# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE** **CIVIL CASE NO: 4380/09**

In the matter between:

**Swaziland Spa Development Company Limited** **Applicant**

**And**

**Minister of Tourism and Environmental Affairs** **First Respondent**

**The Swaziland Gaming Board Of Control** **Second Respondent**

**The Attorney General** **Third Respondent**

**Happy Valley Resorts (PTY) Ltd** **Fourth Respondent**

**CORAM:** **M.C.B. MAPHALALA, J**

For Applicant: Advocate Redding Instructed by John Henwood

For First, Second and Third Respondents: Advocate Patrick Flynn Instructed by Attorney M. Nxumalo

For Fourth Respondent: Advocate Kuny Instructed by Lindifa Mamba

## Summary

Civil Procedure – Application to set aside the grant of a Casino Licence

– Right of a competitor to be heard in terms of the *audi alteram partem* rule - whether competitor has legitimate expectation to be heard – no such rights established – application dismissed.

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**JUDGMENT**
**7th DECEMBER 2011**

[1] The applicant seeks an order reviewing and setting aside the decision of the First Respondent to issue a Casino Licence to the Fourth Respondent; it further seeks an order reviewing and setting aside the issuing of a Casino Licence to the Fourth Respondent by the First Respondent. An order for costs is sought against the First Respondent along with any of the Respondents who oppose the application; it is common cause that only the Fourth Respondent is opposing the application.

[2] The applicant is the holder of a Casino Licence which was issued in terms of Section 9 of the Casino Act. The dispute between the parties relates to the issuing of a Casino Licence to the Fourth Respondent by the First and Second Respondents. The applicant contends that the issuing of the said licence is reviewable both in substantive and procedural grounds since it was not carried out in accordance with the principles of natural justice. The applicant argued that it had not been afforded the opportunity of making representations to the First Respondent on the negative impact that the granting of the licence

would have on its rights to operate its own casino business.

[3] The applicant argued that in terms of its Casino Licence previously issued by the First Respondent in 1966 and 1981, it was afforded an exclusive right to operate a Casino within a radius of sixty four km from its premises. However, the applicant conceded that when it applied for a renewal of its licence on the same terms and conditions, the First Respondent removed the applicant's right to exclusivity which it had previously enjoyed. The applicant argued that the First Respondent merely advised that its right to exclusivity had been removed; however, it was not afforded an opportunity to make representations prior to the removal of the said right.

[4] The applicant further argued that on the 16th September 1996, the First Respondent had made a written undertaking that another Casino licence would not be granted within the affected radius without prior consultation; it further argued that this was done in recognition of its rights to exclusivity. The applicant argued that the undertaking gave it a legitimate expectation that it would be heard before another Casino licence was issued to another person. However, the applicant concedes that the First Respondent in granting the Casino Licence to the

Fourth Respondent exercised his discretion; however, it contended that the discretion was exercised in a grossly unreasonable or irrational manner.

[5] The Applicant argued that if it had been given an opportunity to make representations to the First Respondent, it would have revealed and outlined the extent of its substantial contribution to the socio-economic development of the country; and in particular the several companies they operate, the hundreds of local workers employed, the tourism and direct foreign exchange generated by its subsidiaries, the millions of its profits spent on capital expenditure and reinvested into the business, their contribution to the national revenue in terms of millions of emalangeni in taxes paid to government as well as the substantial amount of money paid to suppliers for materials and services mostly to local suppliers and service providers. The applicant also outlined its social contribution to the community in terms of building a community clinic, sponsorship for scholars, donations to orphanages, hospitals, rehabilitation centres, aid care centres and other charity organizations; the applicant argued that the above information is relevant in deciding whether or not to grant a further casino licence in close proximity to its business. It further argued that the substantial

contribution that it has made to the country could be detrimentally and adversely affected by the issuing of a casino licence to its competitor which is in close proximity to its own business.

[6] The applicant disclosed that its first licence was issued on the 1st April 1966 and that it has been effective for 24 years with the Exclusivity Clause within a radius of sixty four kilometres. On the 4th January 1983 the applicant's licence was renewed with effect from 1st April 1981 with the same rights of Exclusivity for a period of fifteen years; it expired on the last day of March 1966.

[7] The applicant made an application for the renewal of its previous licence on the same terms and conditions. The Second Respondent acknowledged receipt of the application but requested certain information particularly the relationship of the applicant, Swazi Spa and Manzana Estate Limited which information was provided. The Second Respondent subsequently advised the applicant, in writing, that it had resolved to recommend to the First Respondent a renewal of the licence, and that there was no suggestion that the Exclusivity Clause would be removed. A meeting was subsequently held between the Applicant and the First Respondent where it insisted that the licence be renewed on the same terms and conditions including the Exclusivity

Clause; the applicant further undertook not to object to the granting of a Casino Licence to Emphandzeni Hotel about forty two kilometres from the applicant's premises in the event the renewal included the Exclusivity Clause.

[8] On the 16th September 1996 the Minister approved the renewal of applicant's licence on the same terms and conditions except the Exclusive right to operate a casino within a sixty four kilometre radius. The First Respondent advised that the Ministry needed to consult all interested parties and formulate a clear government policy with regard to the positioning of gaming operations in Swaziland. The First Respondent concluded his letter by stating the following:

> "However, I am of the view that you should be given a certain measure of protection in order to safeguard your existing operations. To that end, I undertake not to grant another casino licence within the affected radius without prior consultations with yourselves, and pending the determination of the issue of the radius within the next six months."

[9] The applicant argued that the letter by the First Respondent created a legitimate expectation that it would be consulted. The licence was issued by the First Respondent on the 1st October 1996 and effective from 1st April 1996 without the Exclusivity

Clause for a period of fifteen years. On the 29th January 1997 the applicant informed the First Respondent that it had received information that a Casino Licence had been awarded to Imphandze Hotel, and that it assumed that the suspension of the Exclusivity Clause would be lifted. On the 21st February 1997 the applicant met with the Second Respondent and made representations on the reinstatement of the Exclusivity Clause.

[10] On the 12th March 1997 the First Respondent advised the applicant that after a careful consideration of its representations, it was resolved that its request for an Exclusivity Clause could best be addressed after the Casino Act and the Lotteries Act have been reviewed; and, that such a review would also cater for applicant's complaint against the operations of Rean International.

[11] The applicant alleged that during July/August 2008 he noticed major construction work at the premises of the Fourth Respondent and it was informed that Piggs Peak Casino had purchased the Happy Valley Motel and that they were in the process of converting it to a Casino; the Second Respondent confirmed verbally in September 2008 that a Casino Licence had been issued to the Fourth Respondent. On the 19th August 2009 Applicant's attorney advised the

Second Respondent that they had reason to believe that the Licence had been granted unprocedurally contrary to the principles of Natural Justice as well as not in compliance with the provisions of the Casino Act; to that end, they requested certain information from the Second Respondent in order to establish and confirm their belief. They required information as to the dates upon which the application was received, when application was considered by Second Respondent whether it applied its mind to certain matters including the proximity of the parties, the Substantial Investment by the applicant, the possible impact on applicant's operations and loss of employment, its right to object as well as compliance by the Fourth Respondent with the criteria set out in Section 9 of the Casino Act. In response the Second Respondent advised that the appropriate authority with power to grant licences in terms of the Act was the First Respondent; it advised the applicant to direct its concerns to him.

[12] A meeting was held between the applicant, the First and Second Respondents; and, the First Respondent indicated that he needed time to investigate the complaint made by the applicant. On the 1st October 2009 and pursuant to the said meeting, the First Respondent decried the failure by the applicant not to state the reasons for its belief that the licence to

the Fourth Respondent had been issued unprocedurally; however, he confirmed that the licence had been issued lawfully in terms of section 9 of the Casino Act No. 56 of 1963 after the Fourth Respondent had complied with the laid down requirements and procedure. The First Respondent noted the concern by applicant for lack of public participation in the granting of Gaming Licences but stated that the concern has now been incorporated in the proposed gaming bill; however, he pointed out that the current gaming legislation does not provide room for public participation in gaming applications and objections that may arise. He argued that the removal of the Exclusivity Clause was caused by the need to acquire a substantive tourism market in the global market; and that the two establishments would compliment each other, produce economic spin offs to both parties, enhance the value for shareholders' money, good competitive operations, and the creation of employment opportunities to the Swazi Nation.

[13] The applicant argued that the licence was granted in breach of the undertaking by the First Respondent not to issue a casino licence within a radius of sixty four kilometres from applicant's premises without first consulting with the applicant; and that the First Respondent had undertaken to determine the issue

of the radius within six months from the 16th September 1996. On the alternative the applicant argued that it had a legitimate expectation to be heard and make representations to the First Respondent before the granting of the licence to the Fourth Respondent. It further argued that the issuing of the licence ought to be reviewed and set aside.

[14] The applicant also argued that since the First Respondent's decision to grant the licence involved the exercise of discretionary powers, and affected its existing rights and privileges, he was obliged before issuing the licence to furnish the applicant with notice of its intended action and to give the applicant a proper opportunity to be heard.

[15] The applicant argued that the First Respondent's decision was grossly unreasonable in light of the underlying reasons for granting the licence; it denied that the parties would increase tourism in the country or that they will compliment each other or that there would be economic spin offs. The applicant argued that on the contrary the two establishments would compete with each other, cause a negative impact on the economy and thus reduce the value of shareholders' investments and consequently result in job losses.

[16] The applicant further argued that the issuing of the licence is irregular because the application was made by Happy Valley Enterprises (PTY) Ltd but it was issued to the Fourth Respondent; and that no explanation was made for this discrepancy since the two entities are not the same.

[17] The applicant alleged that the issuing of the licence is in contravention of section 9 (1) (c) of the Casino Act which requires the applicant for a licence to satisfy the First Respondent that it has adequate financial means available to provide and operate a casino of a high standard; and that the documents submitted in support of the application do not address this matter. It further argued that the financial statements submitted by the Rodrigues Group of Companies are not helpful in this regard because they do not bear any relationship with the Fourth Respondent because these are distinct entities; and that no explanation was given of the relevance of the Rodrigues Group of Companies to the Fourth Respondent.

[18] The applicant also alleged that the application was not made to the First Respondent as required by section 9 of the Casino Act but to the Second Respondent; and, that in the circumstances the First Respondent never had the jurisdiction to issue a

Casino licence to the Fourth Respondent. It further argued that there is no evidence that the First Respondent was involved in the decision-making process other than the issuing of the licence; that the evidence suggests that the application was heard and deliberated by the Second Respondent who is not empowered to grant a Casino Licence, and that accordingly, the decision is a nullity.

[19] The application is opposed by the Fourth Respondent, which argued that it does not intend and it is not able to controvert the factual averments raised by the applicant since they are outside of its personal knowledge. It argued that the undertaking relied upon by the applicant as having been made by the First Respondent in 1996 has nothing to do with it because it was not even in existence; and, that when the application was made for the licence in April 2008 which was later issued, it was not aware of the existence of such an undertaking or that there might be any such impediment or obstacle to obtaining the licence particularly because the application was fully motivated and complied with the requirements of the Casino Act.

[20] The Fourth Respondent also argued that the application was fully considered by the Second Respondent in compliance with the Act and that after

a full and searching enquiry, it recommended to the First Respondent the issuing of the licence; and, that the application was fully considered by the First Respondent who took consideration, *inter alia,* of the recommendation, and, in exercising the powers and discretion accorded to him in terms of the Act, he issued the licence. It argued that the First Respondent acted on reasonable and rationale grounds because the applicant has not alleged that the application was tainted by any irregularity or that the Fourth Respondent had been guilty of any irregular or improper conduct.

[21] The Fourth Respondent argued that the applicant's non-exclusive licence, as renewed in 1996 did not entitle it to challenge the Casino licence issued to the Fourth Respondent on the basis of the Exclusivity Clause; and, that, the undertaking upon which the applicant relies does not override the non-exclusivity of the 1996 licence to allow for a legitimate expectation to exist on the part of the applicant. It further argued that the undertaking was not of such a nature that the principles of Natural justice were infringed by the First Respondent's failure to consult with applicant as alleged and, that there is no basis either on the facts or in law, upon which the applicant is entitled to review the conduct of both the First and Second Respondents.

[22] The Fourth Respondent argued that its casino started operating in September 2009 and that to-date the amount invested is about E80 000 000-00 (Eighty million emalangeni) and currently employing about three hundred and fifty people; and, that in addition to the casino, the existing hotel has been rebuilt and restyled to the highest standard with a refurbished restaurant, kitchen, bars, public areas, parking, roads and entrances. Planned future development include a Night Club, Executive houses, luxury town houses, office complex, conference centre, a gym and a small complex of shops all valued at sixty six million emalangeni (E66 000 000.00). It argued that Landlord Motel Enterprises, has raised mortgage finance with financial institutions running into tens of millions of emalangeni, the existence of a long term notarial lease with a casino licence holder being one of the motivations relied upon by the financiers in granting such loans; and, that the revocation of the licence would cause a loss not only to the landlord but to the financiers as well. It argued that it has been competing amicably with the applicant since it commenced operating; and that the applicant has failed to set out prejudice or damage suffered, and that a reduced profit is not a valid ground in law to review and set aside the licence.

[23] The Fourth Respondent argued that in addition to the issuing of a casino licence to Imphandze Hotel, two other Casino licences have been issued by the First Respondent within a radius of sixty four kilometres to Maguga Leisure Resorts (PTY) Ltd on the 26th September 2006 for a distance of forty kilometres as well as to Exclusive Resorts (PTY) Ltd t/a as the Heritage on the 24th September 1998 within a radius of about twenty kilometres.

[24] The Fourth Respondent contends that the applicant, on its won admission, had known of the grant of the licence since September 2008 but it has not offered any explanation why it waited for over a year and allowed the Fourth Respondent to disburse substantial amounts of money before launching the present application; and, that it could not in the circumstances claim “legitimate expectation”, and that this was denied and estopped.

[25] The Fourth Respondent denied the irregularities alleged to exist by the applicant, and, it argued that at the time of the application Happy Valley Enterprises (Pty) Ltd operated the Happy Valley Hotel and it was explained to the Second Respondent during the hearing that if the application succeeded, a new company in the name of the Fourth Respondent would operate the casino business. The applicant had alleged that the application was made

by Happy Valley Enterprises (PTY Ltd instead of the Fourth Respondent; hence, it was argued that the wrong entity applied for the licence and a wrong entity was granted the licence.

[26] The applicant further argued that the application was addressed to the wrong person and that the First Respondent played no part in the decision to grant the licence; on the contrary, the Fourth Respondent argued that there was nothing wrong for the application to be addressed to the Second Respondent because the Minister retains ultimate control and is vested with the ultimate discretionary power to grant or refuse a licence. Furthermore, that in terms of section 6 of the Casino Act, there are four members of the Board, two of whom are public officers designated by the Minister and two of whom one not public officers but appointed by the Minister, one of whom the Minister shall designate as Chairman; the Minister shall appoint a secretary to the Board. In addition the Fourth Respondent argued that the Second Respondent is a creation of the First Respondent which receives applications, ensures the requirements of the Act have been met by the applicant after which it makes a recommendation to the First Respondent. The Fourth Respondent further referred and annexed a letter written by Happy Valley Enterprises (PTY) Ltd and addressed to the

Second Respondent advising that the licence should be issued in the name of the fourth Respondent, a company still to be formed; the letter is dated 5th May 2008. In the letter it is stated that the company would only be formed if they qualify to be awarded with the Casino licence.

[27] The Fourth Respondent further referred to a letter written by the Second Respondent to the Fourth Respondent stating that after a careful deliberation of their application; they intend recommending to the First Respondent to issue the licence; and that they have taken into consideration that the business will be managed by the Piggs Peak Casino who are people of integrity; and, that they do not need to satisfy Article 9 (1) (a) – (f). The said provisions state that the Minister may grant the licence provided the applicant satisfies him that it is the occupier of the whole casino with security of tenure, that it intends to manage the operation of the whole of the facilities of the Casino, that he is a person of integrity, that it has adequate financial means available to provide and operate a casino of a high standard, that being a body corporate it is a company within the meaning of the Companies Act, that it undertakes within the period fixed by or under Section 11 to submit to the Minister for his approval plans and specifications of the proposed casino, and that upon obtaining the

approval to commence and complete the necessary works, and to deposit with the Accountant–General such security as the board considers adequate for the meeting of any obligations incurred to persons gaming in the proposed casino.

[28] It is common cause that there is a Management Agreement between the Fourth Respondent and Casino Enterprises (PTY) Ltd concluded on the 14th December 2008 and effective from 1st January 2009. Similarly, it is common cause that there is a notarial deed of lease between Motel Enterprises (Swaziland) Limited and the Fourth Respondent concluded on the 29th August 2008 and the effective date was on the 1st January 2009 and enduring for an initial period of fifteen years with an option to renew the lease for a further period of nine years; rental is E100 000-00 (One hundred thousand emalangeni) per month with an additional E15,000-00 (Fifteen thousand emalangeni) in respect of water and electricity and at an escalation rate of 5% per annum.

[29] The First Respondent has filed an Answering Affidavit opposing the application. He argued that the first ground of review relating to the Minister's letter that gave rise to a legitimate expectation to be consulted prior to another casino licence being granted was not unqualified and envisaged a determination within the

next six months; and, that the First Respondent at the time had removed the Exclusivity Clause. He argued that the undertaking given in 1996 did not create a legitimate expectation to be consulted in respect of the application by the Fourth Respondent in 2008; and that the correspondence with the Board in 1999 does not support applicant's contention that a legitimate expectation had been created. He annexed a letter from the applicant to the Board requesting a reinstatement of the Exclusivity Clause; it was dated 12th March 1999. He further annexed another letter from the applicant to the Second Respondent dated 2nd July 1999 requesting once again that the board give consideration to re-instating the Exclusivity Clause, and adding that it would consider paying government for such exclusivity. It further sought for an opportunity to meet with the Second Respondent to discuss the matter. On the 5th October 1999 the Second Respondent wrote a letter to the applicant in respect of the request by the applicant of the reinstatement of the Exclusivity Radius; the letter further referred to a presentation by the applicant to the Board on the 10th September 1999 at the Nhlangano Sun Hotel. The Board stated that it had noted applicant's concerns and advised that "it could not deal with the issue of "exclusivity radius" at this stage since it was currently drafting a new Gaming Act in which issues

of Exclusivity would be catered for; and that once the new Act is in place, it would approach the Board to finalise this issue".

[30] In turn the applicant, on the 11th October 1999, wrote to the Second Respondent acknowledging receipt of the letter of the 5th October 1999; and further stated that: "please confirm that no licence will be awarded to any company either under the Casino Act or the Lottery Act within our former area of exclusivity pending the new Gaming Act being finalised. As per your suggestions once the new Act will be reviewed we will be pleased to approach the Board in order to bring this issue to a mutual advantageous conclusion". In response the Second Respondent, in a letter dated 11th November 1999, and addressed to the applicant, the Board stated that "we cannot make such a commitment that no licence will be awarded to any company either under the Casino Act or Lottery Act within your former exclusivity area pending the new Gaming Act being finalised. The Board has adopted a policy in principle that no licence should be granted pending the finalization of the new Gaming Act"; however, no new Act came into existence as was envisaged.

[31] The First and Second Respondents further argued that the second ground of review that the applicant

was deprived of its right to be heard in terms of the *audi alteram partem* rule was baseless; and it further denied that there was a failure of Natural Justice in light of the powers and discretion afforded to the Minister in terms of the Casino Act and there being no provision in the Act for objections on the part of other licence holders. They argued that the procedure followed by the Board and the matters deliberated upon in respect of the application which formed the basis upon which the recommendation was made to the Minister was a reasonable and rationale process resulting in a decision by the Minister; they denied that the decision by the minister was unreasonable and irrationale. They argued that the minister is afforded the discretion to grant licences in terms of the Act. They further referred to the correspondence in 1999 referred above between the applicant and the First Respondent with regard to the Exclusivity Radius as well as a presentation by the applicant to the Board on the 10th September 1999 at Nhlangano Sun Hotel.

[32] The First and Second Respondents deny that the decision to issue the licence and the actual issuing of the licence to the Fourth Respondent was vitiated by a series of material irregularities. They first dealt with the alleged irregularity that an Entity other than applicant for a Casino Licence was ultimately

awarded the licence; and, they argued that the application was made by Happy Valley Enterprises (PTY) Ltd which operated Happy Valley Hotel, and that it was explained to the Board in a letter dated 8th May 2008 that they intended to hold the licence under Happy Valley Resorts (PTY) Ltd, a company still to be formed. In a minute to the Minister dated the 9th May 2008, the Board advised the Minister, *inter alia,* that "on the 5th May 2008 we received a letter from Happy Valley requesting that in the event they qualify to be granted the licence it should be issued in the name of Happy Valley Resorts, a Company still to be formed specifically to hold the licence". They argued that in the circumstances there was nothing irregular in the award of the licence.

[33] The applicant further alleged, as an irregularity, that the application was made to the incorrect entity being the Second Respondent and not to the minister; Second Respondent argued that it was conscious of its role of tendering advice to the Minister in terms of Section 8 (c) of the Act, and that in their Minute dated 9th May 2008, it recommended to the Minister the granting of the licence. They argued that the Casino Act does not provide how an application is to be made, and that the Board is merely a creation of the Minister, and that it merely

gathered and considered the necessary information and advised the Minister on the grant of the licence.

[34] The First and Second Respondents further denied that the First Respondent played no part in the decision to grant the licence to the Fourth Respondent, and that the fact that the Minister was not present during the presentation by Fourth Respondent is irrelevant because the decision was made by the Minister on the basis of information and advice provided to him by the Board. They further argued that the First Respondent has deposed to an affidavit and confirmed that he has a discretion in terms of Section 9 of the Casino Act to grant an application for a Casino Licence; he further confirmed that he granted the licence to the Fourth Respondent after it had complied with the provisions of the Casino Act, and, that all the normal procedures for granting a casino licence were followed.

[35] The First Respondent, when granting the licence, stated that the grant was in the interests of the country to acquire a tourism market share; and that the two resorts would compliment each other. He was of the considered view as well that there would be economic spin offs and that there would be employment opportunities created. He further denied that either the Second Respondent or himself

was required to consult with the applicant prior to granting the licence or that the applicant had a legitimate expectation to be consulted. He further denied that the applicant had a right to be heard either in terms of the Act or on any other basis; and, he argued that in granting the licence to the Fourth Respondent, he acted reasonably and in the best interests of the country. Similarly, Senator Thandi Shongwe who was the Minister at the time when the licence was granted has filed a Confirmatory Affidavit stating that the Second Respondent which deliberated on the application recommended to her the grant of the licence, and, that after being satisfied that the fourth Respondent had complied with the Act, she exercised her discretion in terms of Section 9 of the Casino Act and granted the licence; she further confirmed that all the provisions of the Act were complied with. She denied that the First and Second Respondents were required to consult with the Applicant prior to the grant of the licence or that the applicant had a legitimate expectation to be consulted; she further denied that the applicant had the right to be heard either by virtue of the Act or on any other basis.

[36] The applicant has filed a Replying Affidavit stating, *inter alia,* that in terms of Section 7 of the Casino Act, the function of the Second Respondent is to

supervise and control the conduct and operation of Casinos and to ensure that money due to government by the Licensees is duly paid; and, that in terms of Section 8 of the Act it may inspect Casinos in order to ascertain whether the terms and conditions of a licence are being observed as well as to tender advice to the Minister. The applicant argued that it is apparent from Sections 7 and 8 of the Act that the Second Respondent has no functions and duties before the Casino Licence is issued; and, that it has no role in licence applications, and, that its involvement constitutes an irregularity.

[37] The applicant further argued that a proper reading of the "undertaking letter" is that the undertaking was pending determination of the issue of Exclusivity radius; and, that it was envisaged that the issue would be determined within six months, and that the fact that it was not done within six months "does not result in the evaporation of the undertaking". It further argued that the 1999 correspondence between the applicant and the First Respondent did not affect the undertaking or the legitimate expectation created; and, that it dealt with the question of exclusivity and the applicant's attempt to have it restored.

[38] The applicant further argued that the Exclusivity Radius was not cancelled but merely suspended. I cannot agree with this contention; the fact that upon an application for a renewal of the licence, the Exclusivity Radius was removed means that it was cancelled.

[39] The applicant further argued that the Act does not contemplate the issuing of Casino Licences to companies to be formed, and, that such entities cannot comply with the provisions of Section 9 of the Act or satisfy the First Respondent that it has adequate financial means.

[40] It is common cause that the applicant is a holder of a Casino Licence issued to it by the First Respondent in terms of Section 9 of the Casino Act No. 56 of 1963; the first licence was issued in 1966 and renewed in 1981 and it afforded the applicant an Exclusive right to operate the casino within a radius of sixty four kilometres from its premises. However, in 1966 the applicant was issued with a licence which did not provide for “Exclusivity Radius” even though it has applied for the right to Exclusivity. The Minister stated that he has come to the conclusion that the Ministry need to consult all interested parties and formulate a clear government policy regarding the

positioning of gaming operators in Swaziland. He concluded by saying that:

> "…I undertake not to grant another Casino licence within the affected radius without prior consultations with yourselves, and pending the determination of the issues of the radius within the next six months."

[41] It is common cause that on the 24th September 1998 the First Respondent issued a Casino licence to Exclusive Resorts (PTY) Ltd t/a The Heritage within a radius of about twenty kilometres from the applicant's premises; on the 26th September 2006 the First Respondent issued a Casino licence to Maguga Leisure Resorts (PTY) Ltd. On the 8th July 2008 the First Respondent issued a Casino Licence to the Fourth Respondent. The applicant contends that the issuing of the Casino licence to the Fourth Respondent is reviewable on substantive and procedural grounds and that it was also vitiated by material irregularities. The First ground of review is that the licence was issued in breach of an express undertaking in the letter of the 16th September 1996 where the First Respondent stated that he "undertakes not to grant another Casino licence within the affected radius without prior consultations with the applicant and pending the determination of the issues of the radius within the next six months".

[42] In terms of the undertaking the determination of the issues of the radius was to be done within six months from the 16th September 1996; accordingly this period lapsed on the 16th March 1997, and, it is common cause that the issue was never determined at all, and the undertaking lapsed. As stated in the preceding paragraphs, in 1998 the First Respondent granted a Casino Licence to Exclusive Resorts (PTY) Ltd t/a The Heritage; and, in 2006 the First Respondent issued a Casino Resort to Maguga Resort (PTY) Ltd both of which are within the sixty four kilometres radius. It is also not in dispute that when the said undertaking was given in 1996, the Fourth Respondent was not in existence; and when the application was made by the Fourth Respondent and subsequently granted by the First Respondent, the Fourth Respondent was not aware of the undertaking. However, as stated in the preceding paragraphs, the undertaking had lapsed in March 1997. The applicant tried in vain between 1996 and 1998 to persuade the First Respondent to reinstate the "Exclusivity Clause" in the licence. Since 1996 the applicant has been operating without the Exclusivity provision.

[43] The second ground of Review is that the undertaking by the First Respondent to consult the applicant gave rise to a legitimate expectation on the part of the

applicant that it would be consulted and make representations before a casino licence was issued to another person within the affected radius; and, that the applicant was deprived of its right to be heard in terms of the *audi alteram partem* rule. The legitimate expectation did not endure for more than six months. Furthermore, the applicant made a presentation to the Second Respondent on the 21st February 1997 requesting the reinstatement of the Exclusivity Radius. The First Respondent advised the applicant that the request would be addressed after a review of the Act; and, the request was refused in a letter dated 12th March 1997.

[44] The applicant in a letter addressed to the First Respondent dated 1st April 1997 conceded that there was a need to review the Casino Act which was outdated, and further conceded that it was invited to contribute to the review exercise proposed by the Minister.

[45] Correspondence between the applicant and the Second Respondent militates against the claim to Legitimate Expectation by the applicant that it would be consulted before a Casino licence could be issued to any person. On 12th March 1999 the applicant requested a reinstatement of the Exclusivity Radius from the Second Respondent. On the 2nd July 1999

the applicant again wrote and requested from the Second Respondent to give consideration to reinstating the Exclusivity Radius, and that it could consider paying government for such exclusivity; it further requested a meeting with the Board to discuss their request. The meeting was subsequently held between them on the 10th September 1999 at the Nhlangano Sun Hotel and Casino.

[46] Subsequently, the Board wrote a letter to the applicant on the 5th October 1999 and referred to their presentation made to the Board at Nhlangano Sun with regard to the reinstatement of the Exclusivity Radius; the Board further stated that it noted the concerns raised by the applicant but could not deal with the issue of Exclusivity Radius at that stage since it was currently drafting a new Gaming Act in which such issues would be catered for and that once the new Act was in place, it would be advised to approach the Board to finalise the issue.

[47] On the 11th October 1999 the applicant wrote a letter to the Board asking it to confirm that no licence would be awarded to any company either under the Casino Act or the Lottery Act within their former area of Exclusivity pending the finalization of the new Gaming Act. It further undertook that once the new Act was reviewed, it would approach the Board to

conclude the matter. On the 11th November 1999 the Board informed the applicant that it could not make such a commitment as requested that no licence would be awarded to any company pending the finalization of the new Gaming Act.

[48] In light of the correspondence between the applicant and the Second Respondent as well as the meetings held between them, there is no basis in law for holding that there was an undertaking in existence in 2008 that no Casino licence would be issued to any person before the applicant was consulted. Similarly, in light of the said correspondence and subsequent events to the letter of 16th September 1996, there is no legal or factual basis for holding that the applicant had a legitimate expectation that it would be consulted based merely on the letter of the 16th September 1996. The question of Exclusivity was constantly revisited by the applicant and dealt with by the Board. In addition, the issuing of Casino licences to Imphandze Hotel, Exclusive Resorts (PTY) Ltd t/a the Heritage and Maguga Leisure Resorts (PTY) Ltd doesn't support the argument of legitimate Expectation. Similarly, the letter of the 17th April 1997 by the First Respondent to the Applicant stating that the Ministry cannot stop the operations and expansion of Rean International before the review of the Casino Act and lottery Act militates against the

claim to legitimate expectation; the company holds a Casino Licence within the affected radius.

[49] The Third ground of Review is the Failure of Natural Justice, it being argued by the applicant that the First Respondent in the exercise of his discretion was obliged to give the applicant a proper opportunity to be heard before issuing the licence to the Fourth Respondent; it was argued that the reason being that his decision affected existing rights which the applicant had. It is further submitted that another reason is that the applicant is a substantial investor in the country and contributes immensely to the infrastructure, payment of income tax, a substantial employer and the single largest tourism attraction in the country. **His Lordship Corbert CJ** dealt with the *Audi Alteram Partem* rule as well as the concept of legitimate expectation in the case of **Administrator Transvaal and Others v. Traub and Others** 1989 (4) SA 731 (A) at 749 F and stated the following:

> "The right which is generally referred to by means of the maxim *audi alteram partem*… expresses a principle of natural justice which is part of our law. The classic formulations of the principle states that when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken… unless the statute expressly or by implication indicates the contrary."

[50] I am not persuaded, with respect, that the First Respondent's decision could be said to have prejudicially affected the applicant in their existing rights. The applicant had no right to the Exclusivity Radius because when the licence was renewed on the 16th September 1996, it had been removed; and the applicant has been without the Exclusivity Radius for fifteen years. It cannot be said that the applicant had an existing right to the Exclusive Radius at the time when the First Respondent issued the licence to the Fourth Respondent.

[51] At page 754 G His Lordship stated the following with regard to the concept of "Legitimate expectation":

> "The phrase 'legitimate expectation' was evidently first used in this context by **Lord Denning MR** in the English case of **Schmidt and Another v. Secretary of State for Home Affairs** (1969) 1 ALL ER 904 (CA) at 909 C and F.... **Lord Denning** referred to the decision of the **House of Lords in Ridge v. Baldwin and Others** (1963) 2 ALL ER 66 (HL) ... and stated:
>
> '...that an administrative body may, in a proper case be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or... some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

[52] At page 756 E – 757 His Lordship continued and stated the following:

> "the concept of a legitimate expectation, as giving a basis for challenging the validity of the decision of a public body on the ground of its failure to observe the rules of natural justice was given the stamp of approval by the **House of Lords in O'Reilly v. Mackman and others** (1982) 3 ALL ER 1124 (HL) at 1126 j – 1127 a ….
>
> It is clear from these cases that in this context 'legitimate expectations are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis…. The nature of such a legitimate expectation and the circumstances under which it may arise were discussed at in **The Council of Civil Service Unions and Others v. Minister for the Civil Service** (1984) 3 ALL ER 935 (HL) at 944 a-c, 944 f-j, 954 e-h….:
>
> But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law…. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue….

> The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had a reasonable expectation of some occurrence or action preceding the decision complained of and that reasonable expectation was not in the event fulfilled….
>
> …the principle is closely connected with a right to be heard. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations….”

[53] It is now settled that the legitimate expectation should have a reasonable basis arising from either a promise or undertaking given by or on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The applicant has not shown that such a situation exist in this matter, and there is no reasonable basis for the legitimate expectation. The undertaking or promise relied upon by the applicant in the letter of the 16th September 1996 lapsed and no longer exist. The applicant has not alleged the existence of a practice as a basis for his claim. In light of the correspondence between the parties, the meetings held between them as well as the events that subsequently unfolded after the said

undertaking on the 16th September 1996, it cannot be said that the applicant had a legitimate expectation to be consulted by the First Respondent before issuing a casino licence to the Fourth Respondent.

[54] The fourth ground of review is that the First Respondent's decision was grossly unreasonable or irrational on the basis that it was not supported by the evidence; and that the underlying reasons for the decision by the First Respondent do not bear any rational scrutiny. The applicant denied that the issuing of the licence to the Fourth Respondent will increase tourism in the country or create employment opportunities or result in economic spin offs; it further denied that the two establishments will compliment each other or enhance shareholders' money. It argued that on the contrary the two establishments will compete with each other, result in a negative economic impact, reduce the value of shareholder's investments and result in job losses. In coming to this conclusion, the applicant has relied on the Standish Report.

[55] The Fourth Respondent has demonstrated that it has already effected a substantial investment of E80 Million and with the existing hotel having been rebuilt; the refurbishment of all restaurants, all

kitchens, all bars, all public areas, all parking bays, roads tarred and entrances refurbished and the establishment of a conference centre. Three hundred and fifty people have been employed; and the cost of monthly supplies to run the existing complex is about E1.4 Million all acquired from local suppliers. An amount of E66 Million has been budgeted for future projects including a Night Club, a small complex of shops, offices and gym, office complex and conference centre, eleven luxury town houses and four executive houses. This evidence has not been disputed in the Replying Affidavit filed by the applicant; all that the applicant did in the Replying Affidavit was to call for evidence in support of these averments.

[56] The fifth ground of review is that an entity other than the one which applied for a casino licence was ultimately awarded a licence. It was argued that the application was made on the 14th April 2008 by Happy Valley Enterprises (PTY) Ltd t/a Happy Valley hotel and the licence was issued to the Fourth Resort. It was further argued that at the time of the application and recommendation by the Second Applicant, the Fourth Respondent did not exist, and, that it was only incorporated on the 24th June 2008; the applicant argued that Section 9 of the Casino Act does not envisage the issuing of licences to entities

who are separate and distinct from those who applied for the licences or to companies to be formed. The applicant argued that the above constitutes a material irregularity and falls to be reviewed and set aside since it vitiates the decision of the First Respondent.

[57] It is evident from the evidence before court that Happy Valley Enterprises (PTY) Ltd applied for the Casino Licence; at the time it was also operating the Happy Valley Hotel. When the application was made, the First Respondent informed the Second Respondent that the licence should be held by the Fourth Respondent, a company to be formed; it is not in dispute that these three hotels are in the same Group of Companies; on the 5th May 2008, the Second Respondent was informed of the intention to hold the licence under the Fourth Respondent, and the Minister was also informed of the said intention in May 2008 before his decision was made on the 8th July 2008. In the circumstances, this ground has no merit and ought to fail.

[58] The sixth Ground of review is that the application does not comply with the provisions of Section 9 of the Casino Act. I have dealt with the provisions of Section 9 of the Act in the preceding paragraphs and there is no need to repeat them; essentially, Section

9 sets out the requirements for the grant of the Casino licence by the First Respondent. Before the First Respondent issues the licence, he has to satisfy himself that the applicant is a person of integrity, it has adequate financial means, that it will be the occupier of the whole Casino with a security of tenure, and that it is a company.

[59] The applicant refers to the letter written by the Second Respondent to the Minister on the 8th May 2008 in which it stated, *inter alia*, the following:

> "The Board after careful deliberation intends to recommend to the Minister to issue you with a licence per your submission that it will be operated by Pigg's Peak Casino. The Board has taken consideration that the operators of Piggs Peak Casino are people of integrity and they, therefore, do not need to satisfy Article 9 (1) (9)- (f)."

[60] The applicant argued that it is the Second Respondent which considered the application by the Fourth Respondent and not the First Respondent. The applicant further takes issue with financial statements of sister companies to the Happy Valley Enterprises (PTY) Ltd since they are entirely separate and distinct from it. It further argued that Section 9 of the Casino Act requires evidence of the financial ability of the company making the application; and

that the application did not comply with the provisions of Section 9 of the Casino Act. However, the evidence shows that the financial ability of the Group of Companies was furnished; and the Minister exercising his discretion was satisfied of the financial ability of the Group. Furthermore, Section 11 provides an additional safeguard in respect of facilities which must be completed within fifteen months of approval; and there was an inspection which established that the Casino has been completed in accordance with the necessary specifications. It is common cause that the casino is operational since September 2009 with three hundred and fifty employees.

[61] The Seventh ground of review is that the application was made to the incorrect entity being the Second Respondent by Happy Valley Enterprises (PTY) Ltd. Section 6 of the Act provides for the establishment of the Board, and its membership consists of four persons, two of whom are public officers designated by the Minister and the other two appointed by the Minister from members of the public; in addition, the minister designates one of the members as chairman, and further appoints a secretary to the board. Section 7 of the Act provides for the duties of the Board which are to supervise and control the conduct and operations of the Casino, ensures that

moneys due to government by the licencee are duly paid, as well as to do such things as necessary for the expeditious and efficient exercise of the functions of the Board under this Act. Section 8 provides for the powers of the Board which involves inspecting a casino in order to ascertain whether the terms and conditions of a licence are being observed, co-opt temporarily people with technical or expert knowledge on matters to be considered by the Board, and more importantly, tender advice to the Minister.

[62] The board is clearly a creation by the Minister, and, it assists the Minister in exercising his discretionary powers in terms of Section 9 of the Casino Act when deciding whether or not to grant a Casino Licence. Section 22 of the Act empowers the Minister to make Rules and Regulations prescribing how applications for a casino licence are to be made as well as the issuing and renewal of casino licences. It is common cause that the Minister has not yet exercised his functions in making such Rules and Regulations; and, in the absence thereof, there is nothing wrong with the Board, in its exercise of its powers to advise the Minister in terms of Section 8 (c) to receive applications, receive representations from companies making applications, gather information on the person applying whether he complies with Section 9 of the Act, consider the information, and advise the

Minister accordingly. What is paramount for the validity of the casino licence is that the ultimate decision whether or not to grant the licence must be made by the Minister.

[63] In light of the preceding paragraph, the eighth ground of review that the Minister played no part in the decision making is legally deficient. It is the Minister who made the decision to grant the licence, the Board merely made a recommendation which was not binding on the Minister.

[64] Similarly, it is hypocritical of the applicant to argue that the application was made to the wrong entity or that the Minister played no part in deciding whether or not to grant the licence. It is common cause that the applicant requested a meeting with the Board to make representations on the reinstatement of the Exclusivity Radius; subsequently, two meetings were held between them where the representations were made on the 21st February 1997 and 10th September 1999. Similarly, the applicant exchanged correspondence with the Board on various occasions requesting the reinstatement of the Exclusivity Radius.

[65] It is common cause that the Fourth Respondent was registered on the 24th June 2008, and the casino

licence was issued on the 8th July 2011. The applicant alleges that he became aware of major construction work at the Old Happy Valley in July/August 2008, and he then heard a rumour that the owners of Piggs Peak Casino had purchased the Happy Valley Motel and that they were in the process of converting it into a casino. After numerous enquiries to the Second Respondent to establish the position, it was eventually confirmed by the Second Respondent verbally in September 2008 that a casino licence had been issued to the Fourth Respondent. Notwithstanding such knowledge, the applicant did not lodge this application until the 17th December 2009. In the interim, the Fourth Respondent invested a substantial amount of money into the business as reflected in the Opposing Affidavit deposed by the Fourth Respondent; and it was not aware that the applicant intended to object to the granting of the licence.

[66] I am not satisfied that the issuing of the casino licence to the Fourth Respondent by the First Respondent is reviewable both on substantive and procedural grounds as alleged or at all. Even if it was reviewable on any ground, I would have refused to grant the application on the basis that the applicant did not file this application timeously after becoming aware of the issuing of the licence; it waited for more

than a year and did nothing when the Fourth Respondent which was unaware of the objection was investing a substantial amount of money into the business. However, the First Respondent has exercised his discretion properly in granting the licence to the Fourth Respondent and the applicant has failed to establish any irregularities in the exercise of the discretion which could warrant this court to interfere with his decision. Similarly, the applicant has not established that the undertaking of the 16th September 1996 existed beyond six months or that there is a factual basis which exists for the contention that the applicant had a legitimate expectation that it would be consulted prior to the grant of any licence within the affected radius.

[68] In the circumstances the application is dismissed with costs including costs of Counsel for the First, Second, Third and Fourth Respondents as duly certified in terms of Rule 68 (2) of the High Court Rules.

**M.C.B. MAPHALALA**

**JUDGE OF THE HIGH COURT**