THE HIGH COURT OF SWAZILAND

Paul Mulindwa-Lubega
Applicant

v

Swaziland Institute of Accountants and Others
First to Fifth Respondents

Case No. 3591/97

For Applicant — Mr. Fine
For Respondents — Mr. Flynn

JUDGMENT
(18/02/2000)

The applicant is a chartered accountant. He is the resident partner of Deloitte & Touche, formerly Akintola Williams & Company, which practices in Swaziland.

The Respondent is the statutorily appointed governing body of the Accountancy profession in Swaziland. In addition to its other functions it is empowered and required to investigate complaints that members of the profession have not observed the ethical and professional conduct required of them.

The present application is one in which the applicant seeks to interdict the Council from carrying on with the enquiry and other relief in relation to the enquiry. The enquiry relates to an alleged breach of professionalism and ethics by the firm of accountants in which the applicant is a partner.

The relief claimed in the notice of motion is for an order

"

1.1 Declaring that the procedure adopted by the tribunal chaired by the third respondent and established in terms of section 15.5 of the Accountancy Act, No. 5 of 1985 as amended by deciding:

1.2 that on or about 17th December to prefer *(sic)(proffer?)* the charges recorded in the second respondent's letter of that date against the applicant and adjudicate on those charges;

1.3 On or about 17th December 1996 not to give the applicant an opportunity to give reasons why an enquiry should not be conducted;

1.4 To allow themselves to be influenced in their decisions and rulings by a legal representative appointed by the second respondent;

1.5 To interrupt and limit the cross-examination conducted by the applicant's attorney Samuel Earnshaw during the enquiry.

is *ultra vires* the act or alternatively constitutes unfair administrative justice.

2. Declaring that

2.1 The completion of the enquiry chaired by the third respondent into complaints made against the applicant has been unreasonably delayed: and

2.2 The continuation thereof will constitute unfair administrative justice.

3. Interdicting the respondents from proceeding with the enquiry in terms of section 15 of the Act into the charges brought against the Applicant in terms of the respondent's second letter dated 17th December, 1996.

4. Calling upon the Respondents to show cause why the rulings of the tribunal referred to below should not be reviewed, corrected or set aside.

4.1 The decision of the tribunal that the original complaint made by Bill Farmer was no longer relevant and that Earnshaw was precluded from cross examining farmer on such complaint;

4.2 the decision and ruling of the tribunal to direct the applicant to adduce evidence prior to the tribunal having heard all charges against the applicant including the evidence in support thereof

4.3 The decision of the third to fifth respondents recorded in the letter of 5th December 1997 not to recuse themselves;

4.4 The decisions and rulings referred to in paragraph 1 above"

The notice of motion is confusingly composed but the import and intention of the order sought is clear.

In the founding affidavit after citation of the parties, the applicant has given an account of the background events leading up to the establishment of the

board of enquiry. The essence of the matter is that a complaint has been made to the first respondent regarding the failure of the applicant's firm to observe proper professional standards of audit and qualification of reports in relation to the affairs of the Swaziland Development and Savings Bank. The applicant is said to be personally responsible for the failure to maintain proper professional standards.

The complaint was made on the 28th September 1995. Bill Farmer then employed in the Ministry of Finance, in a letter on behalf of his Principal Secretary to the First Respondent (PM1) referred to a "July 1995 Coopers & Lybrand report" which had been made available to the public. The report Farmer said contained serious statements concerning the non-performing nature of the Bank's loan portfolio. This is a rather circumspect way of saying that the report contained findings that the bank had made a substantial number of excessively large loans to divers customers, which had proved to be bad. The debtors did not pay interest or repay capital and prospects of recovery were dismal. Some individual loans were said to be in excess of the limit permitted by law in relation to the capital of the bank. It is implicit that some mention of this was to have been expected from the Applicant in the audited reports. The Government as a major depositor found itself at risk of a material loss.

The complaint against the applicant and his firm was that over a long period of reporting on their audit no disclosure was made of the non-performing loans or to the non-performance made their value as assets dubious. A subsidiary complaint was that no disclosure had been made that the Bank was consistently failing to comply with the requirements of the Central Bank that interest was not to be shown as accruing on loans which were not being repaid nor serviced by the payment of interest. Clearly to show interest as accruing is a fiction leading to gross distortion of the accounts.

The relevant sections of the Act read as follows:

"PART IV – DISCIPLINARY POWERS OF COUNCIL

Inquiry by council into charge of unprofessional conduct.

15. (1) Subject to this section, Council may enquire into any charge, complaint or allegation of unprofessional conduct against a person registered under this Act:

Provided that, in the case of a charge, complaint or allegation forming or likely to form the subject of criminal proceedings in a court of law, the Council shall postpone the inquiry until such proceedings have been finally determined.:

Provided further that nothing in this section shall be construed as preventing the Council from taking disciplinary action against a person convicted of an offence specified in section 10.Prior to the institution of any inquiry the registrar of the Institute shall in writing advise the person concerned of the nature of the charge, complaint or allegation made against him and give him a reasonable opportunity of exculpating himself in writing and to produce such written evidence as he may desire.

(2) If the Council considers the answer given in terms of subsection (2) as satisfactory, it shall not proceed with an inquiry under subsection (1).

(3) The council may, prior to any enquiry, conduct a preliminary investigation of a person concerning any charge, complainant or allegation of unprofessional conduct made against him.

(4) For the purpose of conducting any inquiry by the Council under this section, the Council shall consist of not less than two of its members together with a law officer appointed by the Attorney General for this purpose.

Matters for a procedure upon inquiry by the Council

16. (1) A person who has been found, after inquiry held by the Council under this Part, to be guilty of unprofessional conduct, shall be liable to one of the following penalties: -

(a) a caution or reprimand; or

(b) suspension for a specified period from practising or performing acts specially pertaining to his profession; or

(c) removal of his name from the register.

(2)A person whose conduct is the subject of an inquiry under this part shall be given an opportunity to appear by himself or with a legal practitioner to answer the charge, and to produce the evidence of any other person in support of his defence.

(3) For the purpose of conducting an inquiry under this section, the Council may –

(a) summon any person to attend and give evidence;

(b) order the production of any book, record, document or thing which has any bearing on the subject of the inquiry

(c) administer an oath through the person presiding at the inquiry.

(4) A summons for the attendance before the Council of a person or for the production to it of any book, record, document or thing shall be in such form as the Council may determine and shall be served either by registered post or in the same manner as it would be served if it were a subpoena issued by a subordinate court.

(5) A person summoned as aforesaid shall be bound to obey the summons served on him and shall be entitled to all the privileges and immunities to which a witness subpoenaed to give evidence before the High Court is entitled.

(6) The Council may terminate any suspension under subsection (1) before the expiry of such period of suspension or cause to be restored to the register any name, which has been removed therefrom."

I will also refer to Section 18 which affords a person whose conduct has been inquired into certain rights of appeal.

Having regard to the provisions of Section 18 this application in some respect is completely premature. Section 18 reads:-

" Any person aggrieved by the decision of Council under this part may apply to the High Court for relief in accordance with the High Court Rule of 1954."

This is obviously a reference to a review *for* it is with reviews that the Rule deals.

"Provided that the High Court shall not set aside the proceedings of the Council by reasons only of an irregularity which did not embarrass or prejudice the applicant in answering the charge of a conduct of his defence."

There is little evidence at this stage of any prejudice caused to the applicant by the procedure adopted by the Council. Most importantly the enquiry is not complete and the council has made no final decision. At this stage too it is not possible to say whether the applicant has been prejudiced by any of the alleged irregularities cited by him

Any person appealing against the decision of the Council shall do so by lodging a Notice of Appeal with the Registrar setting out the grounds of appeal within 14 days of the decision of the Council shall have been communicated to him to lodge an application to the High Court within 14 days after having served the Notice of Appeal on the Registrar.

It is clear that the right of appeal or review arises only after the completion of the enquiry. On this ground alone the application should fail.

A copy of Farmer's letter of complaint was sent to the Applicant and the Respondent immediately in compliance with Section 15(2) informed the applicant of the complaint and requested a response from the applicant, giving reasons why a disciplinary enquiry should not be conducted.

The Applicant promptly replied. The reply in the first place expresses indignation that the Ministry should have issued a press statement referring to the matters, which could be the subject matter of the envisaged enquiry. Whatever cause for complaint the Applicant may have had in this connection, this is not an answer to the matters into which the Respondents are conducting their enquiry.

The Applicant continued in the same letter to make submissions around the point of non disclosure none of which seem to squarely address the question of its alleged failure to mention the non performance of the loans the existence or extent thereof, in its audited reports. I do not consider it necessary or advisable to comment on this decision, but the First Respondent determined to proceed with the enquiry, the applicant's explanations notwithstanding.

On 9 October 1995 the Respondent resolved to conduct a formal enquiry in terms of the Act. The Applicant was so informed and required to attend a meeting of the committee of enquiry, which was convened on 18th December 1995. The applicant represented by his attorney Mr. S. Earnshaw, in limine complained that he was not in a position to prepare for the enquiry on account of what he termed of the vague terms in which the complaint was expressed. This objection was given serious consideration. As a result of this the tribunal postponed further hearing initially to 9th April 1996 and on that date indefinitely thereafter.

Matters were resumed and the next step was that on 17th December 1996 the Applicant was given written notice that the proceedings were to commence on 23rd January 1997. There can be little doubt that this enquiry was to be reconvened was a continuation of that previously referred to. The notification sets out in full particularity the respects in which the applicant and his firm were said to have acted in an unprofessional manner in relation to the audit of and reporting on the financial statements of Swaziland Development and Savings Bank. Attached to this letter were copies of all the relevant documents to which an answer was required. In this way the applicant's initial complaints and vagueness were addressed and met.

The notification includes specific reference to two respects in relation to which the same client, arising from the main charge of failure to qualify the

accounts, in which the applicant and his firm are said to have acted in breach of the code of professional conduct. The applicant complains that these additional charges have been included without the procedure prescribed in Section 15(2) of affording him the opportunity of exculpating himself. The respondents' answer to this is that the "additional charges" are not additional at all but arise from and are bound up with the original complaint of misconduct complained of in Farmer's original letter. In so far as the relief sought in the Notice of Motion reliance on this failure and in so far as the applicant may have a right at this stage to object to the continuation of the enquiry on this ground there is no prejudice to the applicant has been demonstrated and there is no reason why these matters cannot be enquired into simultaneously with the main complaint which was felt. Clearly the matters are bound with each other and are relevant to the complaint.

The form adopted by the Respondents of proffering formal charges against the Applicant is somewhat misleading. The presenting of charges in this manner may tend to suggest that the procedure envisaged in Section 15 is to be adversarial as that of a Criminal court. It obscures the underlying difference, which is that the procedure envisaged is inquisitorial. The council is empowered and required to investigate the complaint. To this end it may call whatever and as many witnesses it considers it may require. These witnesses may be heard in whatever order the Council may determine and there is no provision in the section for cross-examination of witnesses.

As far as the applicant is concerned, the laws of natural justice must be applied. Before any finding is made and acted upon so as to affect him adversely in any way he must be appraised of the matters into which enquiry is to be made and afforded an opportunity of presenting evidence. This right of the person whose conduct is investigated is expressed in section 16(2) as follows

"(2) A person whose conduct is the subject of an inquiry under this Part shall be given an opportunity to appear by himself or with a legal practitioner to answer the charge, and to produce the evidence of any other person in support of his defence."

No mention is made of cross-examination and no mention is made that he into whose conduct enquiry is being made has to be appraised even of what other people may have said. No mention is made of any right to be present when other witnesses are testifying nor, as I have observed, is there any reference to the right of cross-examination.

The present application has been made at the time when the applicant has been called upon to take the stand and answer under oath the allegations in the complaint. In the light of this I will examine the relief which he seeks.

1. In the first place he seeks an order declaring that the procedure adopted by Council chaired by the 3rd respondent and established in terms of Section 15 of the Accountancy Act is *ultra vires* and constitutes unfair administrative justice. The point is that on or about 17th December the additional charges enunciated in the 2nd respondent's letter that date are *res nova* in respect of which he was not given an opportunity, as contemplated in section 15 (2) to give reasons why the enquiry should not be conducted. The answer to this is given by the respondent and it is that the unduly close relationship between the bank and the Applicant as its auditor is associated with the failure to report properly in respect of the suspect loans

2. The applicant also complains that the respondents allowed the presence of independent attorneys appointed by them, and were influenced by such attorneys in their procedural decisions. A consideration of the terms of the section will show that in the first place the commission of enquiry and its constitution are prescribed. The description is that for the purpose of conducting any enquiry by the council in terms of this section the council shall consist of not

less than two of its members together with a law officer appointed by the Attorney General for this purpose. The words are *"not less"*. Once there are two members of the council and the law officer appointed by the Attorney General present who participate in the decision of the enquiry the provisions of this section are complied with. If the council needs to have further people present to assist it or to have people who will lead the evidence or to ask questions on its behalf this is entirely a matter in the purview of the council's powers in terms of the section and no complaint can be made in this regard. As far as the additional charges are concerned I have already dealt with this and shown that what I refer to as additional charges are in fact matters incidental to the main complaint.

3. The next ground is that the council interrupted and limited the cross-examination conducted by the applicant's attorney Samuel S. Earnshaw. The witness, Bill Farmer was considered irrelevant. This means that the council did not contemplate relying on his testimony on which to base their findings. Farmer was merely the person who on behalf of the government brought the matter to the attention of the Council. Whether the applicant has in fact got a right to cross examine is open to doubt but in any event before any complain can be heard by this court the enquiry must be completed and there must be a finding adverse to the applicant. Based on the untested testimony of Farmer. It is open to the commission to recall Farmer if relevancy of his evidence is shown The applicant cannot on this ground avoid giving evidence before the council when called upon to do so.

The procedure adopted in all these respects is neither ultra vires nor can it be said to be unfair administrative justice.

The second prayer is for a declaration that, " the completion of the enquiry chaired by the 3rd respondent into complaints made by the applicant has been

unreasonably delayed and that the continuation thereof would constitute unfair administrative justice."

There is no substance in this at all. It is true that the enquiry has dragged on for years. This is not entirely the fault of the council but the matter, which is being investigated, is one, which is alive to day as much as it was in 1996. The parlous financial position of the bank remains unremedied and the causes therefor undetermined.

There is no reason why the passage of time should render the enquiry unfair. Whether the passage of time is unreasonable or not, it is and remains the statutory duty of the Council to make and complete an enquiry. It is not for the applicant to complain that the matter had been delayed. The continuation of the enquiry does not in my view constitute unfair administrative justice.

The third prayer is for an order interdicting the respondent from proceeding with the enquiry in terms of section 15 of the Act into the charges brought against the applicant in terms of the 2nd respondent's letter dated 17th December 1996. There is no reason why Council's power should be circumscribed in this manner and the applicant is not entitled to an order in those terms.

The forth prayer is an order calling upon the respondents to show cause why the rulings of the tribunal referred to below, should not be reviewed and corrected or set aside.

Once again it seems to me that this application is premature having regard to the provisions of section 18.

The decision referred to are: -

1. That the decision that the original complaint made by Bill Farmer was no longer relevant and that Earnshaw was precluded from cross-

examining Farmer on such complaint. This as I say this is really a matter to be decided after the enquiry has come to some conclusion on the matter. This is clearly an interim order and it is open to the applicant at any stage before the proceedings are closed to lead whatever evidence he may think will support his case. That would include, recalling Mr Farmer.

2. The decision and ruling of the tribunal to direct the applicant to adduce evidence prior to the tribunal having heard all charges against the applicant including the evidence in support thereof. This is a prayer which clearly overlooks the inquisitorial nature of the proceedings and the right of the council to pursue its enquiry in whatever manner it sees fit and to hear whatever witnesses it wishes to hear in whatever order it decides. There is no right to the applicant to dictate when his evidence should be heard.

As I have said the proceedings have to be in accordance with the *audi altered parted* rule and in accordance with the rules of natural justice. But the rules of natural justice do not dictate in what order evidence is to be heard.

There is also the question relating to the third to fifth respondents being requested to recuse themselves. There is no basis for attacking this decision and although there is a record which discloses that one or more of the members did become impatient with the delays which were occurring and the failure of the commission to be able to proceed with this enquiry. That in itself does not show bias and does not show any reason why one or other or any of the respondents should recuse himself.

For these reasons apart from its prematurity, and in addition thereto the application is refused with costs.

S.W. Sapire, CJ