

**IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA**  
**HELD AT GABORONE**

**COURT OF APPEAL CIVIL APPLICATION NO. CACGB-026-17**  
**(High Court Civil Case No. MAHGB-000402-16)**

In the matter between:

**ATTORNEY GENERAL**

**APPELLANT**

**And**

**LETSATSI CASINO (PROPRIETARY) LIMITED** **1<sup>ST</sup> RESPONDENT**  
**GAMBLING AUTHORITY** **2<sup>ND</sup> RESPONDENT**

Attorney Mr S.A. Ziga with Mr G. Begane and Mr A. Mgadla for the Appellant and  
2<sup>nd</sup> Respondent

Advocate S. Vivian with Mr O.S. Rammidi for the 1<sup>st</sup> Respondent

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**JUDGMENT**

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**CORAM: KIRBY J.P.**  
**LESETEDI J.A.**  
**TAU A.J.A.**

**LESETEDI J.A:**

1. The Appellant appeals against an order of the High Court which set aside a decision by the Minister and replaced it with a substitution order renewing the 1<sup>st</sup> Respondent's casino licence for a period of ten years commencing from the date of that Order.

2. The background of that Order follows. In February 2006 the 1<sup>st</sup> Respondent Letsatsi Casino (Proprietary) Limited (Letsatsi Casino) was granted a casino licence in respect of premises at Palapye. The licence was for a ten-year period commencing on the 7<sup>th</sup> February 2006 and expiring on the 6<sup>th</sup> February 2016.
  
3. The licence was issued under the Casino Act (Cap 19:01). The Casino Act was promulgated in 1971 and amended from time to time, the last such amendment being in 1982. In November 1984 under Statutory Instrument No. 102, 1984, the Casino (Control) Regulations were passed as subsidiary legislation to the Act. The enabling provision in the Casino Act for the making of Regulations under the Act was section 33.
  
4. Parts of the Casino Act were subsequently superseded by provisions of the Gambling Act of 2012 whose purpose was to bring together under one legislative ambit and regulation various types of gambling activities of which casino is one. Parts of that Act commenced on the 28<sup>th</sup> October 2012. The remainder were to commence in due course.

Meanwhile the unaffected parts of the Casino Act including licensing renewal of casino licences remained in force. The statutory authority responsible for the issuance, renewal and casino licensing regulation under the Casino Act was the Casino Control Board.

5. At the time of events leading to the launching of an application in the High Court leading to this appeal, the relevant parts of the Casino Act were still in force. The remaining parts of the Gambling Act came into force on the 1<sup>st</sup> of April 2016.
6. Intending to renew its licence Letsatsi Casino wrote a letter to the Casino Control Board on the 27<sup>th</sup> August 2015 purporting to be an application for renewal of its casino licence. The letter is short and it reads:

"Re: Renewal of casino licence - Letsatsi Casino.

Notice is hereby given that Letsatsi Casino is applying for the renewal of its Casino Licence in Palapye. The licence officially expires on 6th February 2016.

By copy of this letter we respectfully request that you to (*sic*) advise us exactly what is required in terms of this renewal.

Kindly acknowledge receipt hereof.

Yours Faithfully

(signed)  
Derick van der Nest  
General Manager  
Botswana Operations"

7. On the 7<sup>th</sup> September 2015 the Casino Control Board (CCB) wrote back advising Letsatsi Casino of the procedure to be adopted. The letter reads:

"Please be informed that when submitting an application for renewal, you will be required to comply with Regulations 2, 3, and 4 of the Casino (Control) Regulations as well as Section 8(1) of the Casino Act.

Please note that the submission of the application for renewal of casino licence must precede the publication."

8. After various steps being taken by Letsatsi Casino and which were considered by the CCB not to be in compliance with the Casino (Control) Regulations (the Regulations) and the directions contained in the above letter, acceptable procedural steps were finally followed by Letsatsi Casino but it was by then too late for it to meet the time lines set out in the Regulations to ripen the application for consideration before its licence expired.

9. On the 23<sup>rd</sup> March 2016 the CCB sat to hear the Letsatsi Casino's representations and its decision was communicated by a letter dated 30<sup>th</sup> March 2016 informing Letsatsi Casino that after considering its submissions for renewal on the 23<sup>rd</sup> March 2016, the Board was of the view that Letsatsi Casino's licence expired before Letsatsi Casino could meet its statutory requirements for renewal and that there was therefore no existing licence to renew. It was pointed out that Letsatsi Casino's publication of the advertisement did not provide sufficient time to meet the required 60 days provided for under Regulation 5(1) of the Regulations for the lodging of objections prior to the consideration of the renewal application. The CCB advised Letsatsi Casino to therefore make a new application for a licence after the commencement of the new Act in view of the fact that the 60 days required under Regulation 5(1) of the Regulations would lapse after the commencement of the Gambling Act, on the 1<sup>st</sup> April 2016.
10. Dissatisfied with the decision of the CCB, Letsatsi Casino appealed to the Minister. In a terse letter the Minister informed Letsatsi Casino

that having considered the appeal, he rejected it. This was now post commencement of the Gambling Act. Under the new Act the gambling licences were now issued and regulated by a new statutory body, the 2<sup>nd</sup> Respondent.

11. Aggrieved by the decision of the Minister, Letsatsi Casino launched a review application in the High Court. It sought an array of reliefs which broadly fell into two categories. The first category was for declaratory reliefs and the second for implementing reliefs. In the declaratory reliefs, it, firstly, challenged the legality of Regulations 2(2), and Regulation 3 arguing, in respect of Regulation 2(2), that the Regulation was directory and not peremptory, alternatively, that the said Regulation was *ultra vires* the main Act and thus void. As to Regulation 3, it contended that the Regulation was not applicable to applications for renewal of casino licences, alternatively, that if it was, the said Regulation was *ultra vires* the Act and therefore void. The second category of reliefs was the reviewing and setting aside of the decision of the Minister, alternatively, that of the CCB from which the appeal had been made.

12. Flowing from the above, Letsatsi Casino sought an order substituting the decision of the Minister, alternatively of the CCB, with a court order renewing Letsatsi Casino's licence for a period of ten years from the date of the court's decision. There were a number of further alternative reliefs sought for the reconsideration of the licence renewal application preceded by a declaratory order on the regularity of the renewal application and seeking the Court to resuscitate the CCB for the purpose of determining the merits of such application.
  
13. The application was opposed by both the Minister and the Gambling Authority. An answering affidavit sworn by one Rammekwa who was at all material times the Secretary of the CCB and who authored a number of letters by the CCB to Letsatsi Casino on the subject matter preceding the decision of the 23<sup>rd</sup> March 2016 was filed on behalf of the Minister and adopted by the Gambling Authority. A replying affidavit thereto was filed by Letsatsi Casino in November 2015. Rammekwa was however not competent to answer Letsatsi Casino's allegations challenging the propriety of the Minister's decision.

Those had to be dealt with by the Minister or someone privy to that decision-making.

14. During the course of the litigation in the High Court the Minister and his attorneys on diverse occasions filed affidavits which were objected to by Letsatsi Casino on grounds of non-compliance. These were withdrawn upon objection. Finally, the time for filing of his answering affidavit having lapsed, the Minister applied for condonation of the late filing. The application was dismissed by the Court on the 27<sup>th</sup> February 2016.
  
15. Having dismissed the condonation application the High Court erroneously thought that the review application stood unopposed. The High Court per Kebonang A.J. (as he then was), shortly thereafter granted the orders which are now being appealed against. All the reliefs sought against the 2<sup>nd</sup> Respondent were withdrawn after the dismissal of the condonation application. The consolidated reasons for the refusal of the condonation application and the grant



of the orders appealed against were handed down on the 3<sup>rd</sup> March 2017.

16. The Minister filed an appeal against both the refusal of the High Court to condone the late filing of his answering affidavit and also the granting of the order which reviewed and set aside his decision replacing it with a substituted order granting a ten year renewal of the casino licence. The Minister appealed on the grounds that the Court below erred and misdirected itself in –

- (a) failing to exercise its discretion in granting leave for the filing of the Minister's answering affidavit out of time;
- (b) refusing to hear argument on the merits of the review application on the basis of the filed papers but instead granting final judgment on the basis that the application was unopposed by the appellant;
- (c) granting judgment in favour of Letsatsi Casino without applying its mind on whether or not Letsatsi Casino has discharged the onus of showing that it was entitled to the reliefs it sought;
- (d) holding that the CCB had not prescribed a format for licence renewals and that the acceptable practice for licence renewals had always been to submit a request for such a renewal by way of a letter. The Court ought to have found that the Regulations prescribed a licence renewal application procedure and that the procedure

being mandatory the casino licence renewal application was void for failure to follow the procedure.

17. The relief sought by the Minister (represented by the Attorney General) from this Court is the upholding of his appeal, setting aside and substituting the decision of the High Court with an order that the review application be dismissed with costs, alternatively, ordering that the matter be remitted back to the High Court for argument on the merits.
18. The appeal is opposed. Letsatsi Casino seeks the appeal to be dismissed with costs, although in its heads of argument it submitted that this Court was in any event in as good a position as the High Court to consider the application itself on the basis of the papers properly filed before the High Court. It submitted that on those papers it was entitled to the reliefs granted by the High Court.
19. At the hearing of the appeal the Minister recognising the convenience of not pursuing the condonation point focused his appeal on the Judge's other findings.

20. In the reasons handed down on the 3<sup>rd</sup> March 2017, the Court below in a twenty page ruling only devoted about three paragraphs to the reasons for granting the final reliefs on the merits of the review application.
21. In treating the application for judicial review as unopposed, Kebonang A.J. relied on **Golakai v The Attorney General and Another [2010] 3 BLR 62 (HC)**. In doing so the learned Judge was in error in two respects. In the first level he overlooked the fact that the affidavit by Mopati Rammekwa filed in answer to the application dealt with issues which were relevant to most material and factual issues raised by Letsatsi Casino regarding the validity of the renewal application and the decision of the CCB. The propriety of that affidavit was never challenged. Letsatsi Casino had filed a replying affidavit thereto. For that reason, save for the allegation that the Minister failed to give reasons for his decision, the bulk of the allegations of fact in respect to what transpired between Letsatsi Casino and the CCB stood to be resolved on Rammekwa's averments together with those of the Letsatsi Casino which were undisputed

save where Rammekwa's averments clearly stood to be rejected on their own. In its replying affidavit Letsatsi Casino appreciated and acknowledged the existence of this opposition, but argued at paragraph 7 of its replying affidavit that the matter "must proceed on an unopposed basis with respect to the reliefs sought against the Minister". Counsel for Letsatsi Casino to his credit expressed his surprise at the Court below's approach in treating the review application as unopposed. He was right to do so. In the light of this misdirection he argued that this Court is in as good a position as the Court below to reconsider the whole application.

22. On a second level the mere fact that an application or proceedings are unopposed does not entitle a litigant to the remedy sought without further ado. A duty lies on the court to consider the claim and satisfy itself on whether, on the averments both of fact and law set out in its papers, the litigant has made out a case for the relief(s) sought. The court will be failing in its judicial duties if it merely granted the reliefs sought without first satisfying itself whether both on the facts and on the law, the applicant has made a case. The court is not a rubber stamp to an unopposed claim.

23. The **Golakai** case was in any event distinguishable from the present case in that in the present case, aside from Rammekwa's affidavit, the Minister had filed a notice of opposition and was therefore entitled to address the court and argue the matter on the case as presented by the applicant.
24. The next question then is, whether Letsatsi Casino was, on the approach and judgment of the Court below (erroneously titled a ruling) entitled to the reliefs granted by the court? On appeal Letsatsi Casino's counsel submitted that although the Judge *a quo* did not, on the face of his decision, consider and form a view on the question of whether or not the Regulations impugned were *ultra vires* the Act or merely directory, this Court should take it that the Judge impliedly made a finding that the two Regulations were *ultra vires* the Casino Act. If this submission by counsel is valid, it will considerably weaken grounds of appeal (c) and (d). Evaluation of this submission requires first that this Court examine the findings of the court below and, secondly, consider whether as a matter of law a court can impliedly hold a statutory instrument *ultra vires*.

25. The Court *a quo* addressed the merits of the review application and the reasons for the reliefs it granted in two brief paragraphs. Having found that the applicant's case as contained in its founding affidavit remained uncontroverted the Judge stated:

"45. I was satisfied based on the record of proceedings filed that the Casino Control Board had not prescribed a format for licence renewals and that the acceptable practice had always been to submit such requests by way of a letter.

46. Based on the foregoing, I was satisfied that the Applicant having timeously requested for a renewal and based on this proved practice should have been granted the renewal. It was for these reasons that I considered the Applicant to be entitled to the reliefs it sought."

26. Regulations 2 and 3 which were impugned and which the Appellant argued prescribed the format or procedure for an application for renewal of casino licence read:

"2(1) Any person may at any time make an application in writing to the Board for the issue or renewal of a licence in the form prescribed in these Regulations. (2) An application for the renewal of a licence in the form specified in the Schedule hereto shall be made to the Board not later than six months before the expiry of the existing licence.

3. Every application shall be in a form of a memorandum containing full details and information on all matters specified in section 8(1) of the Act."

27. If the Regulations as statutory provisions prescribed a format for renewal of a licence then the question of whether or not the CCB had done so would not arise. That question would only arise either if the Regulations were *ultra vires* or did not prescribe the procedure.
28. The question of whether or not Regulations 2(2) and 3 are *ultra vires* the Act is not of fact but of interpretation and requires examination of the construction not only of the Regulations whose validity is in question but also of the main Act. It was not a question which could be glossed over without even mention. For that reason therefore it is clear that the court below never considered the applicant's case on whether or not the questioned Regulations were *ultra vires*. There were specific orders sought by the applicant in respect of the two impugned Regulations and none was granted let alone discussed by the Court below.
29. The legal position, as I understand it, is that a statutory instrument is not to be treated as ineffective in any respect on the ground of *ultra vires* unless and until declared to be so by a court of competent

jurisdiction. See *Bennion on Statutory Interpretation 5<sup>th</sup> edition page 254*. **R v Secretary of State for Transport ex p Factortame [1990] 2 AC 85** and other authorities cited therein support the position. It is important that the position of statutory law i.e. whether it is valid or invalid must be certain. The requirement of certainty is confirmed by *Craies on Legislation 9<sup>th</sup> edition Chapter 3.4.3*. Presumption of validity of statutory law serves a critical role in the orderly conduct of governance and of public interest for the contrary leads to uncertainty, confusion and ultimately chaos the very antithesis of the object of the written law i.e. to create certainty. In my view, a court cannot declare a statutory instrument invalid by implication. To do so would lead to uncertainty both for the functionary who is to implement it and those whom it is to apply. Any declaration of invalidity must be explicit to leave no doubt on nature and extent of invalidity the court has declared. This will enable the law maker to decide what, if any steps, it can lawfully take to make corrective measures. In the circumstances, the Appellant's argument that in the absence of a declaratory order



regarding the status of the Regulations questioned those Regulations stand is well taken.

30. Until set aside by the court, the Regulations were valid and binding not only on the Minister and the CCB but even on applicants, Letsatsi Casino included. As pointed out in the **Minister of Environmental Affairs on Tourism and Another v Pepper Bay Fishing (Pty) LTD 2003 (4) All SA 1 SCA** cited by the Appellant:

"As a general principle an administrative authority has no inherent power to condone failure to comply with peremptory requirement. It has only such power if it has been afforded the discretion to do so."

31. Closer home the High Court held in **Sun International (Botswana)(Pty) Ltd and Others v Attorney-General and Another 2012(2) BLR 502 (HC)** that the Regulations, which are impugned by Letsatsi Casino, were binding on an applicant and that where the applicant has not complied with those Regulations the application is null and void. That view is reaffirmed. Regulation 4(2) whose validity has not been questioned in the review application

says in express terms that the impugned regulations have to be complied with.

32. The Regulations in question have now been repealed alongside with their parent Act save as may be envisaged under section 137 of the Gambling Act in relation to any appeals commenced before the commencement of the present Act. But it is necessary to observe that section 33 of the Casino Act gave the Minister very wide powers to make Regulations for the better carrying out of the objects and purposes of that Act and for giving effect to its principle and provisions. Section 10 of the Casino Act which were being relied upon by Letsatsi Casino to challenge Regulations 2(2) and (3) sets out certain specified circumstances under which the CCB "subject to the approval of the Minister" may revoke or refuse to renew a licence. These were substantive but not procedural matters which would affect not the CCB and the Minister's powers as exercised under the impugned Regulations. In any event section 10 is not a closed list. I am also unpersuaded that outside circumstances stated in section 10, the renewal of a casino licence is automatic. Letsatsi

Casino's argument that the impugned Regulations were *ultra vires* for violation of section 10 of the Casino Act would in the circumstances not have been tenable.

33. For completeness, I now turn to paragraph 45 of the decision of the Court *a quo* that the CCB had not prescribed a format for licence renewals and that the acceptable practice was through submission of requests of renewal by way of a letter. It is on the basis of the alleged practice that the court below held that the applicant was entitled to the reliefs it sought. As was demonstrated in the **Sun International** case *supra*, that is already done by the Regulations. But even on a factual basis that finding does not stand to scrutiny.

34. The founding affidavit and the record placed before the court below shows that in its letter of the 7<sup>th</sup> September 2015, and a subsequent letter of the 15<sup>th</sup> October 2015 and the 5<sup>th</sup> February 2016 the CCB repeatedly advised the applicant of the statutory requirements to be followed in applying for a renewal of the licence. For that reason there could have been no argument that the CCB had not prescribed

a format for licence renewals as the CCB had advised the applicant in writing several times and drawn the applicant's attention to the statutory requirement in the Regulations.

35. In its letter of 17<sup>th</sup> November 2015 addressed to the CCB, it is evident that the applicant was at that time still in the process of preparing the Regulation 3 memorandum which had to be part of the renewal application. By then there was less than three months left before the expiry of the licence, yet Regulation 2(2) required the renewal of the licence to have been made not later than six months before the expiry of the licence.

36. Practice even if invariable cannot supersede a statutory requirement. Where there has been a practice which was inconsistent with the statutory requirements, a party cannot acquire a right or a legitimate expectation to have that practice take precedence over the statutory requirement. Nor can the court competently so order. Even the functionary or the administrative authority itself is bound to follow the law, (here the Regulations) when it discovers that what it had

been doing was inconsistent with the statutory requirement. See **Peloewetse v The Permanent Secretary to the President and Others [2000] 1 BLR 79 (CA) at 90**. It is also well established that a legitimate expectation cannot arise from a practice or representation which is inconsistent with the law or for which any representation was not competent or lawful for the decision maker to make. See, **South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) at 49E-50A; Attorney General v Kgomo & Others [2008] 1 BLR 240 at 249-250**

37. For those reasons, an applicant for the renewal for a casino licence, the CCB and the Minister were all obliged to comply with the Regulations. Those Regulations were valid until a court had declared otherwise. Once this is appreciated, any irrationality on the part of the Minister in not giving reasons for the rejection of the appeal, for this was the complaint which the Minister's answering affidavit had been intended to address, did not take away any substantive rights of Letsatsi Casino to apply for a renewal of licence. Letsatsi Casino had such rights on the facts of this case.

38. The remedy of a substituted order was also incompetent for another reason. As pointed out by this Court in **Bergstan (Pty) Ltd v Botswana Development Corporation Limited & Others [2012] 1 BLR 858 (CA) at 866** and several other decisions of this Court, a substitution remedy is only granted in exceptional circumstances.

Broadly it will only be granted –

- "(a) when the end result is, in any event, a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter;
- (b) where further delays will cause unjustifiable prejudice to the applicant;
- (c) where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant the same jurisdiction; or
- (d) where the court is in as good a position to make the decision itself."

39. None of those circumstances were demonstrated in the present case let alone shown to exist by the High Court. On the contrary the issue of a substitution did not arise for consideration. To be entitled to a substitution remedy the applicant must, in its papers, demonstrate the existence of the specified exceptional circumstances and its entitlement thereto. The court must also so find.

40. In the circumstances of this case, the applicant clearly was not entitled to a remedy of renewal of its licence as none of the circumstances existed. On the other hand, it appeared on the Regulations to have had no case at all. Further, the licence having lapsed on the 6<sup>th</sup> of February 2016, it could not be renewed more than a year later. *Black's Law Dictionary 9<sup>th</sup> edition* defines a renewal "as a recreation of a legal relationship or the replacement of an old contract with a new contract as opposed to the mere extension of the previous relationship". To constitute a renewal, the replacement of the old legal relationship must take place immediately upon the expiry of the previous legal relationship. That is so as otherwise it would not be a renewal but a completely new licence. A lapsed licence was rightly considered by the CCB to be unrenewable.

41. It is worth noting that all reliefs sought against the 2<sup>nd</sup> Respondent i.e., the licensing authority were abandoned at the hearing. The Minister is not a licensing authority. All he could do was to either reject the appeal or uphold the appeal and remit the matter back to

the CCB to hear the renewal application on the merits as that had not been done.

42. The major complaint raised by Letsatsi Casino in the Court below against the Minister, to wit, that no reasons were given for the rejection of the applicant's appeal to him, was never considered by the Court below and not unexpectedly no finding of irrationality on his part was made. The grounds considered by the High Court were the grounds which would have been applicable to the reliefs sought against the Gambling Authority or its predecessor the CCB, if so advised, but not the Minister. It was the CCB's alleged invariable practice of permitting applications for renewal of licences to be made by letter which the Court below found to entitle Letsatsi Casino to the reliefs granted. For that reason, in the absence of any reviewable ground being held to be established against the Minister, it is questionable that the reliefs sought against the Minister could be upheld.



43. In the circumstances the appeal is well founded and there is nothing warranting a referral of the matter back to the High Court on any of the issues.

44. For the reasons given above, the decision of the High Court cannot stand and the following Order is issued –

1. The appeal is upheld with costs.
2. The decision of the High Court is set aside and replaced with the following Order: "The application is dismissed with costs".

**DELIVERED IN OPEN COURT AT GABORONE THIS 27<sup>TH</sup> DAY OF JULY 2017.**



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**I.B.K. LESETEDI  
[JUSTICE OF APPEAL]**

**I AGREE**



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**I.S. KIRBY  
[JUDGE PRESIDENT]**

**I AGREE**



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**T. TAU  
[ACTING JUSTICE OF APPEAL]**