and it is during this period that the Court requires satisfactory evidence that his conduct has been irreproachable. It is impossible to lay down any definite rule as to the time which must elapse. Each case must depend upon its own circumstances. But the Court also feels that where an application for reinstatement has been made and refused, it ought not to be renewed within a period of, at all events, six months. It is not intended that the same gentleman should try again in the course of a few months. For these reasons, although I say it with some regret, I feel that we are bound to refuse the application with costs.

CURLEWIS and GREGOROWSKI, JJ., concurred.

Roos: Will the Court fix a time within which the application may be renewed?

BRISTOWE, J.: The Court will be in a better position to decide when Mr. Kruger has been in his new position for a year. We cannot fix any period, but my own personal feelings are another year will be sufficient, but that does not bind any future Court.

CURLEWIS, J.: In my opinion where an application is refused because the Court is of opinion that sufficient time has not elapsed, the application should not be renewed for at least a year,—probably a longer time should elapse. Had we thought it could be renewed within six months we should have said so.

Attorneys for Applicant: *Roux & Jacobsz*; Attorney for Law Society: *F. Kleyn.*

[A. D.]

REX v. McLACHLAN.

1915. *March* 10. DE VILLIERS, J.P., BRISTOWE and CURLEWIS, JJ.

*Liquor laws.—Intoxicating liquor.—Lease.—Unlicensed person.—"Interested in the business."—*Sec.* 59 (2), *Ord.* 32 *of* 1902.

The word interest in sec. 59 (2) of Ord. 32 of 1902 means a pecuniary interest.

J & Co. let certain premises to M, who obtained a bottle-store licence in respect thereof. In the lease between J & Co. and M it was stipulated that the

* Sec. 59 (2) Ord. 32 of 1902 reads: "The holder of any retail liquor licence shall be liable to forfeit such licence in addition to any other penalty by this Ordinance provided, if he shall whether present in such premises or not permit any unlicensed person to be in effect the owner or part owner of or interested in the business of the licensed premises unless with the consent of the president and two members of the licensing court."

bottle-store business should be carried on by M in an orderly manner in conformity with the liquor laws of this Colony, and that M should do nothing to endanger the licence. M. further gave security for £500 in case the licence should be cancelled through his fault. On these facts M was convicted of allowing J & Co., being unlicensed persons, to be interested in the business of the licensed premises in contravention of sec. 59 (2) of Ord. 32 of 1902, *Held*, on appeal, that the conviction was bad inasmuch as J & Co. were not pecuniarily interested in the business of the licensed premises.

Appeal against a conviction by a magistrate at Johannesburg.

The accused, who was the licensee of a bottle-store in Johannesburg was charged with contravening sec. 59, sub-sec. 2 of Ord. 32 of 1902 in permitting an unlicensed person to be in effect the owner, part owner or interested in the business carried on on the licensed premises. The accused was found guilty and sentenced to a fine of 10s. and forfeiture of his licence. He appealed against the conviction as being bad in law.

The facts appear fully from the judgment of the JUDGE-PRESIDENT.

E. Esselen, K.C. (with him *J. Stratford, K.C.*, and *J. G. van Soelen*), for the accused: The interest of Jagger & Co. in the licence does not amount to an interest in the business within the meaning of the section as they are not interested in the profits. To be "interested in the business" means interested in the profits or losses, which is not the case here.

By our Licensing Act there is no such thing as goodwill in licensed premises because the licence has to be renewed every six months.

Jagger & Co.'s interest is the same as that of a landlord in a policy of fire insurance. The legislature aimed at controlling the sale of the liquor and the person selling and not the landlord of the premises unless he was actually interested in the sale of the liquor. A person who got a percentage on the sales would be so interested: see *Smith* v. *Hancock* (1894, 2 Ch. D. at p. 386).

C. W. de Villiers, A.-G., for the Crown: The word "business" includes goodwill. Here Jagger & Co. have a direct interest in the goodwill of the licensed premises. There is no doubt that such premises have a goodwill.

The words in the section are not to be construed *ejusdem generis*, although I admit that only a pecuniary interest is contemplated by the Act: *vide, Pretoria Bill Posting Co.* v. *Hess* (1911, T.P.D. 360), which follows *The Gophir Diamond Co.* v. *Wood* (1902, 1

Ch. 950). Jagger & Co., however, had a pecuniary interest by reason of their interest in the goodwill.

Esselen, K.C., in reply: The interest of the lessor in the building was not an interest which the law required the lessee to disclose: *Fick* v. *Woolcott* (IV Buch. A.C. 420).

Cur. adv. vult.

Postea (March 18).

DE VILLIERS, J.P.: In this case the accused was charged before the resident magistrate of Johannesburg with contravening sec. 59 (2) of the Liquor Ordinance. The contravention, namely, was that the accused, who held a liquor licence, had permitted Jagger & Co., who were unlicensed persons, to be in effect the owners or part owners of or interested in the business of the licensed premises carried on by the accused on a certain stand in Johannesburg. It appears that as far back as 1909 the premises belonged to Harmens & Zoon, who had a liquor licence in respect thereof, and that on the 23rd February of that year they entered into a lease with the accused by which they let the premises to him for a period of three years at a rental of £50 per month, stipulating that on the expiration of his tenancy he should re-transfer the licence to them. He also undertook, in clause 7, to carry on the bottle-store and wholesale business for which a licence had been granted in a "good, orderly and respectable manner, and in strict conformity with the laws of this Colony for the time being in force"; and undertook "not to do or omit to do, or suffer to be done, or omitted, any act (act of insolvency included) or thing whereby, or by the omission whereof, the said liquor licence at present in his name and in respect of the said premises might be withdrawn, cancelled, suspended or endangered." Then under clause 8 he gave security to the amount of £500 in case the licence should be cancelled through his fault, and under clause 10 he undertook upon the expiration of the tenancy to transfer the liquor licence to the lessors. A year afterwards the same premises were bought by Jagger & Co., and they entered into a lease on similar lines with the accused. The old lease between himself and the previous owners was taken over by the new lessors. They stipulated for £50 rent per month and insisted upon clauses 8 and 10 of the old lease to which I have referred. Now it is alleged by the Crown that the accused because of these clauses has made himself liable under

sub-sec. (2) of sec. 59 in that he has in effect permitted Jagger & Co. to be the owners or part owners of or interested in the business which he was carrying on there, and this contention was upheld by the magistrate. He put it upon the ground that this was not a case of an ordinary agreement between a landlord and a tenant. He says: "The real relationship between Jagger & Co. and McLachlan is in effect that Jagger & Co. own a licensed bottle-store which they have let to McLachlan and which on the expiration of the lease reverts to them." And he relies for that upon what one of the partners, Charles, said, namely: "This liquor licence belongs to J. W. Jagger & Co. It was bought from Harmens & Zoon five or six years ago. We have let this licence to accused, McLachlan." He, therefore, held that the facts in this particular case were such as reasonably may be said to be contemplated by the words "interested in the business." This is a view with which I find myself unable to agree. The question we have to consider is what is meant by "business" in this particular sub-section. Now it is quite clear to me that the word "business" here does not include the licence. The legislature draws a sharp distinction in this sub-section between the "business" and the "licensed premises," which shows that the licence is not included in the business. This also appears in secs. 30 (5), 38, 42, 43, and the very same appears in sect. 59 (1). Take sec. 59 (1): "If he shall permit any other person to manage, superintend or conduct the business of the licensed premises during his absence. . . . ." It is clear what is meant by business here. In this case the licence under which the holder is carrying on the business is that of a bottle-store. He sells the liquor in this way, and the business, therefore, which he carries on is the business to sell in that particular way. This sub-section further contains the following: "Any person who shall at any time be lawfully managing, superintending or conducting the business of the holder of any licence. . ." That makes it even more clear that it is the particular business which the holder of the licence is entitled to carry on. That can only apply to the business of selling liquor. Under sec. 31 the licence is a purely personal one. The law has provided to whom licences shall not be granted; a licence is only granted to a particular person by virtue of his character. That is, it is a strictly personal right which cannot be transferred. And then sec. 59 (2) has for its object this. The legislature wished to prevent that while one person is the holder of a licence he should allow others to be in

effect the owners or part owners of the business carried on under the licence granted to him personally or that he should give another person an interest in the business which he is carrying on by virtue of his licence. As the licence is a strictly personal right, the licensee is not entitled to allow any person to have in any way a share in the business which he carries on. The magistrate seems to think there are no other instances which would apply to the words "interested in the business." But the obvious example is where the owner allows his manager to take a share of the profits. Or the owner may, in order to encourage the sale of liquor, promise the manager, or one of his clerks even, a commission of so much a bottle for what he sells. In that case the clerk or manager would be interested in the business to that extent, and the licence-holder would be liable to the penalties under sec. 59 (2). In this particular case Jagger & Co. are certainly interested in the business in the sense that they are directly interested that it should not be forfeited, but that is not equivalent to saying that they have an interest in the business, and they are certainly not the owners or part owners or in any way interested in the business carried on by virtue of the licence. The stipulation which they have made seems to me to be a perfectly reasonable stipulation. When the owner of premises has a licence and he proposes to let the premises, it would always be in the discretion of the licensing court whether they would transfer the licence to the tenant or not. But it appears to me reasonable for a landlord to say to the tenant: "Do not do anything to endanger the licence, because at the expiration of the lease I am anxious that the licensing court should transfer the licence to myself or to a fresh tenant." The word "interest" certainly has a very wide signification. If we refer to sec. 11 (4) of the same Ordinance we find this: "The following persons shall be disqualified for appointment and, if appointed, shall not continue as members of a licensing court, that is to say: any paid officer or paid agent of any co-partnership or society interested in the sale or the prevention of the sale of intoxicating liquor." There, of course, the word "interested" has a very much wider signification than it has in sec. 59 (2). The society of Good Templars is "interested" in the prevention of the sale of intoxicating liquor, but that is not the sense in which the word "interested" is used in sec. 59 (2). I agree with the decision in the case of the *Gophir Diamond Company* v. *Wood* (1902, 1 Ch. 950). Here the word "interest" means a pecuniary interest. For these reasons I come

to the conclusion that the appeal ought to be allowed and the conviction and sentence set aside.

BRISTOWE, J.: I am of the same opinion. In this case we have to construe the words " owner or part owner of or interested in the business of the licensed premises " in sec. 59, sub-sec. (2) of the Liquor Ordinance. The words " interested in " are extremely wide, and I am not prepared to say that a landlord might not be described as " interested " in the business of the tenant where the goodwill formed part of the leased premises. The position as regards the premises, the licence and the business requires to be distinguished. I take it that as regards the premises the landlord has the *dominium* and the tenant merely a contractual interest. On the other hand, as regards the licence, the ownership is in the tenant. The landlord's interest is merely contractual, namely, the obligation which he imposes on his tenant to do what he can to keep the licence intact, to obtain its renewal and at the determination of his lease to transfer it to the landlord. The business is a combination of a number of assets—the stock-in-trade, the book-debts, the goodwill, and so forth. But as regards goodwill, which is an essential and fundamental portion of the business because without it the business cannot be carried on, it seems to me that in a case of this kind the landlord is the owner because the goodwill of a bottle-store cannot be dissociated from the premises. It is true that it is dependent on the licence, but that simply means that non-renewal of the licence would destroy it. The goodwill itself is inseparable from the premises in which the business is carried on. It passes by the lease without express words just in the same way that a right of water or drainage appurtenant to the premises would pass without being expressly mentioned, because it cannot be separated from the premises. It seems to me, therefore, that the landlord is the *dominus* of the goodwill just as he is of the premises in which the business is carried on. In that sense the landlord may be said to be interested in the business, by virtue of his having an interest in one of the most important assets of the business. But that is not the sense in which the expression is used in sec. 59 (2). The legislature regards as the owner of the business the person who actually carries it on under the authority of a licence obtained in accordance with the statute. In using the expression " the business of the licensed premises " it draws a distinction between the premises themselves and the business which

is carried on there. It may be going too far to say that they are regarded as mutually exclusive, but, at all events, it seems to me to be true to say that for the purposes of this section the business is considered to be distinct from the premises; and if it is distinct from the premises, then I think it is distinct from anything which passes under the lease as appurtenant to the premises. The position becomes more clear if the sub-section is considered by the light of the other provisions in the statute. The object of the statute is to prevent the business from being carried on without a licence. The licensee is the person who carries on the business, and the business in the contemplation of the legislature is the business which he carries on under and by virtue of his licence. And the object of this sub-section is to prevent any unauthorised person being interested in the business as carried on by the licence-holder under the licence. For a person to be "owner or part owner of or interested in the business," he must therefore, in my opinion, be either the holder of the licence or a partner of the holder of the licence, or he must be entitled to a share in the profits. Virtually it comes to this, that to be interested in the business a person must have a pecuniary interest in it. For that reason I think the magistrate erred in finding that the landlord is a person interested in the business within the meaning of the sub-section.

CURLEWIS, J.: I agree that the appeal must be allowed. In my opinion, Jagger & Co. cannot be said to be interested in the business of the licensed premises within the meaning of sec. 59, sub-sec. (2). The sub-section refers to the owner or part owner of or person interested in the business of the licensed premises. It does not speak of the interest "in the licensed premises" or in the "licence," but in the "business of the licensed premises." And what is meant by "interest in the business of the licensed premises?" I take it the legislature meant an interest in the trade or traffic in the sale of liquor which was to take place on licensed premises. And if that is so what must the nature of the interest be in that trade or traffic which is being carried on in the licensed premises? The magistrate has given in his carefully considered judgment various instances of persons who may be said to be interested in the business, though not within the meaning of this sub-section. I take one instance, that of an employee—the person who is in the employ of the owner of the licence and assists him in carrying on the business. Every good employee ought to

interest himself in the welfare of his employer's business, and in that sense he can be said to be interested in the business; but I do not think that such a person is contemplated by the sub-section. On the other hand, if an employee is paid either by way of a percentage in the profits or by way of commission on the sales, then such an employee can be said to be interested within the meaning of sub-sec. 59 (2). 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 the 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. In that sense Jagger & Co. cannot be said to be interested in the business which is carried on in these premises. The lease provides for a specific rent to be paid, and requires McLachlan from time to time to apply for a renewal of the licence, but clause 9 of the lease contains a provision that if the licence be refused by the licensing court, even though not for any fault on his part, the lease remains of full force and effect. So that if during the currency of this lease the licensing board deem it fit not to renew the licence, McLachlan would be bound to pay his rent and the lease would continue for the unexpired term. In my opinion, Jagger & Co. cannot be said to be interested in the business of the licensed premises within the meaning of sub-sec. 59 (2).

DE VILLIERS, J.P.: The conviction and sentence will be set aside.

Attorneys for accused: *Baumann & Gilfillan.*

[A. D.]

FILLIS v. GOLDBERG.

1915. *March* 12. BRISTOWE, CURLEWIS and GREGOROWSKI, JJ.

Costs.—Magistrate's court proceedings.—Appeal.—More than a quarter taxed off.—Sec. 15, *Law* 12 *of* 1899.

When a case has been concluded in the magistrate's court everything which relates to the appeal are costs in the Supreme Court and cannot be taxed in the magistrate's court.

Where in connection with lower court proceedings more than a quarter of the attorney and client bill was taxed off, *Held,* that under sec. 15 Law 12 of 1899 the attorney was not entitled to charge any costs connected with the drawing of the bill of costs and the attendance upon taxation.