IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 2 OF 2006

GAMING MANAGEMENT (T) LIMITED.....PLAINTIFF
VERSUS
GAMING BOARD OF TANZANIA .....DEFENDANT

J U D G M E N T

1. Date of Final Submission – 17/7/2007
2. Date of Judgment – 26/7/2007

MASSATI, J:

The Plaintiff's claims against the Defendant are:

(a) a declaration that the Defendant's act of issuing a notice to revoke the National Lottery issued to the Plaintiff whilst there is a pending court case (Commercial Case No. 92 of 2005) under which the court has ordered the parties to maintain the status quo is unlawful.

(b) a declaration that the Plaintiff, having duly lodged an application for renewal of licence, and having paid the required application fee and the Licence Renewal Fee both which the Defendant accepted and receipted, have complied with the requirements

of licence hence the act of the Defendant in issuing notice of intention to revoke the licence is unlawful.

(c) an order that the status quo ante be maintained until the final and conclusive determination of Commercial Case No. 92 of 2005 pending in the High Court of Tanzania, Commercial Division,

(d) general damages be assessed and ordered by the court for loss of business and goodwill which the Plaintiff has suffered, and continues to suffer up to the determination of the suit above referred.

The Plaintiff therefore seeks for judgment and decree against the Defendant along the above prayers together with costs.

On the other hand, the Defendant thinks that the Plaintiff is not entitled to the reliefs sought for the following reasons in corresponding order: -

(a) the Defendant's act of issuing a notice of revocation of the national lottery is quite distinct and substantively different with matters pending in Commercial Case No. 92 of 2005.

(b) the application for and payment of renewal fees and licence were made after expiration of the statutory time, and even if they were made in time, they were not in law, a condition precedent for issuance of the licence or refund of fees.

(c) Since the matters pending in this court in Commercial Case No. 92 of 2005 and the present one are different, the application to maintain the status quo is not tenable.

(d) Since the notice was for intention to revoke and not a revocation the Plaintiff is not entitled to general damages for loss of business.

On the above grounds it was the Defendant's prayer that the suit be dismissed with costs being incompetent and devoid of merit.

MS. F.K. LAW CHAMBERS were instructed to represent the Plaintiff, whereas MS MBUNA & CO, ADVOCATES, and later joined by KESARIA & CO. ADVOCATES appeared for the Defendant.

On completion of all the preliminaries, the suit was set for trial of four issues namely: -

(i) Whether or not the Defendant's notice of intention to revoke the Plaintiff's licence for National Lottery is lawful?

(ii) Whether or not the Plaintiff is entitled to a renewal of the National Lottery Licence.

(iii) Whether or not the status quo order can be made in those proceedings pending the final determination of Commercial Case No. 92 of 2005.

(iv) To what reliefs are the parties entitled.

Instructed by their respective firms, Mr. Kibuta learned Counsel appeared and prosecuted the Plaintiff's case whereas Mr. D. Kesaria and Mr. Mafuru, jointly appeared at the trial for the defence.

Each party produced one witness and a litany of documentary exhibits. The Plaintiff exhibited 8 documents and the Defendant relied on 14 documentary exhibits.

Briefly, the Plaintiff's case was presented through a Mr. Nimavat who testified as PW1. Led by his Counsel, PW1 informed the court that he was the principal officer and

managing director of the Plaintiff Company. Their business is online lottery which entailed the establishment of centres as retail outlets for the lotto game. The centres are connected to a central data base where any play is registered and then a ticket issued to the player at the terminal roll. It was his evidence that the Plaintiff was licenced to do that business by the Defendant under the Gaming Act, 2003 by a licence issued on 14 May 2004. It was an exclusive licence to run the National Lottery which allowed the Plaintiff to do business throughout mainland Tanzania for a period of five years up to 31/10/2009. PW1 mentioned some of the games allowed under the licence as Lotto games offline, online, instant lottery, scratch card in all variations. According to PW1, all games were under the exclusive licence of the Defendant or a sublicence such as the Plaintiff. As part of the ground work, PW1 submitted a business plan to the Defendant and obtained an agreement to operate the National Lottery.

PW1 further informed the court that sometime in December 2004 there was an advertisement in a daily paper inviting applications for sub licence for another type of game and in 2005, a licence was issued to another Company known as SELCOM GAMING LIMITED which was authorized to operate all types of lottery including SMS Lottery but independent from the Plaintiff Company. The Plaintiff referred the matter to the Defendant board, but could not reach any

compromise. So the Plaintiff had to file a suit in this court to protest its licence. This was Commercial Suit No. 92 of 2005 which was filed in September 2005. On 19/10/2005, the court issued an interim order restraining the Defendant from operating SMS Lottery pending final determination of that suit. However, the order was not complied with because on 30/12/2003 the Plaintiff received a letter from the Defendant constituting a notice of intention to revoke the licence, which was within the existence of the interim order. Besides, the Plaintiff also countered all the allegations contained in the notice of intention to revoke. As at the time of testifying, the Plaintiff had paid for the licence and application fee for 2006/2007 which payments had been receipted by the Defendant, but the Plaintiff believes that the 5 year licence was still valid, only that it was renewable annually, from which renewal licence was paid for, well in time. PW1 however admits that the amendment to s. 20 of the Gaming Act replaced which substituted one which invalidates annual renewals of national lottery was brought to his attention by a letter from the Defendant dated 8/2/2007 which also acknowledges payments of fees for 2006/2007.

In support of his testimony, the witness presented a total of 8 exhibits, which can briefly be described as follows. Exh.P1 is the National Lottery Licence No. 0003 issued on

14/5/2004 to the Plaintiff Company to manage and run the national lottery in the following types of lotteries.

1. Lotto – all variation of lotto games on line and offline.
2. Instant Lotteries (scratch cards) All variations.

It shows that the licence was to expire on 31/10/2005. Exh.P2 is an application for a National Lottery dated March 9, 2004. Exh.P3 is an agreement to operate the National Lottery between the Plaintiff and the Defendant which was signed on 2/8/2005. Exh.P4 is a *"notice of intention to revoke the National Lottery Licence"* dated 29/12/2005 from the defendant to the Plaintiff. Exh.P5 is a cutting from the Daily News paper of 14/12/2005 advertising a request by the Defendant for Application/Proposal from National Lottery Sub lease. Exh.P6 collectively is a series of letters exchanged between the Plaintiff and the Defendant between 17/7/2005 to 2/1/2006 regarding the new lottery project. Exh.P7 is a letter from the Plaintiff to the Defendant dated 2/1/2006, responding to Exh.P4 – the notice of intention to revoke the National Lottery Licence. And lastly, Exh.P8 is a letter from the Defendant dated 8/2/2007 regarding renewal of national lottery licence. At a later stage in this judgment, I may have to examine some of these exhibits more closely if need be.

After this, PW1 was thoroughly cross examined by the learned defence Counsel. The salient features of the cross examination can be put as follows: -

(a) PW1 is just an employee, incharge of operations, and neither a shareholder nor does he sit in the Plaintiff's board of directors.

(b) PW1 is well versed with the Gaming law, and regulations, and was aware of Regulation 18 of the Gaming Regulations but he could not tell for certain whether his recruitment was notified to the Defendant unless he checked with the Company Secretary.

(c) When the licence was issued, PW1 had not yet been employed by the Defendant but was able to tell what had already been done from the records he found; neither was he there when the agreement was signed.

(d) That it is mandatory in law, for key personnel of gaming employees to be vetted.

(e) That part of the purpose of the gaming industry is to generate revenue to the government in the form of levy and game tax.

(f) That under the agreement the Plaintiff was to install 350 terminals within the first year, and 1300 within two years, but that when PW1 joined the Company in November 2005 only about 100 terminals had been installed by the Plaintiff, which was about 1/3 of what ought to have been installed. By April 2006, about 280 terminals had been installed, out of which only 181 were in actual operation.

(g) The word *"exclusive"* does not appear in the licence signed in August 2005 (Exh.P3) nor in the law – the Gaming Act.

(h) That the Company had invested over 3 billion in the business, but PW1 had no and could not produce any documentary evidence to substantiate these figures.

(i) That although the Plaintiff is licenced to operate lotto game, it is not licenced to operate SMS gaming activities for which SELCOM was licenced.

(j) That out of the many variations of the lotto games, only one game has been launched and the Plaintiff had not yet started the scratch card lottery.

(k) That the interim order of the Commercial Court in CC. 92 of 2005 was subsequently stayed by the Court of Appeal of Tanzania and has not been reactivated since the matter is still pending in the Court of Appeal.

(l) That according to the law, 15% of the gross revenue of the operator goes to the Exchequer by way of 2% Levy; 3% loyalty, and 10% gaming tax.

(m) According to the Plaintiff's business plan, the target was to earn 316/= million per month or 4.2. billion per year of which 600 million would have been realized by way of income to the exchequer.

(n) However the actual gross income realized by the Plaintiff up to the end of 2005 was only shs.37,967,000/= only, of which 15% would have been paid in taxes, loyalty and gaming levy. The following year ending 23/9/2006 the gross revenue was shs.47,280,500/= only but he did not have the actual figures paid to the exchequer. In short the

projected figures proved far higher than the actual amount earned.

(o) That in law an application for renewal of the licence has to be made within 30 days before expiry.

(p) In the present case the licence expired on 31/10.2005, and the application for renewal was sent on the same day and received by the Defendant on November, 1. 2005.

(q) PW1 was not sure whether the three additional directors notified to the Defendant board at the time of filing an application for renewal of the licence were vetted as demanded by the law.

(r) So far, terminals have only been installed in Dar es Salaam.

(s) PW1 does not recall whether the Plaintiff has submitted any audited financial statement to the Defendant board as required by law; but the Plaintiff generates from its system, weekly draw wise reports.

(t) The number of actual terminals for any week of business is not reflected in the weekly reports.

(u) Out of 319 terminals installed in Dar es Salaam by February 2006 only 252 were operating, while others might not be operating for one reason or the other, but on the average up to 50% of all the installed terminals would be generating business.

(v) PW1 would not know whether the performance bond submitted by the Plaintiff had a time limit or open ended, but he is sure one was presented.

In re examination PW1 clarified the following matters:-

(a) Of the two business plans, the witness was only familiar with Exh.P2 and knows nothing about the other.

(b) The actual gaming licence was issued in November 2004, but exhibit P2 was submitted in March 2004 prior to the grant of the licence and along the application for licence.

(c) Exh.P4 was a threat to revoke the licence, and all that the Defendant wanted to know was

exhaustively replied by the Plaintiff in its letter of 2/1/2006 to which no reply had been received from the Defendant as at the date PW1 was testifying (i.e. 1/3/2007) nor summoned to explain or clarify by the Gaming Board.

(d) Section 41 of the Gaming Act, by its wording contemplates just one licence for the National Lottery, which is what he infers as an exclusive licence.

(e) The projection of shs.6.3 billion income was made on certain assumptions such as additional games that would generate new business and income but for which permission was denied by the Defendant.

(f) Since PW1 was not present in court during the proceedings in Commercial Case No. 92 of 2005, it is possible that some of the things that transpired there escaped his attention, but the court had directed that nothing should be done which would interfere with the proper functioning of the Plaintiff's operations, and that the status quo as per the previous orders should be maintained. This was the essence of the ruling of Dr. Bwana J, in relation to the present case No. 2/2006 (pp 5, 6).

(g) That the Plaintiff has installed 381 out of which 181 are active online terminals and the weekly reports only convey the number of terminals at which games were conducted in that week, but those terminals may overlap in the reports, but the 181 terminals are still active, although some may not conduct business in a certain week.

In my assessment, although PW1 was eager to answer the questions put to him in cross examination, he was ill equipped to answer the most basic questions, and to some he was completely evasive.

After closing the Plaintiff's case the Defendant fielded its Chief Executive Officer Mr. TARIMBA ABBAS, to testify as DW1.

Led by Mr. Kesaria, learned Counsel, DW1 informed the court that he is the Defendant's Director General since 2003, and prior to that he was the Director of National Lotteries of which the Gaming Board of Tanzania is its successor. He boasted that he was well versed with the gaming industry in Tanzania.

DW1 said that the Plaintiff is the licencee of national lotteries and licensed by the Defendant Board. He tendered

the Application for National Lottery Licence and the covering letter as Exh.D1 A & B. The licence was issued not only on the basis of this application but also on the feasibility study or business plan received on 12th March, 2004. He tendered the business plan as Exh.D2. He testified that he had never come across Exh.P2, as it was never submitted or received by the Defendant Board. The witness stated that along with the application from Exh.D1 B, was a list of the Directors of the Plaintiff Company which, according to the law, were all vetted and approved by the Gaming Board. The Board was also influenced by the projected figure of business turnover of shs.7.8 billion, because it showed that the project was viable, and that the government was going to benefit from this business, which is normally 15% overall of the gross sales. Eventually the licence was issued to the Plaintiff. He identified Exh.P1 as the licence.

DW1 testified that all gaming licences, including Exh.P1 had a life span of one year, but renewable, and in the case of a national lottery the Board has powers to grant a licence valid for 5 years. What it means is that the licencee will be able to run that particular product for 5 years subject to annual renewals. During that period no licensee would be issued with another licence for the same product. He identified Exh.P3 as the relevant agreement, that contains the terms and conditions of operating such lottery, which is owned by the

Government. This does not mean that the licencee had a blank cheque to operate the lottery as he pleases for 5 years.

And if the Board is dissatisfied with the performance of the licencee, it can issue a licence to another practitioner. It is the Gaming Board which conducts the daily surveillance and monitoring of the game to make sure that all the gaming laws are complied with, and their performance is assessed on a day to day basis. And that is what is intended to be achieved by annual renewals.

The annual renewal was not automatic, but is statutory and has to be done within the prescribed time frame, which is 30 days before expiry of a licence. In this case Exh.P1, the expiry date was 31st October 2005, and so an application for renewal should have been received 30 days before 31st October. But in the present case the Plaintiff had to be reminded by the Defendant by its letter of 27th October 2005 that it had not yet received its application for renewal. He tendered that letter as Exh.D3. On receipt of Exh.D3 the Plaintiff quickly lodged their application which was received by the Defendant on 1st November 2005. He tendered the application for renewal as Exh.D4.

DW1 further testified that under the Gaming Laws, operators are not allowed to change directors without

submitting their names to the Board and being vetted. The requirement for vetting also touches on other key gaming employees, shareholders, main contractors and sub contractors of the operator. Changes have to be notified within 7 days and the notifying must be in writing. In the present case up to the time of receiving the application for renewal, no changes of Directors had been received from the Plaintiff Company. He tendered the application for renewal together with the annexures as Exh.D4 A, B and C. Compared to the estimated projection of 7.89 billion shillings Exh.D4 B shows that during the lifespan of the expiring licence, the gross turnover was only shs.37.9 million. Exh.D4 C also lists down a list of 3 additional directors of which no notice was received prior to the application for renewal, and the new directors had never been vetted.

DW1 further produced as Exh.D5 a letter dated 7th November 2005 from Gaming Management, providing a list of employees, following their (the Defendant's) request for such information which was sent on 2/11/2004, and after all the Plaintiff only provided an organizational structure.

The list further contains a list of 29 employees, some of whom were key employees who were not disclosed to the Gaming Board before receiving the letter of 7th November

2005, and the Gaming Board had never vetted or approved them.

It was DW1's testimony, that Exh.P4 was not a notice of revocation, but a notice of intention to revoke the licence. It is only the Board of Directors of the Gaming Board which had the authority to revoke the licence. The notice of intention to revoke is issued as a matter of law, if there exist grounds that amount to failure by the licence to perform. If the licencee responds to the notice within 14 days, the response would be sent to the Board, where the licencee may be required to appear to make any additional presentation before the Board makes its decision. If the licencee is aggrieved, he may appeal to the Minister.

DW1 then was then led to elaborate each of the grounds in their notice of intention to revoke. It was his view that ss. (12) 15 (2) (18) (1) and 42 (2) of the Gaming Act No. 4 of 2003 had been contravened by the Plaintiff. As to poor performance the Defendant sent to the Plaintiff a letter expressing their concern on the trend of sales and operations. He tendered that letter as Exh.D6. This letter was not responded to by the Plaintiff. This constituted another ground of revocation. Poor performance affected the operations of the Board and revenue to the national coffers, and contribution to sports development. Performance was still dismal even in the second

year. In the 180 days of its existence the Plaintiff had collected only shs.115,000,000/= against shs.14 billion projected for the two years which was an insignificant performance.

Even after serving the Plaintiff with a notice of intention to revoke, the Defendant Board continued to renew the Plaintiff's licence and they are still continuing with the business without any significant improvement in their performance, because they had not even started other types of lotteries, such as instant lottery. He tendered the application for renewal of the licence for 2006/2007 as Exh.D7 A, B, C, collectively. DW1 said that although per Exh.D7 B and Exh.D4 B the performance was poor, the licence was renewed because the matter was in court which had ordered that the status quo be maintained, and required them not to suspend or revoke the licence. So, as far as this order was concerned the Defendant has continued to comply with, and for no other order prior to the one issued in the present case. There was no similar order in Commercial Case No. 92 of 2005 which granted a temporary injunction against the Board from granting an SMS Online national lottery to another licencee, which is not the same as the National Lottery to which the Plaintiff was licensed. In any case, DW1 said, that order had since been stayed by the Court of Appeal. He tendered the two decisions as Exh.D8 A and B.

Addressing himself specifically to one of the issues framed for determination by the court, DW1 said that the two cases are different, the first one relates to the issuing of licence for SMS lottery, and the present one pertains to the notice of intention to revoke the National Lottery.

DW1 testified that although the Plaintiff may have made some investments, it could not amount to several billions as alleged and the Board had no such proof anyway. He would be amazed to find a multi billion investment yielding only shs.1,000,000/= per week, gross income.

DW1 also elaborated on the national gaming policy, and what the government intends to achieve by the gaming activities and the impact to the economy if the government did not collect the budgeted projected taxes; and whatever goals or plans set by the Board would be defeated. As an example, DW1 said that in the first year the Board was expecting shs.200,000,000/= but due to the poor performance, they had to down size their budget. He tendered the Government policy on lottery games as Exh.D9, and as to the effects of poor performance on the Board's budget he produced the 2005/2006 as Exh.D10, and the 2006/2007 as Exh.D11. These budgets were prepared/based on the projected income from the licencees because that is the source of the Board's

funds. For instance for 2005/2006, although the Plaintiff's projections were shs.7.8 billion their estimates were based on only a fraction of it i.e. shs.1.3 billion, out of which they estimated an income of shs.261/ million only, but even that target could not be reached. In fact they only ended up with shs. 3.4/= million for the whole of that year; thus defeating their developmental plans. This effect was also felt in the following year, in which, out of the projected shs.261,000,000/= only shs.3,000,000/= was achieved for the 2006/7 year, thus forcing them to down size their budget. So they had to review their 2006/7 budget by using the actual gross weekly gaming revenue of shs.1,000,000/= per week, and so brought it down to shs.69,000,000/=.

DW1 then turned to the terms and conditions of the Agreement (Exh.P3). He said, that according to the agreement (Clause 4.2) the Plaintiff was supposed to have installed 350 outlets (8%) by 31/7/2005, 1,300 outlets by June 30, 2006, and 2,300 outlets after one year. But currently, only 36 out of 1300 terminals are generating income up to last year (2006) as opposed to the projected 2300 as at now. And so PW1 misled the court when he was distinguishing between the number of terminals installed, and those which were operating, because once a terminal is connected, it will be talking to the central system and so recognized.

According to DW1, the agreement expects the terminals not only to have been installed, but also to be operational. He tendered the trend analysis for the last 78 draws as Exh.D12 to show how much was sold in the given draws, the number of terminals in existence, the tickets sold and the actual sales values for that week. He also tendered a Game Wise Sales Report generated by the licencee's own system as Exh.D13.

DW1 went on to inform the court that the Plaintiff also failed to launch instant lottery within the life of the licence. This is the scratch card, from which, by scratching the card, the results are know instantly. Another failure on the part of the Plaintiff was to attain the installation of 350 terminals by July 2005 not only in Dar es Salaam but also to other parts of the country. The Plaintiff has never reached other parts of the country.

DW1 further testified that he only received some of the letters produced by the Plaintiff as Exh.P6 collectively, namely those dated 17/7/2005, that of 22/7/2005 in response thereto, and that of 2/8/2005. The others were not received. And to demonstrate that, DW1 tendered an extract of the register of all incoming mails kept by his office as Exh.D14.

DW1 also gave his opinion on the claims of exclusivity of the licence. He said that the licence granted to the Plaintiff

was not exclusive, because they could still issue other licences to other products of the National Lottery. The SMS Lottery which was issued to SELGOM was one example. The Plaintiff was only licenced to play 649 Lotto Games and Scratch Cards only. The law did not prohibit the issuing to other licencees of other kinds of lottery.

It was also part of the evidence of DW1, that the Plaintiff was also required in law to furnish Audited Financial Statements to the Board annually, but the Plaintiff has not done so from 2004 to 2007. In the Agreement the Plaintiff was also supposed to provide a performance bond, in order to protect the players, in the event the operator fails to meet his obligations. In this case the Plaintiff produced a performance bond only in the first year, but has never renewed it ever since, and there was no other financial security.

Lastly, DW1 stated that due to poor performance of the lottery games, the credibility of the National Lottery is currently very low, due to low sales, and if this trend is left to continue it will be very difficult to put it back on track.

It was with this final note that DW1 prayed for the dismissal of the suit with costs.

Dw1 was also not spared. He was thoroughly cross examined by Mr. Kibuta, learned Counsel. I will now summarise the scores from that examination.

(i) The notice of intention to revoke was issued in compliance with the law which demanded the Board to take remedial steps in any case where any grounds exist for arresting any non observance of the law.

(ii) The principal allegation of non compliance is the law itself, which is implied in the conditions of the licence (Exh.P1) according to which the licence is issued. Of the terms and conditions of the licence, the Plaintiff failed to request for renewal in time in terms of s. 15 (1) of the Gaming Act, after the licence had expired on 31/10/2005 and renewal was to be made 30 days before 31st October 2005. However there are also provisions in the Act which touch on the life span of the licence such as s. 20, although there has been an amendment to this section.

(iii) However the amendment to s. 20, does not take out National Lotteries from other licences.

(iv) The licence for National Lottery may last for 5 years but subject to annual renewal, and that is how the law is administered in practice.

(v) Section 20 (3) of the Gaming Act has been amended by the Finance Act 2006.

(vi) Under the amended ss. 3, the law now reads that a licence granted or renewed for purposes of management of national lottery shall, subject to payment of annual fees remain valid for a period of five years.

(vii) The effect of the July 2006 amendment to s. 20 (3) was to make the life span of five years subject to the payment of the annual fees, although the requirement was not removed.

(viii) The Plaintiff made payment of USD.50,000/= as renewal fees on 31/10/2005 and the same was receipted by the Board, together with shs.1,000,000/= as application fees.

(ix) Section 41 (1) permits the grant of a National Licence Lottery to the Company, but it is possible to issue a licence to run that lottery to more than one

Company, if at the time of making the application it was not already one of the national lotteries. That licence would be part of the National Lottery Licence, by reference to its various products, which is one and the same thing.

(x) Given that the licence held by the Plaintiff is issued under s. 41 (1) of the Gaming Act, it cannot be issued to another Company. There can only be one National Lottery Licence for those products.

(xi) The Plaintiff in fact never sought approval of the Gaming Board to employ key personnel which was to be sought by filling in forms that constituted on official application.

(xii) The Plaintiff was entitled to launch any product granted to them without further approval but failed to launch the scratch cards.

(xiii) At no time had the Plaintiff approached the Board to request to introduce an instant game, but the subject matter of Exh.P6, was a new product altogether, not those already licenced. They had nothing to do with 649 lottery and scratch cards.

In re-examination, DW1 clarified the following areas;

(i) The Gaming Board has not revoked any licence but simply given notice of intention to revoke which is not the same as the revocation itself. It is the Board of Directors who actually take the decision in terms of s. 24 (1) of the Gaming Act.

(ii) There is nothing wrong in giving the notice of intention to revoke. In fact it was part of the Board's regulatory functions.

(iii) The gaming licence is issued subject to the Gaming Act, 2003, the regulations there under, and the terms and conditions appearing on the reverse side of the licence, so that if any of the conditions in the licence are breached, the Board would be entitled to issue a notice of intention to revoke as well as any breach of the Gaming Act or regulations.

(iv) The amendment to the Gaming Act did not issue a blank cheque to the Plaintiff to do whatever he wanted for the duration of the 5 years life span of the licence. This does not prevent the Board from taking any corrective measures against any

breaches including issuing a letter of intention to revoke as it was still subject to regulatory control.

(v) In this case the Plaintiff breached the law by not making the application for renewal within the prescribed time. In fact in the first year, the Plaintiff admitted in their covering letter that it was an oversight on their part in delaying to submit their application for renewal and so kept on applying for renewal in the subsequent years.

(vi) The amendment to the Gaming Act does not repeal s. 15 of the Act.

(vii) According to Exh.P1, the validity period of the licence is one year expiring on 31st October 2005.

(viii) Even after the amendments to s. 20, of the Gaming Act, the Board continued to issue licences, and the Plaintiff has never questioned the validity of those licences as renewed or their validity period, nor challenged them in any court of law.

(ix) The Plaintiff has been licenced to operate Lotto and instant lotteries. It does not affect or cover other different products.

(x) Exclusivity of the licence is not in issue in the present case.

(xi) The present case is on the legality of the notice of intention to revoke.

(xii) The letter referred to in cross examination does not appear in the bundle of Exh.P6, and so not part of the Plaintiff's evidence.

(xiii) The Plaintiff never responded to the letter from the Defendant requiring them to fill in forms to seek approval of their key employees, to which they never did, and they never even collected the forms from the Board's office, nor did they pay the application or the annual subscription fees.

(xiv) In the absence of such application forms the Defendant could not process the approval of the employees as the same was not sought officially.

(xv) The letter of 7th March 2006 relating to the new product was written after the commencement of this suit, in response to the application for approval from the Plaintiff for introduction of new games,

made after the commencement of the present case, as a result of which DW1 was prosecuted for contempt of court but acquitted.

Although DW1 occasionally lost his temper and avoided answering a few of the questions, he generally commendably did so and emerged from the cross examination stirred but not shaken. He answered most questions with alacrity, precision and confidence. He exhibited an impressive knowledge of the gaming industry.

From the testimonial and documentary evidence tendered in court, I am satisfied that the following matters are not in dispute.

(1)That the Defendant is a regulatory body established under the Gaming Act 4 of 2003 to regulate the Gaming Lottery activities in Tanzania.

(2)That the Plaintiff was licenced to operate the National Lottery's products in all variations of online and offline lotto games, and instant lotteries (scratch cards) from 14, May 2005 to 31st October 2005.

(3) That sometime in December 2004 the Defendant advertised in a newspaper to invite other interested persons to apply for the national lottery sublicence.

(4) Subsequently, a licence was issued to SELCOM to run SMS lotteries.

(5) Following this the Plaintiff filed Commercial Case No. 92 of 2005 in this court to protect its interests as licenced.

(6) In the course of the proceedings in that case, the court granted an interim injunction, restraining the Defendant, its licencees sublicences, servants or agents from operating the SMS lottery pending the determination of that suit. However, that order was stayed by the Court of Appeal of Tanzania in Civil Application No. 175 of 2005 which is still pending.

(7) On 13/1/2006, the Plaintiff instituted the present suit on receiving from the Defendant a notice of intention to revoke the licence.

(8)The Defendant has indeed issued such notice of intention to revoke the licence to the Plaintiff.

(9)The Defendant can only revoke the licence through its Board of Directors and the licencee has a right to appeal there from to the Minister.

It is on the basis of the evidence on record, and the undisputed facts, that learned counsel proceeded to address the court on the issues framed for trial. They did so in writing.

Addressing the court on the first issue, Mr. Kesaria, learned Counsel for the Defendant, submitted that the notice was lawful and was issued in accordance with s. 24 (1) of the Gaming Act, because there was no status quo in existence to preserve. On the other hand, Mr. Kibuta, learned Counsel for the Plaintiff, contended that the intended notice of revocation was unfounded both in law and in fact, and therefore unlawful.

The first issue is **whether or not the Defendant's intention to revoke the Plaintiff's National Lottery Licence lawful?** Mr. Kesaria's answer to this issue partly relied on his belief that there was no status quo to maintain. I think the learned Counsel jumped the gun by doing so because that as

we shall see later this formed a separate issue No. 3. although it formed part of the first of the Plaintiff's prayers I intend to approach it from the way the issue was framed by looking at the lawfulness of the notice of intention to revoke the licence alone.

In my view, the answer to this issue is a simple one, and it is whether the Defendant was permitted to issue the notice of intention to revoke a licence. This is because, according to **BLACK'S LAW DICTIONARY**, 8th ed. t p. 902, the term *"lawful"* means: -

> *"Not contrary to law, permitted by law..."*

And s. 24 (1) of the Gaming Act, provides: -

> *"Where the Board is satisfied that grounds exist for revocation of the licence granted in terms of section 15, it shall, in writing notify the licensee of the existence of such grounds and call the licensee to furnish reasons, within fourteen working days of that notice served personally to or placed at the registered office of the licensee, as to why the licence should not the revoked failing which the licence will cease to be valid."*

This is a statutory duty of the Defendant and cannot be challenged, on any other ground, except, perhaps if it did not furnish the grounds for the intended revocation, or of improper service or if it revokes the licence prior to the expiry of 14 days within which the licensee is required to furnish reasons. A mere notice of intention to revoke is, in itself, not a revocation and it therefore cannot be challenged. The amendment to s. 20 of the Act does not strip the Board of its power under s. 24 of the Act.

Mr. Kibuta has strenuously argued that the Defendant could not do so in view of the amendment to s. 20 (3) of the Act which made it unnecessary to renew the licence, because its life span was for 5 years subject only to payment of annual fees. In my view, the power under s. 24 (1) is procedural, whereas s. 20 contains substantive rights. That section could only be invoked in challenging the reasons advanced for the intended revocation, but not the **notice** itself. That is the whole purpose of calling upon the licence to furnish reasons why the licence should not be revoked. The power to revoke is itself vested in the Board, established in s. 15 of the Act.

So, I think the Defendant's notice of intention to revoke the Plaintiff's National Lottery Licence is lawful. It is one thing to say that the notice is unlawful (i.e. not permitted by law) and quite another to contend that it had no justifiable

reasons. By way of analogy, for instance, it cannot be contended that a notice of appeal is invalid or unlawful because the grounds of the intended appeal have no merit.

It is my view therefore that the first issue should be answered in the affirmative.

The second issue is: **whether the Plaintiff is entitled to a renewal of its National Lottery Licence?** Mr. Kibuta learned Counsel, submitted that in view of the amendments to s. 20 (2) and 20 (3) of the Gaming Act, all that was required of the Plaintiff to do was to pay a renewal fee of USD 50,000 which the Plaintiff did. So, the Plaintiff, having complied with that requirement, was entitled to a renewal. But Mr. Kesaria, submitted that given the blatant and indiscriminate breaches and total disregard of the law, committed by the Plaintiff, the answer to the second issue is in the negative.

Although the parties tendered many documentary exhibits in support of their sides of the story on this issue, to me it is more of question of law, rather than fact although as I shall demonstrate below the Defendant has sufficialy shown why on the facts on the Plaintiff is not entitled to a renewal. Mr. Kibuta may apparently be right that with the amendment to s. 20 (3) of the Gaming Act, it may now be presumed that the life of a 5 year licence is extended by merely paying

renewal fees. And there is no dispute that in this case the Plaintiff did pay USD 50,000 as renewal fees. But, I think that is not the correct position. In my opinion it is ultimately wrong to contend that payment of renewal licence alone, and without more, is sufficient to automatically reactive the existence of the National Lottery Licence. There are several reasons against that argument.

First, as rightly submitted by Mr. Kibuta, himself section 20 (3) must not be read in isolation of the other provisions of the Act, and in particular, the other provisions of Part III of that Act, which includes the powers of the Board under s. 24 (1) of the Act. Otherwise, the Board would fail in its duty to regulate the gaming business. Take for instance, a case where a licensee ceases to carry on the licensed business, (but continues to retain the license simply because it has paid renewal fee) but fails to notify the Board of any change of particulars required to be entered in the registrar of the licence which are requirements under s. 21 of the Act. How would the Board supervise its performance in such situation?

Secondly, the Gaming Regulations require that in the case of a National Lottery License, the Licencee must enter into an Agreement with the Board. There is no doubt that in the present case, there is such an agreement. It was tendered as an Exh.P3, which is acknowledged to have been made

under s. 41 (2) of the Gaming Act No. 4 of 2003. That section provides: -

> *"41. (2) Where a Company is appointed pursuant to subsection (1) the Board shall enter into agreement with the Company so appointed to run a national lottery on behalf of and under the auspices of the Board and such lottery shall be owned by the Government."*

In my view, it would defeat the object of the legislature if the licencee under this provision would be left free to run the gaming licence without any let or hindrance or control from the Board on behalf of the Government which owns such lottery.

The requirement for payment of renewal fees may have been intended to make life easier for licencees of such types of lotteries, but was, not, by any means intended to make renewal automatic, because the provision does not go further to spell out the consequences of the Board refusing to accept the renewal fees which, again by its wording, it can.

Thirdly, the Agreement (Exh.P3) must be construed in its proper context. I have no doubt in my mind that this was a mercantile contract. A written mercantile contract must be

construed in the light of the intention of the parties to be gathered from the words of the instrument. If the words are clear in themselves they must be construed accordingly, but if they are susceptible of more than one meaning, the court must inform itself of the surrounding circumstances that could bear on the contract. It is also a rule of construction of a mercantile contract that the court will lean against a construction which would confer substantial benefit on one party with no corresponding benefit to the other, for such an arrangement is unlikely to have been contemplated in an ordinary commercial transaction.

Under clause 23: 1 of that Agreement the Board reserves the right to terminate the Agreement for among others, any default contemplated in clause 22. Clause 22 regards as a default any material breach of any obligation under the Agreement or the Gaming Act. As hinted above, DW1 has sufficiently demonstrated to my satisfaction that the Plaintiff has breached, not only some provisions of the law, but also its obligations under the Agreement by demonstrating poor performance, unrealistic projections, leading to loss of government revenue, and the Board, thereby injuring the integrity of the national lottery, failure to furnish an audited financial statement, and failure to renew the performance bond. All these defaults on the part of the Plaintiff render it dangerous to the members of the pubic to play the lottery

games conducted by the Plaintiff. That, I think is not in the public interest and is the sort of situation not contemplated by the parties.

Fourthly, while there is no doubt that the Plaintiff had paid a renewal fee of USD 50,000/= this, in itself would not prevent the Defendant Board from performing its statutory regulatory duty, because there is no estoppel to the performance of a statutory duty.

It is for the above reasons that, I would answer the second issue in the negative.

The next one but last issue is **whether the status quo ante Order can be made in these proceedings pending the final determination of Commercial Case No. 92 of 2005?** Mr. Kesaria, learned Counsel for the Defendant, submitted that although the parties in this suit and Commercial Case No. 92 of 2005 are the same the issues in dispute are completely unrelated. That case should not therefore influence the present proceedings. On his part, Mr. Kibuta, submitted that since the Plaintiff has been served with a licence renewal with a covering letter dated 2/2/2007 from the Defendant, this issue was overtaken by events and was no longer relevant, as the status quo had been maintained.

I think, Mr. Kibuta must have been referring to the order of Dr. Bwana J dated 24/2/2006 in this case, in which he ordered the Defendant not to revoke the Plaintiff's gaming licence. The same order was reiterated on 31/3/2006. However, so long as this was an interim order within the present suit, and was only intended to last up the time of the ruling on the preliminary objection, I do not think it is valid any longer. Besides, the issue as framed was connected to Commercial Case No. 92 of 2005, which I believe, is still pending. So the issue is still alive today and this court cannot leave it in suspense as the present case comes to an end.

I agree with Mr. Kesaria, that since the issues in the two cases are different, it is not possible for one suit to affect the out come of the other. If there were similarities in the issues in the two cases, apart from the names of the parties the principles of stay of suit under s. 8 of the Civil Procedure Act (cap 33 – RE 2003) would have prevailed.

It is not disputed that an interim order was granted in Commercial Case No. 92 of 2005, but as the evidence clearly shows, this was suspended by the Court of Appeal in Civil Application No. 175 of 2005 (Exh.D8 B) pending the hearing and determination of the application for revision.

The interim order in CC. 92/2005 having been suspended, there is, I think, no status quo for this court to maintain as far as that case is concerned. So, I will also answer the third issue in the negative.

The last issue **is to what reliefs are the parties entitled?** As shown above, the Plaintiff in this case has sought for several reliefs, two of which are for declaratory orders, an order to maintain the status quo, ante Commercial Case 92/2005, and general damages I have, I hope amply demonstrated above that the notice of intention to revoke was lawful, and the issues in Commercial Case No. 92 of 2005 are different from those in the present one. Therefore there is no material on which to issue a declaratory order for unlawfulness of the notice. I have also held above that mere payment of renewal fee does not automatically entitle the Plaintiff to a renewal, the amendment to s. 20 of the Gaming Act notwithstanding.

I have also held that though the parties in the two cases could be the same, the issues are so dissimilar that even s. 8 of the Civil Procedure Code Act could not be applied to stay the present suit, so that there can be no status quo to maintain.

Since the Plaintiff's principal claims have not been proved to the satisfaction of the court, I cannot agree that the Plaintiff has suffered any loss, or damage as to entitle him to an award of general damages.

Consequently, all the Plaintiff's claims fail and are dismissed with costs.

Order accordingly.

SGD

S.A. MASSATI

JUDGE

26/7/2007

8,184 words

I Certify that this is a true and correct of the original order Judgement Ruling
Sign .....
Registrar Commercial Court Dsm.
Date 7/08/07