

**LOTUS HOLDING COMPANY LTD v SEYCHELLES INTERNATIONAL BUSINESS
AUTHORITY**

(2012) SLR 153

F Ally for the plaintiff
W Lucas for the defendant

Judgment delivered on 30 May 2012 by

RENAUD J:

Introduction

The plaintiff entered suits Civil Side No 107/10 on 30 March 2010 and Civil Side No 244/10 on 19 August 2010.

This Court at the instance of the parties consolidated the two cases and heard them together.

Whilst Civil Side No CS 107/2010 and Civil Side No CS 244/2010 were *pendente lite* this Court heard the petitions of *Ms Stella Port-Louis v SIBA* CS No 91/2010 and *Ms Agnes Jouanneau v SIBA* CS No 90/2010, and, on 29 July 2009 this Court quashed the defendant's decision revoking or removing their fit and proper status under the ICSP Act.

The Parties

The plaintiff is a company incorporated under the Companies Act 1972 of Seychelles, and is managed by two directors, namely, Mr Mark Reckins and Mrs Alexia Armsbury. It was an international corporate service provider (hereinafter "ICSP") and was duly licensed under the International Services Providers Act to render services connected with the formation, management or administration of specified entities as defined in the ICSP Act.

The defendant is a body corporate established under the Seychelles International Business Authority Act 1994 (SIBA) and *inter alia* monitors the provision of the international corporate services under the International Corporate Services Act (ICSP) and the Seychelles International Business Companies Act (SIBC).

Prayers of Plaintiff

The plaintiff entered Civil Side No 107/2010, wherein it prays as follows, following the defendant's refusal to reinstate the plaintiff's licence to operate as an ICSP, after the plaintiff had requested the defendant to do so.

- (1) to review the defendant's decision given on 28 May 2010, refusing to renew the plaintiff's ICSP licence and to assess the fit and proper status of Mrs ARMSBURY and Ms GERMAIN under section 17(1) of the ICSP Act;
- (2) in reviewing the said decision to declare that the defendant's decision given on 28 May 2010, refusing to renew the plaintiff's ICSP licence and to assess the fit and proper status of Mrs ARMSBURY and Ms GERMAIN is unlawful, unjustified, unfair, unreasonable, made maliciously and in bad faith and/or in breach of the parties' arrangement or agreement;
- (3) in reviewing the said decision to order the defendant to -
 - (i) to renew the plaintiff's ICSP licence; and/or
 - (ii) hear and reconsider the plaintiff's application for the renewal of its ICSP licence in accordance with section 4(2) of the ICSP Act; and
 - (iii) to assess the fit and proper status of Mrs ARMSBURY and Ms GERMAIN; and
 - (iv) to order and condemn the defendant to pay the plaintiff loss and damage in the sum of US\$25,900, which is due up till now and continuing until the date of judgment.

Plaintiff's Case

By letter dated 15 January 2010 addressed to the plaintiff, the defendant revoked the plaintiff's ICSP licence substantially on the grounds that the "fit and proper" status of Ms Stella Port-Louis and Ms Agnes Jouanneau, the plaintiff's two (2) employees, under the ICSP Act had been removed.

The plaintiff contends that in view of the fact that Ms Port-Louis and Ms Jouanneau's fit and proper status have been restored, the revocation of its licence should *ipso facto* be restored in that the revocation of its licence was based substantially on the revocation of the fit and proper status of Ms Jouanneau and Ms Port-Louis.

The plaintiff argued that it is clear in the defendant's letter of 15 January 2010 that it is because the "fit and proper status" of Ms Jouanneau and Ms Port-louis were removed that the plaintiff's licence was revoked and that the defendant had relied upon paragraph 3 (a), (b), (c), (e) and (f) of the Schedule 3 of the ICSP Act to revoke their fit and proper status, which relates to criteria for determining the fit and proper status of a person.

According to the plaintiff, in any event if during Ms Jouanneau and Ms Port-Louis' interview the defendant found that there was anything wanting in the plaintiff's control system and procedures, the defendant should have called the plaintiff and given the plaintiff an opportunity to be heard on the allegations. This, the defendant failed to do and thus its decision should be quashed.

The plaintiff claims that the defendant's decision in revoking the plaintiff's ICSP licence was taken in bad faith and contrary to the defendant's proper discharge of its functions and powers. The plaintiff further claims that the defendant's decision revoking its ICSP licence is unlawful, unjustified and in breach of the arrangement or agreement entered into by and between the parties for the plaintiff's provision of the said services.

After this Court order made on 12 May 2010, the plaintiff applied to the defendant for the renewal of its ICSP licence, which was to expire on 15 May 2010, and in so doing complied with the provisions of section 4(2) of the ICSP Act, namely -

- (a) paying the annual licence fee in accordance with plaintiff's prior arrangement or practice with the defendant in regards to the payment of any fees; and
- (b) lodging the certificate of compliance.

The plaintiff by that same letter notified the defendant of the following changes in the plaintiff in accordance with section 6(3) & (4) of the ICSP Act -

- (1) the proposed appointment of Alexia ARMSBURY, a practising Attorney of the Supreme Court of Seychelles and a Notary, as the director of the plaintiff; and
- (2) the employment of Ms Stephanie GERMAIN as Corporate Manager of the plaintiff's operation as an ICSP.

That upon or after the plaintiff's application for the renewal of its ICSP licence and its notification of the changes in respect to the plaintiff, the defendant did not require any other documents or information from the plaintiff that it may request from the plaintiff under section 6(2) of the ICSP Act for it to deal with the plaintiff's application for the renewal of its ICSP licence.

By letter of 28 May 2010 addressed to the plaintiff, the defendant notified the plaintiff that -

- (1) it will not grant the plaintiff with an ICSP licence; and
- (2) it will not consider any application for candidates to undergo a fit and proper assessment for the proposed appointment with the plaintiff.

The decision of the defendant referred to above was on the following grounds –

- (1) the plaintiff had failed to submit its application for renewal one (1) month prior to the expiry date in accordance with a circular dated 22 July 2009;
- (2) the failure of the plaintiff to pay the annual licence fee;
- (3) the serious problems within the control system and procedures of the plaintiff's office specially:-
 - (i) the provision of directorship services by persons associated with the plaintiff;
 - (ii) the failure to conduct proper staff appraisals;
 - (iii) the absence of adequate professional indemnity insurance cover for its employees; and
 - (iv) accounts have not been signed by the relevant persons, namely all the directors.

In view of the said refusal, the plaintiff filed Suit No CS 244/2010, wherein it claims that as an ICSP it had a legitimate expectation that its ICSP licence would be renewed and the fit and proper assessment of Mrs Alexia Armsbury and Ms Stephanie Germain would be completed, especially that this Court had ordered that its licence be reinstated.

The plaintiff contends that the defendant's decision refusing to renew its ICSP licence and to assess the said fit and proper status was wrongful, illegal, unjustified, unreasonable, unfair, made maliciously and in bad faith and contrary to the defendant's proper discharge of its functions and powers.

It further contends that the defendant's decision refusing to renew its ICSP licence is in breach of the arrangement or agreement entered into by and between the parties for the plaintiff's provision of its services.

The plaintiff prayed this Court to grant the relief stated above.

Defendant's Case

The defendant does not admit the averment of the plaintiff that as an ICSP it had a legitimate expectation that its ICSP licence would be renewed and the fit and proper assessment of Mrs Alexia Armsbury and Ms Stephanie Germain would be completed. The defendant averred that the renewal of or granting of a licence is not automatic in particular when a company has failed to comply with the legal requirements of an ICSP in the past.

The defendant contends in its statement of defence that the grounds for it to revoke the defendant's ICSP licence went beyond the fit and proper status of Mrs Port-Louis and Ms Jouanneau and as per the evidence of Mr Steve Fanny and as contained in the defendant's letter of 15 January 2010 to the plaintiff - "there are concerns in terms of the systems and controls which exist within the office (of the plaintiff)".

The defendant denied the averment of the plaintiff that the defendant's decision refusing to renew its ICSP licence and to assess the said fit and proper status was wrongful, illegal, unjustified, unreasonable, unfair, made maliciously and in bad faith and contrary to the defendant's proper discharge of its functions and powers.

The defendant averred that the decision not to renew the plaintiff's ICSP licence was not done in bad faith but was due to the fact that the plaintiff has failed to maintain proper management of its company and to safeguard the reputation of the offshore industry in the past.

The defendant also denied the averment of the plaintiff that further and alternatively to the above stated averment that the defendant's decision refusing to renew its ICSP licence is in breach of the arrangement or agreement entered into, by and between the parties for the plaintiff's provision of its services. The defendant averred that there was

no such arrangement or agreement and put the defendant to strict proof of that allegation.

The defendant also does not admit the averment of the plaintiff that by reason of the matters (sic) the plaintiff is suffering loss and damage in the sum of US\$350 per day from the date of the decision and continuing, which sum the defendant is liable to make good to the plaintiff. The defendant rejects any claim of liability or loss incurred by the plaintiff if it exists.

Evidence of Plaintiff

The plaintiff called Mark Reckins, its director, to give evidence on its behalf. Mr Reckins gave clear evidence that was not discredited at all by the defendant about the plaintiff's discharge of services under the ICSP Act and the fact that when Ms Port-Louis and Ms Jouanneau were called by the defendant it was for them to clarify their relationship to SP Trading Limited only.

According to Mr Reckins, Ms Port-Louis, Ms Jouanneau or the plaintiff had no direct involvement with SP Trading Ltd and were not involved in, or a director of SP Trading Ltd or linked in any way to its alleged illegal transaction.

Furthermore, he testified that there was no evidence to show and prove that the plaintiff has failed in its control and procedures as an ISCP. In fact it was admitted by the defendant that the defendant was conducting a compliance review of the plaintiff, which had not yet been concluded. In fact if there was anything alarming that needed the defendant to revoke the plaintiff's licence, it would have found during such exercise. This was not the case.

Mr Reckins also testified as to the plaintiff's application for the renewal of its licence after this Court had ordered that its licence be reinstated. The defendant in its letter of 28 May 2010 notified the plaintiff that -

- (1) it will not grant the plaintiff with an ICSP licence; and
- (2) it will not consider any application for candidates to undergo a fit and proper assessment for the proposed appointment with the plaintiff

on the following grounds -

- (1) the plaintiff has failed to submit its application for renewal one (1) month prior to the expiry date in accordance with a circular dated 22 July 2009;
- (2) the failure of the plaintiff to pay the annual licence fee;
- (3) the serious problems within the control system and procedures of the plaintiff's office specially -
 - (i) the provision of directorship services by persons associated with the plaintiff;
 - (ii) the failure to conduct proper staff appraisals; and
 - (iii) the absence of adequate professional indemnity insurance cover for its employees; and

(iv) accounts have not been signed by the relevant persons, namely all the directors.

Mr Reckins further testified that on 12 May 2010, the plaintiff applied to the defendant for the renewal of its ICSP licence, which was to expire on 15 May 2010, and in so doing the plaintiff complied with the provisions of section 4(2) of the ICSP Act, namely -

- (a) paying the annual licence fee in accordance with plaintiff's prior arrangement or practice with the defendant in regards to the payment of any fees; and
- (b) lodging the certificate of compliance.

The plaintiff further notified the defendant of the following changes in the company in accordance with section 6(3) & (4) of the ICSP Act -

- (1) the proposed appointment of Alexia ARMSBURY, a practising Attorney of the Supreme Court of Seychelles and a Notary, as the director of the plaintiff; and
- (2) the employment of Ms Stephanie GERMAIN as Corporate Manager of the plaintiff's operation as an ICSP.

Mr Reckins testified that the plaintiff had an account with the defendant from which it was a standard practice that any expenses of the plaintiff with the defendant would be deducted and paid therefrom. It was on that basis that the defendant was to deduct and pay the fees for the annual fee. According to Mr Reckins upon or after the plaintiff's application for the renewal of its ICSP licence and its notification of the changes in respect to the plaintiff, the defendant did not require any other document or information from the plaintiff.

It should be noted that under section 6(2) of the ICSP Act the defendant may require a licensee to furnish further information or documents in respect of any change in the licensee for it to deal with a licensee's application for renewal of its ICSP licence. However, in regards to the plaintiff, the defendant failed to require from it any such further information or documents in respect of such change before dealing with its application for renewal.

Evidence of Defendant

The defendant called Mr Steve Fanny, its Chief Executive Officer, to give evidence on its behalf. Mr Fanny maintains that the defendant's decision for the revocation of the licence is based on good grounds and that the defendant could not renew the plaintiff's licence because the plaintiff's licence had been revoked, which he repeated over and over again in the course of his evidence.

Mr Fanny testified that directors should discharge their functions personally and should not give power of attorney or authority to third parties to act on their behalf. His stance proved his ignorance of the law and the unsoundness of his decision.

Mr Fanny was showed section 52(1) of the IBC Act which permits the directors of an IBC to appoint any person to be an officer or agent of the company, and to section 70(1) of the IBC Act that permits a company to authorise any person either generally or in respect of any specified matters as its agent to act on behalf of the company both in and outside Seychelles. He admitted that he was not aware of such provision.

Submissions of Plaintiff

Based on the facts testified by Mr Renkins, it is the plaintiff's submission that the defendant's decision to revoke the plaintiff's ICSP licence was taken without giving the plaintiff any prior notice, or a real opportunity to be heard and to defend itself of any allegations and neither was it given an opportunity to take any step to rectify any undesired situation.

Counsel for the plaintiff responded to the issue raised by the defendant in its closing submission in that the review should have been commenced by way of petition instead of by plaint.

It is a submission of the plaintiff that Mr Fanny's evidence as established under the plaintiff's case confirms the defendant's bad faith in processing the revocation and application for the non-renewal of the plaintiff's licence.

He added that Mr Fanny was adamant that in the circumstances of the revocation the plaintiff's licence could not be renewed. He disregarded the fact that the Supreme Court had ordered that the plaintiff's licence should be reinstated and as a result as the licence was to expire the defendant was under the obligation to renew the licence.

The plaintiff submits that the defendant's decision revoking the plaintiff's ICSP licence is unfair, unlawful and unjustified and contrary to the proper discharge of its functions.

It is also the plaintiff's submission that the defendant's decision refusing to renew its ICSP licence and to assess the said fit and proper status was procedurally improper, taken in bad faith and a breach of natural justice.

Furthermore, the plaintiff submits that it was clear from the evidence that the defendant took irrelevant matters into consideration and failed to take into consideration relevant matters.

According to the plaintiff, the defendant did not act fairly and acted in bad faith in its processing and dealing with the plaintiff's application for the renewal of its ICSP licence and to assess the fit and proper status of Mrs Armsbury and Ms Germain.

The plaintiff further submits that based on the evidence, the defendant's decision was wrongful, illegal, unjustified, unreasonable, unfair, made maliciously and in bad faith and contrary to the defendant's proper discharge of its functions and powers.

It is a further submission of the plaintiff that it was clear from the manner that the defendant treated the plaintiff's application for renewal in the defendant's letter to the plaintiff of 28 May 2010, and the reasons given by the defendant when one considers the evidence of Mr Mark Reckins and Mr Steve Fanny explaining each of the said grounds that the defendant was acting in bad faith and contrary to the defendant's proper discharge of its functions and powers.

In view of the fact that the Supreme Court had ordered the defendant to reinstate the plaintiff's licence, counsel for the plaintiff submitted that it is clear from the reasons given by the defendant refusing the renewal that it was trying to defeat the order of the Supreme Court and to find excuses to refuse the renewal of the licence.

The plaintiff's counsel submitted that as an ICSP, the plaintiff has suffered loss and damage as a result of the revocation of its licence. Mr Reckins gave evidence as to the source of income of the plaintiff and the amount of loss that it is incurring.

In the alternative, the plaintiff claims that it had an arrangement that the defendant entered with it for it to employ Ms Port-Louis and Ms Jouanneau as non-managerial staff as per the defendant's letter to it of 16 June 2005. The defendant recommended that the said persons receive immediate training in the field of corporate services, which Mr Reckins confirmed that they received.

Submissions of Defendant

In his final submission counsel for the defendant raised a point of law in that section 17(1) of the ICSP provides for a specific procedure and that the plaintiff ought to have entered an "application" instead of a "plaint" in the case of a judicial review. This matter has been addressed by counsel for the plaintiff in his submissions stated above.

Counsel for the defendant submitted that the criteria for awarding "fit and proper" status are set out in Schedule 3 of the Code of Practice of Licensees of ICSP. Section 3 provides a list of 9 different criteria to determine if a person is "fit and proper". Once a person is declared "fit and proper" the person must thereafter maintain that standard at all times.

He submitted that the Code however does not provide any mechanism to remove that status once acquired. It is the contention of the defendant that once the behaviour of a "fit and proper" person falls below the required standard that status may be removed by way of notification with reason.

The defendant, however, admitted that the person affected should be granted the opportunity to rectify the wrongdoing or to improve his or her behaviour.

Section 8 of ICSP provides for the duties of licensees and section 10 provides for the functions of SIBA in respect of licences.

Section 15 of ICSP provides a list of circumstances where SIBA can revoke a licence whereas its sub-section 2 requires that written notice be given of such revocation.

Section 17 of ICSP sets out the review procedure of a decision taken by SIBA by the Supreme Court and eventually by the Seychelles Court of Appeal.

There is no express procedure laid down for the revocation of a licence. Section 15(2) of ICSP simply states that SIBA shall give notice of such revocation to the licensee.

Counsel for the defendant submitted that Exhibit P7, a letter dated 15 January 2010 addressed to the plaintiff, is actually the letter of the defendant notifying the plaintiff of the revocation of its licence. He submitted that for this reason the defendant has complied with the requirement of ICSP in exercise of its power to grant and to revoke a licence.

It is also the submission of the defendant that it properly exercised its discretionary jurisdiction under ICSP and acted in good faith when revoking and refusing the renewal of the licence of the plaintiff and it did so in order to protect the Seychelles offshore industry.

The Law

When it comes to review and appeal with regards to matters connected to ICSP it is section 17 of ICSP that applies. Section 17(1) provides –

An application may be made to the Court for the review of any decision of the Authority –

- (a) to refuse to grant or renew a licence under this Act;
- (b) to suspend a licence under section 17;
- (c) to revoke a licence under section 18.

In the case of *Khawaja v Secretary of State for Home Department* [1983] 1 All ER 765, it is stated that:

Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

In matters of review, the Seychelles Court of Appeal in the case of *Doris Raihl v Ministry of National Development* (2010) SLR 66 provided much guidance and the quotes that follow are pertinent -

The golden rule jealously guarded in administrative law by the Courts is that no executive decision adversely affecting the rights of the citizen, more particularly, his property rights, may be taken behind his or her back, without affording him or her an opportunity to be heard: *Ridge v Baldwin* [1964] AC 40; *Dimes v Grand Junction Canal Proprietors*; *Perrina v The Port Authority and Other Workers Union* (1971) MR 168.

Again, in the case of *Yulia Timonina v Government of Seychelles and The Immigration Officer* SCA 38/2007, the Seychelles Court of Appeal at paragraph 15 of its judgment in reviewing the role of the judiciary in judicial review applications stated that it is –

... to ensure that what is done by the Executive is proper and in accordance with given laws and procedures. Where a law gives power to the Executive, it is a fundamental principle that such power be exercised by the Executive judiciously and within the limit provided, the key concept being fairness. In other words, where a law requires the Executive to give reasons for its decision, the required reason should be adequately given. Failing to do so, a citizen or whoever is affected by that failure has the right to come to court seeking the necessary redress.

The Seychelles Court of Appeal in *Raihl* stated that an authority exercising quasi-judicial powers –

which is by law invested with power to affect property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds and that rule is of universal application, and founded on the plainest principles of justice...

The Seychelles Court of Appeal quoted the above excerpt from the case of *Cooper v Wandsworth* (1863) 14 CB (NS) 180.

The Seychelles Court of Appeal went on to state that –

Administrative law is not about judicial control of Executive power. It is not Government by Judges. It is simply about judges controlling the manner in which the Executive chooses to exercise the power which Parliament has been vested in them. It is about exercise of Executive power within the parameters of the law and the Constitution. Such exercise of power should be judicious. It should not be arbitrary, nor capricious, nor in bad faith, nor abusive, nor taking into consideration extraneous matters.

(From the cases of *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141).

In the case of *Council of Civil Service Unions and Ors v Minister for the Civil Service* [1984] 3 All ER 935 the three grounds on which a decision may be subject to judicial review were classified as – illegality, irrationality, and procedural impropriety. Procedural impropriety concerns not only the failure of an administrative body to follow procedural rules laid down in the legislative instruments by which jurisdiction is conferred, it includes the failure to observe the rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

In the appeal case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, with respect to the modern concept of natural justice, the term now used is “the duty to act fairly” -

Principles of natural justice” is a term now hallowed by time, through overuse by judicial and other repetition. It is a phrase often widely misunderstood and therefore is often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by another term such as “a duty to act fairly.

With regard to the concept or doctrine of “legitimate expectation”, I share the same view with reference to an excerpt found in “Wikipedia”.

It cannot be overemphasized that the concept of legitimate expectation has now emerged as an important doctrine. It is stated that it is the latest recruit to a long list of concepts fashioned by the court to review an administrative action.

It operates in public domain and in appropriate cases constitutes a substantive and enforceable right.

As a doctrine it takes its place beside such principles as rules of natural justice, the rule of law, non-arbitrariness, reasonableness, fairness, promissory estoppel, fiduciary duty, and perhaps, proportionality to check the abuse of the exercise of administrative power. The principle at the root of the doctrine is the rule of law which requires regularity, predictability and certainly the Government’s dealing with the public.

An expectation could be based on an express promise, or representation or by established past action or settled conduct. It could be a representation to the individual or generally to a class of persons. Whether an expectation exists is a question of law, but clear statutory words override any expectation, however founded. However, as an equity doctrine it is not rigid and operates in areas of manifest injustice. It enforces a certain standard of public morality in all public dealings.

However, considerations of public interest would outweigh its application. It would immensely benefit those who are likely to be denied relief on the ground that they have no statutory right to claim relief.

Exercise of discretion is an inseparable part of sound administration and, therefore, the State which is itself a creature of the Constitution, cannot shed its limitation at any time in any sphere of State activity. A discretionary power is one which is exercisable by the holder of the power in his discretion or subjective satisfaction. The exercise of discretion must not be arbitrary, fanciful and influenced by extraneous considerations. The defendant is no doubt a creation of and an agency acting on behalf of the State, hence the doctrine of legitimate expectation is equally applicable to it in its process of decision making.

Findings and Conclusions

It is not in dispute that the plaintiff held an international corporate service provider’s licence (ICSP licence) issued by the defendant under the ICSP to provide international

corporate services in Seychelles, namely the formation, management or administration of specified entities as defined in the ICSP Act.

Upon or after the plaintiff's application for the renewal of its ICSP licence and its notification of the changes in respect to the plaintiff, the defendant did not require any other document or information from the plaintiff that it may request from the plaintiff under section 6(5) of the ICSP Act for it to deal with the plaintiff's application for the renewal of its ICSP licence.

By letter of 28 May 2010 addressed to the plaintiff, the defendant notified the plaintiff that -

- (1) it will not grant the plaintiff with an ICSP licence; and
- (2) it will not consider any application for candidates to undergo a fit and proper assessment for the proposed appointment with the plaintiff.

The decision of the defendant referred to above was on the following grounds -

- (1) the plaintiff has failed to submit its application for renewal one (1) month prior to the expiry date in accordance with a circular dated 22 July 2009;
- (2) the failure of the plaintiff to pay the annual licence fee;
- (3) the serious problems within the control system and procedures of the plaintiff's office specially -
 - (i) the provision of directorship services by persons associated with the plaintiff;
 - (ii) the failure to conduct proper staff appraisals; and
 - (iii) the absence of adequate professional indemnity insurance cover for its employees; and
 - (iv) accounts have not been signed by the relevant persons, namely all the directors.

The plaintiff filed a petition for the review of the defendant's revocation of the plaintiff's licence in *Lotus Holding Company Limited v SIBA* CS No 121/2010.

The petition was fixed for hearing before the Chief Justice and at the hearing the defendant's counsel drew the Court's attention to the fact that the plaintiff had also filed Civil Side 107/2010, and as a result thereof this petition should be dismissed. The Chief Justice heard the preliminary objection and the petition in *Lotus Holding Company Limited v SIBA* CS No 121/2010, and dismissed the petition for abuse of process on the defendant's motion.

His Lordship FMS Egonda-Ntende CJ at page 2 of the judgment (no 5) states –

I agree with learned counsel for the Petitioner, Mr. Frank Ally, that the statutory scheme for review under section 17 of the ICSP Act would provide a more comprehensive opportunity for the parties to agitate their case without the limitations inherent under judicial review under the supervisory jurisdiction of the Supreme Court. Under the Judicial Review the Supreme Court does not look at

the merits of the decision as such, outside of the 3 main grounds of procedural impropriety, irrationality and illegality. Judicial review is more concerned with the process of decision making of the subordinate court, tribunal or body rather than the merits of the decision so made.

It should be noted that section 17(1) of the ISP Act states – “An application may be made to the Court for the review of any decision of the Authority (a) to refuse to grant or renew a licence under this Act”.

Under Part IV of the ICSP Act – Enforcement - this Court is invested with all the powers to review the decision of the defendant and to make appropriate orders.

I have carefully considered the case of both the plaintiff and the defendant as pleaded, together with the testimonies of the witness of the respective parties, as well as the contents of the written submissions of counsel for the parties, and what follow are my findings and conclusions in relation to the issues raised.

The Chief Justice in his considered judgment when dismissing the petition for abuse of process in the directly related case of *Lotus Holding Company Limited v SIBA* CS No 121/2010, addressed the point raised by counsel for the defendant with regard to the procedure that ought to be followed when seeking review of matter under the ICSP Act.

For this reason I find no merit in the point raised and I do not intend to consider that issue again now as it will amount to this Court sitting on appeal on its own decision.

I find that the defendant's decision to revoke the plaintiff's ICSP licence was taken without giving the plaintiff any prior notice whatsoever of any act of the plaintiff detrimental to the public interest or the interest of its clients or in contravention of any relevant laws of Seychelles, and without giving the plaintiff a real or any opportunity to be heard and to defend itself of any allegations and also without giving the plaintiff an opportunity to take any steps to rectify any undesired situation.

I find that the defendant's decision in revoking the plaintiff's ICSP licence is unfair, unlawful and unjustified and contrary to the proper discharge of its functions because any previous review by the defendant of the plaintiff's operation as an ICSP has not revealed any act committed or being committed by the plaintiff detrimental to the public interest or the interest of its clients and any contravention of any of the relevant laws of Seychelles.

I also find that the defendant failed to conduct any inspection or review or a thorough inspection or review of the plaintiff's control systems and procedures as an ICSP, as required by law, immediately before taking such action against the plaintiff or any member of staff of an ICSP.

In the circumstances I find that the defendant's decision in refusing to renew the ICSP licence of the plaintiff and to assess the said fit and proper status was procedurally improper and a breach of natural justice, because the plaintiff was not given any real

opportunity or sufficient opportunity to be heard before the defendant took its decisions regarding appraisals, payment of the annual licence fee, directorships of persons associated with it or companies incorporated and existing out of Seychelles, professional indemnity insurance, and, signatures on the audited accounts of the plaintiff.

Furthermore, I find that the defendant did not require any document, explanation or information from the plaintiff relevant to its application for renewal of the ICSP licence for it to deal with the plaintiff's said application before it took its said decisions.

I find that the plaintiff was not given any real opportunity to be heard and to defend itself against any complaint regarding the plaintiff's discharge of its duties as an ICSP and an opportunity to defend itself or take steps to comply with the law or to rectify any purported or alleged deficiency in its control system and procedures.

I likewise find that the defendant failed to conduct a thorough inspection of the plaintiff's control systems and procedures, as required by law, before refusing the plaintiff's ICSP licence.

It appears that the defendant has based its decisions substantially on a compliance review that it effected at the plaintiff's office on 28 August 2009, without giving the plaintiff the opportunity to be heard thereon or producing the final report of the review.

The defendant having not completed its report following its compliance review of 28 August 2009, thus not knowing whether indeed the plaintiff was carrying business in contravention of any law or detrimental to the public interest or to the interest of its clients, and as such, the defendant did not and could not have requested the plaintiff to comply with the law failing which to suspend or revoke its ICSP licence. If the defendant had any reason to believe that the plaintiff was carrying on its business in a manner detrimental to the public interest or to the interest of its clients or in breach of any of law, it should have notified the plaintiff thereof immediately after the compliance review and require it to take urgent and immediate steps to comply with the law or rectify any deficiency, which the defendant failed to do.

I also find that the defendant failed for no valid reason to consider the application of Mrs Armsbury and Ms Germain and to assess them for fit and proper status.

It is evident that the defendant took irrelevant matters into consideration and failed to take into consideration relevant matters, because:

- (a) Ms Jouanneau and Ms Port-Louis are non-managerial staff of the plaintiff under the initial arrangement that it had with the defendant;
- (b) the plaintiff had appointed or was proposing the appointment of a new director in the person of Mrs Alexia Armsbury, an Attorney--At-Law and Notary of long standing practising in the same building as the plaintiff conducts its business; and

- (c) the employment by the plaintiff of Ms Germain, a university graduate holding a Bachelor of Commerce (Property) with Distinction from the Curtin University of Technology, Australia.

All these show that the defendant did not act fairly and rationally when processing and dealing with the plaintiff's application for the renewal of its ICSP licence, and in its assessment or non-assessment of the fit and proper status of Mrs Armsbury and Ms Germain.

It is also my finding that the defendant's decision was wrongful, illegal, unjustified, unreasonable, unfair, and is contrary to the defendant's proper discharge of its functions and powers because:

- (a) the defendant kept making reference to the removal of the fit and proper status of Ms Jouanneau and Ms Port-Louis, which were no longer relevant considerations for the plaintiff's application for the renewal of its licence as they are non-managerial staff of the plaintiff and the plaintiff had appointed a new managerial staff and director;
- (b) the plaintiff had not contravened the ICSP Act which warranted the defendant's refusal of its ICSP licence and not to assess Mrs Armsbury and Ms Germain for fit and proper status;
- (c) if the defendant had any good reason to believe that the plaintiff carried on its business under the licence in a manner detrimental to the public interest or to the interest of its clients or in breach of any law it should have required the plaintiff to take steps to comply with the law or rectify the deficiency, which it failed to do, rather than refuse the renewal and perform the fit and proper assessment;
- (d) the deficiencies that the defendant raised could be easily remedied and the defendant failed to give the plaintiff any opportunity to remedy them.

The defendant took the decision he did, contrary to the proper discharge of its functions and powers specially its reliance on the following flimsy grounds, that -

- (a) the signature by Ms Port-Louis (who is a shareholder of the plaintiff) on the audited accounts as a director when she was not a director, which was an oversight (even to the defendant at the time);
- (b) the plaintiff had no insurance cover for its employees in the USA;
- (c) the provision of directorship services by persons associated with the plaintiff in companies incorporated outside the jurisdiction of the defendant and Seychelles laws; and
- (d) the failure to conduct proper staff appraisals.

I find that the circular of 22 July 2009, which the defendant referred to, is merely administrative and any non-compliance thereof cannot disbar an applicant's licence from being renewed or warrant the refusal of the renewal in that the ICSP Act as amended (vide section 4(4)) permits the defendant to renew licences with retrospective effect subject to payment of a penalty.

The plaintiff paid or could have paid the annual licence fee as it had an account with the defendant in which there were sufficient funds from which the defendant would deduct any fees due. The defendant was aware of this arrangement which is a settled arrangement between the defendant and all ICSPs whereby all ICSP holds a credit account facility with the defendant which is occasionally replenished and whenever a transaction is effected by the defendant on the ICSP's behalf, the ICSP's account is debited accordingly. If the ICSP's account had insufficient funds, the defendant informs the ICSP and the ICSP credits more fund into it.

I therefore do not consider the failure to pay the annual licence fee such a material breach that warrant the refusal of the renewal of the ICSP licence because such failure could have been easily remedied. In my view, this reasoning appears to be vexatious and capricious on which the defendant relies upon to refuse the renewal the plaintiff's licence.

On the basis of the evidence, it is clear from the manner that the defendant treated the plaintiff's application for renewal and the reasons given, that the defendant was not acting rationally and in good faith, but displaying emotional reaction to a perceived situation, contrary to the proper discharge of its functions and powers, because -

- (a) the defendant disregarded its discretion that it can renew licences under the ICSP Act with retrospective effect having admitted that several licences are renewed with retrospective effect subject that the licensee pays a penalty;
- (b) that an IBC can give Power of Attorney to any person to act on its behalf in terms of section 52(1) and 70(1) of the IBC Act;
- (c) the Chief Executive Officer of the defendant in his evidence admitted that he was not aware of the provisions of section 52(1) and 70(1) of the IBC Act and vehemently defended his stance that such was not permitted under our law;
- (d) the defendant was still in the process of conducting a compliance review of the plaintiff, which was not completed and the plaintiff had commented on the defendant's first report and the plaintiff was awaiting the defendant's response to its comments; and
- (e) the defendant failed to give the plaintiff any opportunity to be heard on the said allegations or issues that the defendant relied upon to refuse the renewal of the licence.

In view of the fact that this Court had ordered the defendant to reinstate the plaintiff's licence it is clear from the reasons given by the defendant in refusing the renewal of the plaintiff's ICSP licence, that it was trying to defeat the order of this Court and to find excuses to refuse the renewal of the licence.

I find that no doubt the plaintiff as an ICSP must have suffered certain loss and damage as a result of the revocation or non-renewal of its licence by the defendant and this Court has to determine the appropriate quantum.

The plaintiff is claiming the sum of US\$25,900 and continuing until the date of judgment. The CEO of the defendant adduced details of the plaintiff's revenue statistics for the past 4 years in order to refute the plaintiff's claim. The basis of the claim of the plaintiff is rather vague but nonetheless I am satisfied that in the circumstances the plaintiff suffered losses. I assess such losses at a global nominal sum of US\$5000.

Orders

In the final analysis and for reasons stated above I make the following orders:

- (i) I hereby order the defendant to renew the plaintiff's ICSP licence; and/or hear and reconsider the plaintiff's application for the renewal of its ICSP licence in accordance with section 4(2) of the ICSP Act; and
- (ii) I hereby also order the defendant to assess the fit and proper status of Mrs Armsbury and Ms Germain; and
- (iii) I hereby further order and condemn the defendant to pay the plaintiff loss and damage in the nominal sum of US\$5,000 with interest at the legal rate. I also award the plaintiff costs of this suit.