merits and resolve the matter as if the Court *a quo* had pronounced on all the relevant issues. The Court considered the choices and settled for the latter. The choice was inspired by the adequacy of the information at its disposal which it could utilise to decide all the issues and the need to expedite its decision in view of a substantial period having lapsed without finalisation.

GROUNDS OF APPEAL

- [9] The grounds challenging the judgment and order of the Court *a quo* is that it erred in law and/or in fact in:
- 9.1 Holding that the Commission and Ithuba, as organs of State, by launching the application, did so prematurely and in contravention of the provisions of Section 41 of the Constitution and the Framework Act;
 - 9.2 Finding that firstly, Ithuba was an Organ of State, secondly, it was performing duties on behalf of the State and thirdly, it should be regarded as an Organ of State for purposes of the Framework Act;
 - 9.3 Failing to have regard to the definition of an Organ of State as described in Section 1 of the Framework Act;
 - 9.4 Finding that Ithuba was bound to follow a dispute resolution process described in the Framework Act;
 - 9.5 Relying on the judgment of *Allpay Consolidated Investments Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*²;
 - 9.6 Failing to take into account that Lottostar against which relief is sought, is not an Organ of State for purpose of Section 41 of the Constitution and the Framework Act;
 - 9.7 Upholding the *point in limine* and directing the parties to take steps to resolve the dispute in accordance with Section 41 of the Constitution and the Framework Act, in consultation with the Minister of Trade and Industry.

² 2014 (1) SA 604 (CC);

BACKGROUND

[10] The salient background facts from which this matter traces its origins are that Ithuba holds an exclusive licence to operate the National Lottery in terms of section 13 of the Lotteries Act 57 of 1997 ("the Lotteries Act"). The exclusivity of the license of Ithuba derives from a deliberate scheme in terms of which, at any given time, there will only be one operator of the National Lottery. The objective of the scheme is to strike a balance between the advantages of gambling and its potential disadvantages.

[11] In consequence, Ithuba is bound by a series of obligations stemming from the regulatory scheme. One of the obligations imposed on Ithuba is that over the eight-year period of its Licence it is expected to contribute 27% of its ticket sales revenue to the National Lotteries Distribution Trust Fund ("the Fund"). The contributions to the Fund are also used to fund good causes. It has also invested heavily in establishing the infrastructure necessary for the operation of the National Lottery.

[12] The exclusive right of Ithuba to operate the National Lottery is statutorily protected. To this end, Sections 57(1)(b) and 57(2)(g) of the Lotteries Act are significant to note. I proceed to cite both below in the sequence described:

12.1 "57(1)(b) a person will be guilty of an offence if he or she *"conducts, facilitates, promotes or derives any benefit from a lottery, promotional competition or sports pool . . . unless such lottery, promotional competition or sports pool is or has been authorised by this Act or any other law."*;

12.2 "57(2)(g) a person will be guilty of an offence if he or she *"conducts, organises, promotes, devises or manages any scheme, plan, competition, arrangement, system, game or device which directly or indirectly provides for betting, wagering, gambling or any other game of risk on any outcome of any lottery unless authorised by or under this Act or any other law."*

- [13] It is not disputed that Lottostar and Betting World (Pty) Ltd ("Betting World"), which was granted leave to intervene as the third respondent in the Court *a quo*, accept bets on the outcome of foreign lottery draws, including on the outcome of the South African National Lottery. In making these offerings, both rely on their bookmaker licences issued by the Board in terms of the Mpumalanga Provincial Gambling Act 5 of 1995 ("the Provincial Gambling Act").
- [14] The Provincial Gambling Act does not, however, empower the Board to authorise bookmakers to accept bets on the outcome of lottery draws. This is because the regulation of lotteries is a matter reserved for the exclusive legislative competence of Parliament. Ithuba alleges that as a result, the offerings made by Lottostar and Betting World are unlawful. Ithuba claims further that from a player's perspective, the experience of placing bets on the outcome of lottery draws through Lottostar and Betting World is almost indistinguishable from the experience of playing the National Lottery through Ithuba.
- [15] Both Lottostar and Betting World therefore compete for the customers of Ithuba but unlike the latter, they carry no legislative obligations that come with the Lotteries Act insofar as they do not make contributions to the Fund. Their obligations extend only to payment of tax at a rate of 1.5% of their ticket sales revenue. These less burdensome obligations, alleges Ithuba, allow Lottostar and Betting World to offer higher prize pay-outs and more regular prizes to players, giving them an unfair advantage over Ithuba. It was against these background facts that the application that served before the Court *a quo* was conceived.

ISSUES

- [16] The questions for adjudication on appeal are:

16.1 The correctness of the decision of the Court *a quo* upholding the preliminary

objection that in terms of Section 41(3) of the Constitution and the Framework Act organs of State should endeavor by all means to resolve their disputes by employment of the alternative dispute resolution measures described in the Framework Act prior to approaching courts;

- 16.2 If the decision of the Court *a quo* as outlined above is incorrect, the question that arises is, should this Court entertain the remaining preliminary point of non-joinder and/or the merits of the application instead of referring the matter back to the Court, which has already heard oral argument on both those matters;
- 16.3 Was the Court *a quo* correct to characterize the dispute between Ithuba and the Board as an intergovernmental dispute;
- 16.4 The lawfulness of the business activities of Lottostar in accepting bets on the outcome of any lottery.

LEGAL FRAMEWORK

LEGISLATIVE PROVISIONS

- [17] In their endeavor to assist this Court to arrive at a correct decision, the parties have referred to various statutory provisions contained mainly in four pieces of legislations, the Constitution, Framework Act, Lotteries Act and Provincial Gambling Act. The provisions of the Sections from the different Acts that I have fully described *supra* will not be repeated below but reference to them will probably be made during analysis. The starting point has to be Section 41 of the Constitution, which is headed: PRINCIPLES OF CO-OPERATIVE GOVERNMENT AND INTERGOVERNMENTAL RELATIONS:

“(1) All spheres of government and all organs of state within each sphere must:-

- (a) *preserve the peace, national unity and the indivisibility of the Republic;*
- (b) *secure the well-being of the people of the Republic;*
- (c) *provide effective, transparent, accountable and coherent government for the Republic as a whole;*
- (d) *be loyal to the Constitution, the Republic and its people;*
- (e) *respect the constitutional status, institutions, powers and functions of government in the other spheres;*
- (f) *not assume any power or function except those conferred on them in terms of the Constitution;*
- (g) *exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and*
- (h) *co-operate with one another in mutual trust and good faith by:-*
 - (i) *fostering friendly relations;*
 - (ii) *assisting and supporting one another;*
 - (iii) *informing one another of, and consulting one another on, matters of common interest;*
 - (iv) *co-ordinating their actions and legislation with one another;*
 - (v) *adhering to agreed procedures; and*
 - (vi) *avoiding legal proceedings against one another.*

(2) *An Act of Parliament must:-*

- (a) *establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and*
- (b) *provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.*

(3) *...*

(4) *..."*

[18] Section 45(1) of the Framework Act dealing with judicial proceedings fortifies the provisions of Section 41(3) of the Constitution and provides that no government or Organ of State may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.

[19] Section 239 of the Constitution describes organs that are Organs of State. To this end, it provides:

"(a) *any department or state or administration in the national, provincial or local sphere of government; or*

(b) *any other functionary or institution -*

(i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*

(ii) *exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer".*

[20] The meaning of Organ of State was decisive in persuading the Court *a quo* to direct the parties to first attempt to resolve the dispute in line with the provisions of Section 41 of the Constitution and the Framework Act. As such, it is vital to scrutinise the different statutory provisions to establish their correct interpretation. Depending on the interpretation that this Court will ascribe to them, Section 41 of the Constitution and the Framework Act may or may not find application. According to the Framework Act, the meaning of an Organ of State is as defined in section 239 of the Constitution, excluding those listed in section 2(2). Section 2 of the Framework Act prescribes the institutions to which the Act applies and those to which it does not and it stipulates:

“Application of Act

(1) *This Act applies to –*

- (a) *the national government;*
- (b) *all provincial governments; and*
- (c) *all local governments.*

(2) *This Act does not apply to –*

- (a) *Parliament;*
- (b) *the provincial legislatures;*
- (c) *the courts and judicial officers;*
- (d) *any independent and impartial tribunal or forum contemplated in section 34 of the Constitution and any officer conducting proceedings in such a tribunal or forum;*

- (e) any institution established by Chapter 9 of the Constitution;
- (f) any other constitutionally independent institution; and
- (g) any public institution that does not fall within the national, provincial or local sphere of government.”

CASE AUTHORITY

[21] Lottostar and the Board have referred this Court to *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*³. I have perused the judgment but could not decipher its significance to the arguments before this Court other than the definition of an Organ of State. It follows that this Court will not derive any benefit by making further reference to it. Perhaps I should add that all Organs of State generally derive their legitimacy and exercise public power based on legislation but not all of them are considered Organs of State as intended in Section 41(3) of the Constitution and the Framework Act. *The Independent Electoral Commission v Langeberg Municipality* **2001 (3) SA 925 (CC)**, to which I will refer later in this judgment is an illustration of this point.

[22] The above said, the same parties’ reference to *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*⁴ ought to receive this Court’s attention. Lottostar and the Board have referred to Paragraph 22 of the judgment where the following is stated:

“[22] It is necessary to focus on the reasoning that led to the conclusion that the Council exercised public power. The High Court observed correctly that private institutions were increasingly being used to perform state functions⁶⁵ and, relying on the definition of an organ of state in the Constitution,⁶⁶ reasoned

³ 2014 (4) SA 179 (CC)

⁴ 2006 (11) BCLR 1255 (CC)

that the nature of the functionary was of little consequence. On this basis, the crucial inquiry for the High Court was whether the Council exercised public power because, if this was so, the fact that it was authorised by its memorandum and articles of association would make no difference.”

- [23] Reference to the AAA Investment case *supra* is misplaced. The Applicant in the AAA Investment case is undeniably an organ of State but it cannot be readily brought under the fold of Section 41(3) of the Constitution and the Framework Act. An explanation of the statement of the Constitutional Court in the preceding paragraph is simply that one must not look at the nature of the functionary and necessarily make conclusions predicated thereon but at times the public power that such functionary exercises may be the determining factor.
- [24] It will become clear as this judgment unfolds that both the Commission and Ithuba are not Organs of State as contemplated in both Section 41(3) and the Framework Act. The relevance of AAA Investment to this matter is as such, not only doubted but it is misguided.
- [25] To turn back to the Langeberg Case mentioned above. To the extent that one of the questions that the Constitutional Court had to decide pertained to whether or not the municipality was under obligation to observe the provisions of Section 41(3) and the Framework Act, this case is ‘on all fours’ with the case *in casu*. In Langeberg the Court held that while the Independent Electoral Commission exercised public power and performed public functions, it did not mean that it was an Organ of State in the sense envisaged in the Constitution and the Framework Act.
- [26] The Constitutional Court accepted that the Independent Electoral Commission was established to fulfil a public mandate by national legislation but that being so it still remained independent from Government notwithstanding that its continued existence and sustenance depended solely on Government. The Langeberg

Municipality was therefore not obliged to first exhaust all efforts to settle the dispute with the Independent Electoral Commission prior to approaching court because the latter was not an Organ of State.

- [27] A case that followed on the footsteps of Langeberg Municipality *supra* is *Education for all and Others v Minister of Basic Education and Others*⁵. The pertinence of this case warrants this Court to cite Paragraphs 33 and 34, which deal with the definitions of Organ of State and government and intergovernmental disputes, in full:

“[33] In my view the definitions of 'government' and 'intergovernmental dispute' in s 1 are dispositive of this issue. A government means the national, a provincial or a local government. An intergovernmental dispute means a dispute between different governments or between organs of state from different governments, arising from the sources identified in the definition. All the parties accepted that a school governing body is an organ of state as defined in s 239 of the Constitution. But as defined in IRFA, the expression 'organ of state' bears the meaning ascribed to that expression in s 239 of the Constitution, excluding those listed in s 2(2) of IRFA. One of the exceptions, listed in s 2(2)(g), to which IRFA is expressly stated not to apply, is a public institution that does not fall within the national, provincial or local sphere of government;

[34] A school governing body manifestly does not fall within the sphere of any of those governments. As its preamble makes clear, IRFA was enacted to give effect to s 41(2) of the Constitution, which calls for an Act of Parliament to establish or provide structures and mechanisms to promote and facilitate intergovernmental relations and to provide appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes. Section 40(1) of the Constitution says government in the Republic is constituted as national, provincial and local spheres of government. Sections 40 – 41 of the Constitution are thus directed at spheres of government and organs of state within each sphere. An intergovernmental dispute

⁵ 2014 (4) SA 274 (GP)

is thus a dispute between parties that are part of government, in the sense of being either a sphere of government or an organ of state within a sphere of government."

ANALYSIS

WAS THE LAUNCHING OF THE APPLICATION BY THE COMMISSION AND ITHUBA IN VIOLATION OF SECTIONS 41(3) OF THE CONSTITUTION AND 45 OF THE FRAMEWORK ACT

[28] If one has regard to the meaning of an Organ of State as described above, it is manifest that the Commission is not an Organ of State. That conclusion is dispositive of the argument of Lottostar and the Board that for purposes of operating the national lotteries, Ithuba is an extension of the Commission as it is an entity through which the Commission discharges or performs its public duties. Like in the Education for all case *supra*, it is common cause that the Commission is an Organ of State as defined in Section 239 of the Constitution. That said, the definition of 'Organ of State' bears the meaning assigned to that in Section 239 of the Constitution, excluding those listed in Section 2(2) of the Framework Act. One of the exceptions, listed in Section 2(2)(g), to which the Framework Act is expressly stated not to apply, is a public institution that does not fall within the national, provincial or local sphere of government. The attempt by Lottostar to seek to distinguish between a public institution and an Organ of State is unnecessary and in any event misguided because the Section is concerned with the definition of an Organ of State and not of a public institution. The Commission in this matter is a public institution referred to in Section 2(2)(g) of the Framework Act. Thus, paying attention to the provisions of Section 4 alone, as does the Board, without examination of those of Section 2 of the Framework Act could be misleading.

[29] The Commission is in a similar position as the School Governing Body in the Education for all case in that it is a public institution that does not fall within the national or provincial or local sphere of government. As such and inexorably,

Ithuba could not have been executing functions of an Organ of State when fulfilling its mandate as entrusted to it by the Commission. This Court's conclusion on this question means that it would have been of no consequence even if the dispute was between the Board and both the Commission and Ithuba because while the Board is understandably an Organ of State, its opponents are not.

- [30] The decision of the Court as described above means that even if it were to be assumed that the Board has a direct and substantial interest in the dispute, especially one that would require it to defend itself, neither Ithuba nor the Commission can be said to have disregarded the dispute resolution provisions contained in Section 41(3) of the Constitution and the Framework Act. The dispute is between two private entities, Ithuba and Lottostar. In the circumstances, the Court *a quo* erred in characterizing the dispute as an intergovernmental one because both Lottostar, on the one hand, and Ithuba and the Commission, on the other, are not Organs of State. As such, the parties were not prematurely before court and should not have been sent away to resolve their controversy as contemplated in Section 41(3) of the Constitution and the Framework Act.

SHOULD THIS COURT ENTERTAIN THE REMAINING POINT *IN LIMINE* ON NON-JOINDER AND THE MERITS OF THE APPLICATION INSTEAD OF REFERRING THE MATTER BACK TO THE COURT *A QUO*

- [31] It is trite that ordinarily, where a court disposes of a matter on a *point in limine* and does not address merits at all, a court sitting as one of appeal should be wary to deal with the merits. This is generally so because it would be considering the matter without the benefit of the views of the Court *a quo*. In those circumstances, it is accepted that it is idyllic to remit the matter back to the Court *a quo* for decision on the merits. This was the approach adopted by Lottostar and the Board. Betting World was somewhat indifferent insofar as it did not have any intransigent stance on the question of remission.

[32] Section 19 of the Superior Courts Act is headed: Powers of Court on Hearing of Appeals. It provides that:

"The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law -

(a)

(b)

(c)

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

[33] The rule as described above is not inflexible and a court has discretion whether or not to remit. On the date of hearing, this Court took a short adjournment during which, acting in terms of Section 19(d) of the Superior Court Act, decided that the balance of convenience and interest of justice weighed heavily in favour of the Court hearing the merits and making a decision without remitting it back to the Court *a quo*. Factors that the Court considered included, among others, the length of time that this case has taken to get here and the enormous legal expenses that have been incurred by the parties to this litigation. Moreover, the Court had been exposed to all the material that served before the Court *a quo* and everyone involved was ready and willing to present argument.

[34] A referral of the matter back to the Court *a quo* to decide on the remaining *point in limine* and the merits would only perpetuate the status quo. If the actions of Lottostar and Betting World of taking bets on the outcome of lottery draws mean that the two are deriving substantial financial free benefit from infrastructure to which they did not make any financial contribution and such actions are later found to be unlawful, Ithuba will have incurred inestimable financial losses that may or may not be recoverable. Accordingly, the balance of convenience and interest of justice were skewed in favour of this Court continuing to hear both the remaining *point in limine* and the merits.

[35] Before I conclude on the subject, I need to mention that Lottostar makes the point that the dispute is one between the Commission and the Board both of which are Organs of State, the one in the national and the other in the provincial sphere of Government respectively. The dispute between them concern the constitutional status, powers or functions of any of those Organs of State as contemplated in Section 167(4)(a) of the Constitution in respect of which the Constitutional Court has exclusive jurisdiction. The interpretation of the Commission of the Gambling Laws is in conflict with the Board on this issue. The Commission has now on appeal left Ithuba to fight the dispute alone in circumstances where the matter was not fully canvassed in the papers. For this reason, Lottostar feels that it would be appropriate to refer the matter back to the Court a quo to be dealt with as intended in Section 19(c) of the Superior Courts Act, 10 of 2013.

[36] Section 167(4)(a) of the Constitution provides that 'only the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state'. My understanding of the argument of Lottostar is that this Court lacks jurisdiction to entertain this matter because the controversy is between two Organs of State, the Commission/Ithuba and the Board, the one in the national and the other in the provincial sphere of government respectively. This argument will not take this Court anywhere. The decision that the dispute is not between two Organs of State necessarily denotes that Section 41(3) and the dispute resolution mechanisms laid down in the Framework Act do not find application. As such, this matter does not fall under the exclusive jurisdiction of the Constitutional Court.

NON-JOINDER

[37] Here Lottostar, supported by Betting World, argued that the main relief declaring that a bookmaker, holding a valid bookmaker's license under Provincial Gambling Laws, in this instance under the Provincial Gambling Act, may not offer bets on the outcome of lotteries sought by Ithuba, will directly and substantially affect:

- 37.1 Each and every Provincial Gambling Authority, insofar as the scope and ambit of its constitutional status, powers or functions are concerned;
- 37.2 Each and every other entity in the National Sphere of Government, concerned with the regulation of the Gambling Industry (as effectively conceded by Ithuba; and
- 37.3 Each and every person holding a bookmaker's license under the Provincial Gambling Laws.

[38] The essence of the argument of Lottostar and Betting World was that the declaratory order would constitute a judgment *in rem* for it would bind all bookmakers holding a valid bookmaker's license under Provincial Gambling Laws. While it is correct that a judgment *in rem* binds all persons whereas a judgment *in personam* does not, this court is of the view that the relief sought by the Commission, if granted, does not constitute a judgment *in rem* and would therefore not bind all bookmakers. This is why. In *Tshabalala v Johannesburg City Council*⁶, the following was said about a judgment *in rem*:

"As pointed out by Spencer Bower, sec. 243, judgments declaring the legality, or the illegality, of a tax, are decisions in rem, affecting as they do both the political and the financial status of all citizens on whom the tax is imposed. It is, therefore, not the status of the tax that is affected. The second case referred to by counsel for the appellant is Wakefield Corporation v Cooke, 1904 A.C. 31 H.L. There a resolution passed in 1901 by an urban authority that certain repairs to a street should be apportioned among the owners of adjoining premises was objected to by the respondents. It was contended that in 1898 a court of summary jurisdiction had determined that the same street was a highway repairable by the inhabitants of Wakefield at large and that the matter was therefore res judicata. The objection was sustained by a court of summary jurisdiction and this decision,

⁶ 1962 (4) SA 367 (T) at 369F to 370A

which was the subject of successive appeals, was finally confirmed by the House of Lords holding that the 1898 determination was a judgment in rem and conclusive as to the status of the street. Here again it was not the status of the resolution but the status of the street that was determined. Mr. Unterhalter was unable to refer the Court to any case where a declaration of validity or invalidity of a by-law was held to operate as a judgment in rem and I have not been able to find any such authority. Indeed, an untenable position would arise if a palpably ultra vires by-law, declared to be valid by a magistrate, should preclude every other magistrate with jurisdiction in the area of the municipality and also the Division of the Supreme Court of the Province from holding that the by-law is invalid. If such were the case the magistrate would in effect confer on the municipality legislative powers beyond the scope of the particular enabling ordinance.”

- [39] The dictum in *Tshabalala* was interpreted as follows by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others*⁷ at para [2]: “A judgment in rem determines the objective status of a person or thing.”
- [40] Lottostar stated that the mere fact that Betting World which, like Lottostar, holds a valid bookmaker’s license, was permitted to intervene as a result of its direct and substantial interest in the relief sought, constitutes sufficient proof that all other parties operating and running similar businesses should be joined to this dispute. To this end, this Court was referred to the matter of *ABSA Bank Limited v Naude NO and others*⁸ where it was stated that if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. For this reason, Lottostar submitted that the non-joinder defence is valid and should be upheld, the matter remitted back to the Court *a quo* and all the necessary parties joined to the proceedings.
- [41] The starting point to mention in this regard is that it is not any interest that a party may have in a matter that will entitle it to be joined to proceedings. It will be

⁷ ZACC 33 at para [2].

⁸ [2015] JOL 33323 (SCA)

instructive to refer to *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd and Another*⁹ where the Court quoted from what was said in an earlier case of *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers*¹⁰, where the court, following a profound scrutiny of authorities on the meaning of direct and substantial interest, concluded that it entails the following: “. . . *an interest in the right which is the subject-matter of the litigation and . . . not merely a financial interest which is only an indirect interest in such litigation*”. This position persists to date. The *Absa v Naude* case above does not depart from the principles espoused in the cases referred to above. That said and as will be seen below, it does not apply to these facts as Lottostar would have this Court believe.

- [42] To determine the interest, a court examines the right which is the subject matter of the litigation and not merely a financial interest, which may be an indirect interest in such litigation.¹¹ The question is, will all the other parties in similar position as Lottostar be legally prejudiced by the order that this Court may grant refusing the proposed joinder? Both the declarator and the interdict are sought against Lottostar and not the Board nor Betting World and whoever else. Seen in

⁹ [1972] 4 All SA 493 (C)

¹⁰ 1953 (2) S.A. 151 (O)

¹¹ See: *Milani And Another v South African Medical And Dental Council And Another* 1990 (1) SA 899 at 903 A-D, where the following was said:

“Our Courts have at times recognised that certain persons are affected by legal proceedings but they have no right to be joined. The sub-tenant of the tenant in a suit against a lessor is a case in point. (Compare Sheshe v Vereeniging Municipality 1951 (3) SA 661 (A) at 667A; and Ntai and Others v Vereeniging Town Council and Another 1953 (4) SA 579 (A) at 591.) In the United Watch case supra Corbett J at 417B - C said about such a sub-tenant:

'The sub-tenants' right to, or interest in, the continued occupancy of the premises sub-leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation. The sub-tenant, in effect, hires a defeasible interest. (See Ntai and Others v Vereeniging Town Council and Another 1953 (4) SA 579 (A) at 591.) He can consequently have no direct legal interest in proceedings in which the tenant's continuing right of occupation is in issue, however much the termination of that right may affect him commercially and financially.'

this light, it is hard to appreciate the direct and substantial interest that all these other parties in similar position as Betting World may have in the litigation between Lottostar and Ithuba.

[43] In support of Lottostar, Betting World asserted that joinder is necessary but stopped short of giving an undertaking that it would be bound by the order of this Court on the very subject. The question is, how can Betting World claim that it would be adversely affected if it fails to acknowledge that the order will affect it? That refusal to make the undertaking speaks volumes – it is indicative that it will not be prejudicially affected by the order of this Court. If this is so, I cannot come to terms with how any other party in a similar position will be adversely affected. As such, they cannot be joined. The argument by Betting World that the order that the Court will grant will be *in rem* as opposed to *in personam* cannot hold because the effect of the resultant order will be limited to Lottostar.

[44] Stripped of all the verbiage, an order in favour of Ithuba will not be enforceable against Betting World. This is why Betting World would not guarantee that such order would, as a matter of course, be applicable to it. Surely, it is quite evident that the relief is formulated in a manner that if this Court were to grant an order in favour of Ithuba, that order cannot be enforced against a party conducting similar business elsewhere in this Province let alone in all the other provinces. No party therefore other than Lottostar has any legal interest in this matter. The principles laid down by the cases dealing with *in rem* and *in personam* orders referred to by Betting World are correct but are inappropriate for this situation. The finding of this Court that any order that it may grant against Lottostar will be *in personam* obviates the need to extensively deal with the cases mentioned by Betting World. In the result, the non-joinder defence ought to fail.

MERITS

[45] The application that served before the Court *a quo* was founded on the continued infringement of Sections 57(1) and 57(2)(g) of the Lotteries Act by Lottostar and Betting World, which was permitted to join the proceedings following its successful application to that end. Section 57(1) of the Lotteries Act provides that:

“Any person who –

(a) participates in; or

(b) conducts, facilitates, promotes or derides any benefit from the lottery, promotional competition or sports pool, shall, unless such lottery, promotional competition or sports pool is or has been authorised by or under this Act or any other law be guilty of an offence.”

[46] Section 57(2)(g) lays down that:

“Any person will be guilty of an offence if he or she –

conducts, organises, promotes, devises or manages any scheme, plan, competition, which directly or indirectly provides for betting, wagering, gambling or any other game of risk on any outcome of any lottery unless authorised by or under this Act or any other law.”

[47] Lottostar has been accused of taking fixed odds bets on the outcome of foreign lotteries. Lottostar does not contest that it does so but does not believe that doing so contravenes Section 57(1)(a) or (b) or Section 57(2)(g) of the Lotteries Act as described above. It is common cause that neither the Lotteries Act nor the National Gambling Act allows Lottostar to engage in the activities defined here. Lottostar, backed by Betting World, asserts that its conduct is permitted by the provisions of the Provincial Gambling Act.

[48] The argument is that the bookmakers' license of Lottostar authorises it to engage in the conduct that Ithuba brands unlawful. The license sanctions. So continues

the argument, Lottostar to take bets on contingency, which could incorporate outcome of a foreign lottery. This approach is fallacious because it is clear from Schedule 4 of the Constitution that unlike in the case of gambling, the Constitution does not give any concurrent competency to a provincial legislature insofar as lotteries are concerned. If the provincial legislature lacks the competency to allow the conduct of Lottostar, it is inconceivable that Lottostar can claim to derive power to engage in those activities from a source that naturally does not have it.

[49] Betting World has contended that while it is correct that a provincial legislature cannot authorise a party to operate a lottery, it can nonetheless allow such a party to take bets on the outcome of a lottery. Ithuba countered this assertion by reference to the definition of gambling in the Provincial Gambling Act, which describes it as the playing of any gambling game, bet or wage on any lawful event excluding any lawful lottery or sports pull. I must agree with Ithuba that the definition of gambling as aforesaid lays to rest the argument advanced by Betting World.

[50] The second criticism of Betting World by Ithuba is that an endeavour to distinguish between operation of a lottery and taking bets on the outcome of a lottery emasculates the very purpose of the scheme. The objective of the scheme was, and continues to be to have only one lottery controlled by national legislation, the Lotteries Act, in terms of which one party is appointed and granted a license for a period of eight years. The licensee collects money from which it must contribute 27% of it to projects perceived to be for good cause. Accordingly, if parties who have no obligation to make contribution towards good cause projects, like Ithuba does, are allowed to take bets on the outcome of a lottery, it brings down the whole arrangement. This could not have been the intention of the legislature and the argument is rejected as devoid of any merit.

FINDINGS

[51] The Court *a quo* has erred:

51.1 By regarding both the Commission and Ithuba as Organs of State;

51.2 That Ithuba was involved in an intergovernmental dispute with the Board;

51.3 By directing the parties to endeavour to resolve the dispute between them in terms of the dispute mechanisms prescribed in the Framework Act.

[52] The balance of convenience and the interest of justice were such that this Court was entitled to hear the merits of the matter notwithstanding that it did not have a judgment of the Court *a quo* on the merits. Insofar as non-joinder is concerned, the relief sought by Ithuba is against Lottostar and no other party. As such, all the other parties do not have legal interest to be joined.

CONCLUSION

[53] This matter demonstrates how justice is often delayed¹² when meritless preliminary defences are raised in circumstances where no real defence to the merits lie. After all and from the onset, Lottostar admitted that it engages in fixed odd bets on the outcome of lotteries, an activity which is outlawed and criminalized by section 57(1)(a) and (b) and 57(2)(g) of the Lotteries Act while Lottostar continues to realize, large financial benefit from its unlawful activities.

[54] It is generally undesirable for a court to confine itself to the adjudication and decision on a preliminary defence/s where such preliminary defence/s does not resolve the entire dispute. In this matter, only one preliminary defence was decided and pronounced upon, leaving the other preliminary defence and the merits undecided. This is more so undesirable where there is a distinct possibility that the decision on the special plea would prompt an appeal. It has been held in *Churchill*

¹² The Notice of Motion was issued on 31 October 2016, almost 5 years ago.

*v Premier of Mpumalanga and Another*¹³ at paras. 4 to 6 as follows:

"The ambit of the appeal

- [4] *The heads of argument before this court dealt only with the special plea and not negligence or vicarious liability. We asked appellant's counsel at the outset what order should be made if the appeal succeeded. It emerged from the discussion that there was confusion about the ambit of the appeal. Appellant's counsel took the view that the high court's judgment disposed of all issues of liability other than the special plea and therefore, if the appeal succeeded, a suitable declaratory order should be made in regard to liability. Respondents' counsel contended that the appeal was limited to the special plea and indicated that if it was upheld the case should be remitted to the high court to determine the issues of negligence and vicarious liability.*
- [5] *An examination of the record showed the respondents' approach to be incorrect. Before the trial started the judge noted that the parties had agreed to separate the merits from issues of quantum and enquired whether the special plea could be determined on the basis of the agreed facts. Counsel for the respondents, who was counsel before us, said this was not possible, because if the court rejected the special plea the remainder of the merits would need to be determined. He added that whether the plaintiff's injuries arose out of her employment could best be determined in the context of all the happenings on the day in question. The judge then made an order that the case would proceed on the merits, with the issue of damages and quantum to stand over until there had been a final resolution of the merits.*
- [6] *The confusion over the ambit of the appeal appears to have arisen because the judgment does not deal in any detail with the issues of negligence and vicarious liability arising if the special plea was dismissed. After upholding*

¹³ 2021 (4) SA 422 (SCA)

the special plea, the judge said:

'There is accordingly no need to consider the defendants' other defences. However, I need to say this and no more. Having regard to the evidential material before me as set out earlier in this judgment, the defendants' delictual defence would have come to naught.'

This was an undesirable way in which to dispose of these matters given the distinct possibility that the decision on the special plea would prompt an appeal to this court. But it is clear that, had he taken a different view of the special plea, the plaintiff's claim would have succeeded. He should have given his reasons for that conclusion, notwithstanding his view on the merits of the special plea."

[55] The conduct of Lottostar is in contravention of the provisions of Section 57(1)(a) and (b) and 57(2)(g) of the Lotteries Act. In the result, the appeal is upheld and I propose the following order:

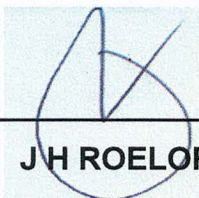
ORDER

1. The order of the Court *a quo* is set aside and is substituted for the following:
 - 1.1 The scheme, plan, arrangement or system of Lottostar whereby it offers bets, whether or not of a fixed-odd nature, on the outcome of lotteries is declared unlawful;
 - 1.2 Lottostar is interdicted from offering bets, whether or not of a fixed-odd nature, on the outcome of any lottery; and
 - 1.3 Lottostar, the Board and Betting World are directed to pay the costs of Ithuba.

- 1.4 The costs are to include those of the application for leave to appeal in the Court a quo and in the SCA;
- 1.5 In each case, the costs must include those consequent upon the employment of two counsel.


B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

I agree,


J H ROELOFSE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 31 August 2021 at 10:00.

APPEARANCES:

Counsel for the Appellant:

Adv A Cockrel SC

Adv N Stein

Instructed by:

**Maluleke Msimang & Associates
c/o TM Chauke Attorneys**

Counsel for the First Respondent:

Adv M Oosthuizen SC

Adv G Bensch

Instructed by:	Lunenburg & Janse Van Vuuren Inc
Counsel for the Second Respondent:	Adv M Mphaga SC
	Adv B Nodada
Instructed by:	State Attorney
Counsel for the Third Respondent:	Adv J Blou SC
	Adv A Friedman
Instructed by:	Roodt Incorporated
	c/o Seymore Du Toit & Basson Inc
Counsel for the Fourth Respondent:	Adv E Labuschagne SC
	Adv I Hlaletoa
Instructed by:	Maluleke Inc t/a Maluks Inc
	c/o Swanepoel & Partners
Date of Hearing:	11 June 2021
Date of Judgment:	30 August 2021