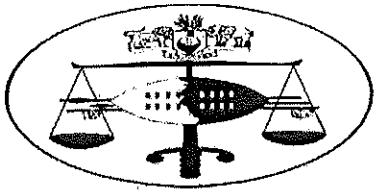

IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 1370/2022

HELD IN MBABANE

IN THE MATTER BETWEEN

NDALLAHWA AND COMPANY (PTY) LTD	**APPLICANT**
AND	
ESWATINI INSTITUTE OF ACCOUNTANTS	**1st RESPONDENT**
THE ATTORNEY GENERAL N.O.	**2ND RESPONDENT**

NEUTRAL CITATION:	**NDALLAHWA AND COMPANY (PTY) LTD VS *ESWATINI INSTITUTE OF ACCOUNTS & OTHERS (1370/2022) SZHC – 174 [23/08/2022]***
CORAM:	**B W MAGAGULA J**
HEARD:	**04/08/2022**
DELIVERED:	**23/08/2022**

SUMMARY: *Civil Law - Urgent application by an audit firm to be reinstated to the register of audit firms in Eswatini – Provisions of the Accountants Act of 1985 read together with the Provisions of the Accountants (Amendments) Act, 2011, considered – The Administrative Law Principle of ultra vires and audi alteram partem considered.*

Interpretation of the term 'member' in the Act and Auditor or registered Accountant in terms of Section 6 (3) and 6 (2) respectively considered. Applicant does not have an auditor working in it's employ - cannot have a locus to bring the application before court, 1st Respondent's point in lime upheld. Currently, no registered auditor is in the employ of the Applicant. It would therefore contravene Section 6 to re-instate the Applicant as an audit firm, when it's composition is without a registered Auditor in terms of Section 6 of the Accountants Act of 1985.

JUDGMENT

BACKGROUND FACTS

[1] The Applicant is Ndallahwa and Company (Pty) Ltd, it is a company registered and incorporated in terms of laws of the Kingdom of Eswatini. Amongst its services it practices as an audit firm. It has its principal place of business at Barcamrick Building, office no. 2, Louw Street Manzini in the District of Manzini, Eswatini.

[2] The first Respondent is Eswatini Institute of Accountants, a statutory body established in terms of Section 3 of the Accountants Act, 1985 having its offices at Lot 218, Nuir Towers, Somhlolo and Mdlanya Street in Mbabane.

[3] Cited also is the Attorney General, in his official capacity as such, as the 2nd Respondent. It is not immediately clear to me why the Attorney General is a party in these proceedings. During one of the court hearings, I enquired from Applicant's counsel, as to why has the Attorney General been cited? The answer given that the Applicant was being careful. It is also not clear to me what that means. More especially since the Rules are explicit as to who should be cited in court proceedings. This include parties that have an interest in the matter or against whom orders are sought. It does not readily appear that the Attorney General or the government of Eswatini has an interest in this matter. Neither an order is sought against the government.

[4] The Applicant approached this court on a certificate of urgency. Other than the usual prayers relating to urgency in essence the Applicant seeks the following prayers;

4.1 That the conduct by the 1st Respondent of removing the Applicant from the register of audit firms on the 11th July, 2022 be hereby declared as unlawful and contrary to the Accountants Acts of 1985;

4.2 That the Applicant's removal from the register of audit firms be uplifted and/or set aside;

4.3 That the Applicant be allowed to trade and/or carryon business as an audit firm pending finalization of these proceedings;

4.4 That the 1st Respondent retracts the press notice which appeared in the Times of Eswatini on the 12th and 13th July, 2022 and that the Respondent be directed to issue out a retracement in both the Times of Eswatini and Swazi Observer;

4.5 That prayer 1, 2 and 5 operate with immediate and interim effect from the first date of enrolment pending finalization of the matter;

4.6 That a *Rule Nisi* be hereby issued calling upon the Respondents to show cause why prayers 1, 2, 3, 4, 5, 6, 8 and 9 should not be made final.

4.7 Costs of suit at attorney and own client scale as against the 1st Respondent.

[5] The Respondent is opposed to this application and has filed an answering affidavit through it's Executive Director, Barnabas Dlamini.

[6] After Applicant had filed it's replying affidavit, on the next hearing date which was on the 28th July 2022, the 1st Respondent applied for leave to file a further affidavit. The reason advanced was that the Applicant had raised new issues in it's replying affidavit.

[7] I will revert to the detail of the alleged new issues later in this judgment. What is relevant for now is that the court allowed the filing of the further affidavit and also gave leave to the Applicant to respond if need be. This then necessitated that the matter be postponed to the 4th August 2022 for arguments.

THE APPLICANT'S CASE

[8] The application is by and large a sequel to a notice published by the 1st Respondent in the local press. A copy of the notice is reflected in annexure **"NLA 7"** to the Applicant's application. The notice published is captured as follows;

NOTICE

Notice is hereby given that NDALLAHWA & COMPANY will no longer operate as an Audit firm in Eswatini as from the 11th July 2022 as they do not have an Auditor to sign an opinion.

The firm is removed from the register as from the 11th July 2022.

Barnabas Dlamini

Executive Director

[9] The Applicant's application is premised on the following grounds;

9.1 The manner in which the Applicant was removed from the register of audit firms is appalling.

9.2 The act of removing the Applicant from the register of auditors in Eswatini is contrary to **Section 33 of The Constitution of the Kingdom of Eswatini.**

9.3 The Applicant was not subjected to rules of natural justice in that it was not given an opportunity to plead it's case before the adverse order was meted out against it. Such right is afforded to every person indiscriminately, and it is entrenched in the Constitution's Bill of Rights. Hence, this court must intervene and afford the Applicant redress against the aforesaid violation.

9.4 In light of the alleged procedural flaw, the court need not look into merits of the matter to give redress to the Applicant. But if the court finds that the procedural aspect was not adhered to and as such the unfortunate resolution of the 1st Respondent was

handed down on this basis alone, the decision of the 1st Respondent should be set aside.

9.5 The rights of the staff employed by the Applicant to trade in the profession of their choice has been violated by the 1st Respondent, and such violation is unlawful. In this regard the Applicant has cited **Section 32 (1) of The Constitution**. The Applicant supports it's arguments further by stating that, the shutting down of the Applicant's operation inadvertently means that staff members will be left without a platform to practice their vocation, and that is dentrimental to them.

9.6 The manner in which the 1st Respondent acted, is contrary to the Accountants Act of 1985, particularly Section 50 which addresses elementary stages of what should transpire when one is presumed to be in violation of the Accountants Act. The Applicant further argues that, the aforesaid provision stipulates that the disciplinary powers in respect of charges of professional conduct are given to council. In a nutshell, the Applicant therefore argues that not only was the procedure set out in Section 15 not followed, but the 1st Respondent through its Executive Director usurped the powers of this disciplinary body through the 1st Respondent's Director. The Applicant argues that the person that took the offensive decision, is not the Council but the 1st Respondent's Executive Director. This then means

according to the Applicant, the decision of the 1st Respondent as it stands is *ultra vires*.

9.7 The unlawful act by the Respondent has brought about far reaching consequences upon the Applicant, in that it's good name that the Applicant has accomplished and sustained over a period of 30 years has been unjustly taken away by the 1st Respondent's unlawful conduct.

9.8 The Applicant has also premised it's application on an interdict. Applicant argues that the remedy which can come to the aid of the Applicant is a mandatory interdict. I note though, that the mandatory interdict is not part of the prayers that are sought by the Applicant in it's notice of motion. I will come back to deal with this issue in my analysis and conclusion section of the judgment.

9.9 The Applicant went further to demonstrate it's entitlement to the interdict by pleading the requirements of an interdict. It has stated why it has a clear right to the order that is sought for example. The Applicant argues that by virtue of **Section 33 of the Constitution and Section 16 (3)** of the **Accountants Act No. 3 of 1985**, the Applicant is accorded a right to approach the High Court if a decision has been taken without it having stated it's case.

[10] The Applicant also argues that it has suffered harm to its good name that it has worked hard to achieve over a period of 30 years. Therefore the continuation of the *status quo* will permanently ruin its reputation. The Applicant's clientele is affected by the *status quo*.

10.1 The balance of convenience favors the granting of interim order. The 1st Respondent stands to suffer no prejudice if the interim is granted, yet if the interim order is refused the problems that the Applicant complains about persist, and it stands to suffer prejudice.

10.2 The Applicant avers that she has made an attempt to write to 1st Respondent to explain that the appointment of Dr. Lawrence Sibandze into the Public Service Pension Fund is of no consequence to his signing duties with the Applicant. The Applicant further argues that the aforesaid Dr. Lawrence Sibandze, has himself written to the 1st Respondent attesting to the fact that he can continue to be a resident reviewer and a signing partner of the Applicant. According to the Applicant, the 1st Respondent has regrettable elected to ignore those explanation letters and interventions by the Applicant. The Applicant argues further that even the Applicant's attorneys of record also caused a letter to be issued to the 1st Respondent on the 14th July 2022 demanding that the *status quo* be restored. But the 1st Respondent failed or ignored to heed to this demand. The Applicant therefore

argues that it is left with no alternative remedy, but to approach this court.

[11] In a nutshell, that is the basis of the Applicant's case as per its founding affidavit that is deposed to by Mr. Edgar Ndallahwa, who described himself as the director of the Applicant.

Respondent's Case as outlined in its Answering Affidavit

[12] The 1st Respondent through its answering affidavit deposed to by its Executive Director in opposition to the Applicant's application is as follows in summary;

12.1 The Applicant is in contravention of the Accountants Act of 2011 in that the professional whom it avers is it's resident auditor, Dr Lawrence Sibandze, resigned from the Applicant on the 28th February 2022. As such, the Applicant has failed to demonstrate before court that it has a resident auditor in it's employ.

12.2 Mr Edgar Ndallahwa the deponent to the founding affidavit, is not a registered member of the 1st Respondent as an auditor, hence the Applicant has been without a managing and or signing partner in excess of a period of 4 months.

12.3 Mr Edgar Ndallahwa who has deposed to the founding affidavit of the Applicant, does not have a *locus standi* to operate the audit

firm, in the absence of resident signing partner who qualifies as an auditor.

[13] The Applicant's order declaring that the removal of the Applicant from the register of the audit firms is unlawful and not sustainable in the circumstances, as it seeks to contravene the law.

[14] The Applicant is in contravention of **Section 27 (1) (d) of the Accountants Act** which states that no person who is registered as an auditor shall practice under a firm name or title unless on every letter head bearing such firm or title appears his present fore names or initials thereof or his present full surname.

[15] The letter dated 13th June 2022 written by Applicant to the Respondent signed by Mr Edgar Ndallahwa, is in contravention of the **Accountants Act No.5 of 1985** specifically **Section 14 (1) (a)**. It states that only a person who is registered as an auditor, shall notify the counsel (1st Respondent) for whom his firms act as an auditor or in respect of any change in constitution of such a firm within 21 days after the date which such change takes place.

[16] The 1st Respondent did not cause the Applicant to cease all operations. But rather that it will not operate as an audit firm, as such the 1st Respondent insist that it has not hamstrung the Applicant to provide the other services as appearing in its profile. It can still continue to provide accounting services, as

the Applicant's director is currently registered as a registered accountant. Applicant can still continue to provide business valuations and secretarial services amongst other things.

[17] The Applicant as a matter of procedure, could not be given a hearing in the absence of a full time resident signing partner. It is that professional, to whom misconduct applies to, who should ordinarily be given a reasonable opportunity of exculpating the Applicant in writing and to produce such written evidence against it as it may desire. The Applicant therefore argues that, other preliminary stages could not be adhered to in the circumstances. Due to the fact that there is currently an absence of an auditor in the Applicant's employ. As such, there can be no hearing to address the cause of the complaint.

[18] The 1st Respondent further argues that Applicant has mistakenly made reference to Section 15 and Section 16 of the Accountants Act of 1985, which makes reference to the word *"person"* in respect of matter for procedure upon enquiry by the council. The 1st Respondent rebutts this argument by stating that the Accountants (Amendment) Act No. 18 of 2011, has limited the enquiry in the above sections relating only to a *"member"* of the 1st Respondent.

[19] The 1st Respondent further contends that the change in the statute from reference to person to a member, means a person registered in terms of Section 9 of the Act. This therefore means that Mr Edgar Ndallahwa cannot be

reprimanded or suspended nor have a sanction imposed upon him in terms of the Act, because he is not admitted as an auditor of the firm.

[20] The 1st Respondent did not act *ultra vires* as the Applicant suggests, but merely removed the Applicant as an audit firm, as there was no registered member in the firm who could answer to any inquiry which would be addressed as an auditor. The 1st Respondent further argues that the Applicant's very own letters to it, are testament to this as they are neither signed by an auditor nor bear the initials of a managing and or resident partner as is required by the Act. In a nutshell, the 1st Respondent argues that there is no managing partner in the Applicant's employ upon which a remedial action can be taken nor a sanction imposed.

[21] The above Honourable court would be acting *ultra vires* if it were to grant the orders as prayed for by the Applicant, directing that the Applicant be restored to operate as an audit firm. This according to the 1st Respondent is because this is a privilege that the Applicant in terms of the Act does not possess, as there is currently no auditor registered as such under the firm. As such the Applicant cannot seek relief, which is in contravention of the law. As such due to the Applicant's lack of *locus standi* such a relief cannot be enforced.

[22] The issue before court is not a question of a disciplinary matter to be dealt with in terms of the Act. The issue is a question of existence or constitution of the Applicant. The 1st Respondent argues that, an audit firm can only exist

and operate if there is an auditor qualified and admitted as an auditor in terms of the law. Therefore, the question that the Applicant has failed to address is whether the firm had an auditor at the time the 1st Respondent published the notice removing it from the register, and to then demonstrate to the court who that auditor is.

[23] The 1st Respondent denies that it has caused negative aspersions to be cast against the Applicant. Such negative impression existed long before the notice removing it from the list of registered audit firms was published. The 1st Respondent demonstrate this by stating that in a letter dated 5th October 2021, Dr. Lawrence Sibandze who at the time was the firms resident auditor, wrote to the 1st Respondent to report that the Applicant was in breach of the Act by the act of Mr. Edgar Ndallahwa of signing audited financial statement in respect of some clients, yet he was not a chartered accountant nor a practicing chartered accountant. This act was on its own a contravention of Section 12 of the Accountants (Amendment) Act of 2011.

[24] The Applicant has been reported to the Eswatini Royal Police Service and criminal investigation are currently under way under **Case No NBRSSI; - 6621/2021.**

[25] The Applicant has no clear right to continue operating as an audit firm in light of the demonstrated contraventions of the Act, which regulates the profession of Accountants in the Kingdom of Eswatini.

[26] The Applicant is not in good standing as the 1st Respondent is in possession of an external audit report dated 10th September 2021, which was made by the **Zambia Institute of Chartered Accountants (ZICA)** and the Applicant is aware of this. In the said report, the **ZICA** concluded that the Applicant had failed to demonstrate that it was in compliance with the relevant international standards on auditing, such that the opinions issued were not fully supported by the work performed and recorded.

[27] The 1st Respondent has a duty to protect the public and accounting profession accordingly. As such, the publication of the notice was in the furtherance of its function as such and the Applicant cannot interpret such publication as an act of tainting its public image.

[28] The Applicant was advised well ahead of time and given adequate notice that it will be removed from the register of audit firms on a specific date, for failure to comply with the provisions of the act. As such, the 1st Respondent denies that the matter is urgent because the firm should not even exist due to the absence of a member registered as an auditor duly practicing under the Applicant's name.

[29] The Applicant cannot rely on the infringement of Constitutional liberties when and if granted the relief sought. The orders will be incapable of enforcement. The 1st Respondent argues that this matter is not ripe for determination due to the fact that if the 1st Respondent were to revoke its

decision, the Applicant would not have an auditor to carry out the work of audit firms.

[30] The Applicant has shown elements of dishonesty, in that it's insists that Dr. Lawrence Sibandze has been engaged by it, and that the board of Public Service Pension Fund has endorsed his appointment. Yet, the said Dr. Sibandze has denied this and specifically stated that the board of the Public Service Pension Fund has not sat, ever since he was appointed in its employ.

[31] In a nutshell, the above summarizes what the 1st Respondent's case is. As it is permissible in the Rules of court, the Applicant exercised its right and filed a replying affidavit to the 1st Respondent's answering affidavit.

Applicant's Replying Affidavit

[32] The highlights of the Applicant's affidavit are as follows;

32.1 The Applicant emphasized in its affidavit that the Respondent does not seem to deny that it failed to constitute an enquiry as per the provision of the statute. Applicant retaliated that the non-compliance with the disciplinary procedure of members is the very essence and basis of the procedural irregularity complained of.

32.2 The Applicant further aver that when it moved the application it was not aware that there was an amendment to the enabling statute in 2011. Hence, it only came to its knowledge after the institution of the proceedings that there was such a legislation. The 2011 Act vests the

disciplinary powers with a special tribunal established by the Minister of Finance. Despite the provisions of the Amendment Act, the Applicant argues ferociously that, this does not change its position and in fact it buttresses it. In that, the 1st Respondent exercised powers which it did not have in terms of the enabling statute, and as such Applicant re-iterates that 1st Respondent acted *ultra vires* and any pronouncement emanating from such conduct must as a matter of law, be set aside for lack of legal authority.

32.3 The 1st Respondent further argues that in light of this new development, the Applicant's case was now two fold; firstly, of non-compliance with procedure and the fact that fundamental principle of *audi alteram partem* was not adhered to before an adverse decision was taken. Secondly, the 1st Respondent is not vested with legal authority to take the decision it did.

32.4 The Applicant insists that Dr. Lawrence Sibandze accepted the role of signing partner and he continues to be on the Applicant's payroll in line with his undertaking. To demonstrate that, the Applicant attached to the replying affidavit a proof of payment, purporting to be Dr. Sibandze's salary for the month of June 2022. Mr. Edgar Ndallahwa further denied that he ever held himself as an auditor and or signed off work as an auditor.

32.5 The Applicant further reiterated that it does have the requisite *locus standi* to bring the application before court. It based its argument on form J, which reflects Mr. Edgar Ndallahwa as a director of the Applicant.

32.6 The Applicant further refuted that there is no registered auditor working in the employer of the Applicant and insists that Dr. Lawrence Sibandze is still doing work for the Applicant as a registered auditor. The Applicant took its argument further and argued that there is no requirement that the said auditor should be at the helm of the audit firm. In that regard, the Applicant attached a notice of appointment which was apparently sent to the 1st Respondent on the 13th June 2022 and 11th July 2022.

32.7 Mr. Edgar Ndallahwa justified the non-inclusion of his forenames or initials on the Applicant's letter head, on the fact that he is not an auditor. As such, his name was not supposed to be reflected in the firm's letter head.

32.8 The Applicant repeated that the 1st Respondent did not treat it fairly as its case is similar to the case for one Mr. Msibi. In as much as he is employed by the University of Swaziland, but he practices as an independent auditor. The argument being that there is nothing wrong with Dr. Sibandze being employed full time at EPSPF and retaining his role as an auditing partner at the Applicant's undertaking at the same time.

THE LAW APPLICABLE

Declaratory Order

[33] Taking into consideration that one of the prayers sought[1] pertains to a declaratory order. The Applicant under prayer 3 seeks an order as follows;

[1] Prayer 3 in the notice of motion.

That the conduct by the 1st Respondent of removing Applicant from the register of audit firms on the 11th July 2022 be hereby declared as unlawful, and contrary to the Accountants Act of 1985.

[34] In essence the Applicant seeks that this court must make a declaratory order to the effect that the contract sought to be declared as contrary to the specific law as aforesaid. (The Accountants Act of 1985). This then means the legal basis that informs the prayer is hinged on the 1985 legislation.

[35] None of the parties addressed specific arguments towards this issue of a declaratory order. Be that as it may, I find it prudent to set out what the law is pertaining to this area of its requirements the law.

[36] One of the requirements of a declaratory order, is that the party must have an existing, future or contingent right or obligation. Declaratory judgments play a large part in private law and are particularly a valuable remedy for settling disputes before they reach a point where a right is infringed.[2]

[37] The essence of a declaratory judgment is that it states the rights or legal position of the parties as they stand, without changing them in anyway; though

[2] See H.W. R Wade; **Administrative Law** 6TH Edition at page 593

it may be supplemented by other remedies in suitable cases. See **H.R WADE: Administrative Law 6th Edition.**

[38] A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything. To disregard it will not be contempt of court. By enabling a party to discover what his legal position is, opens the way to the use of other remedies for giving effect to it, if that should be necessary. But it cannot be used to litigate matters which are not governed by the law and not justiciable in the courts.

[39] Section 33 of the Constitution of the Kingdom of Eswatini states the following;

RIGHT TO ADMINISTRATIVE JUSTICE

33 (1) ***"A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved".***

[40] The Applicant has also relied on Section 32 of the constitution, hence it also proper to state what the law is in respect of that position; Section 32 of the constitution states as follows;

Rights of Workers

(1) **"A person has the right to practice a profession and to carry on any lawful occupation, trade or business".**

[41] The Applicant's case on the founding affidavit also traverses on Section 15 of the Accountants Act of 1985. The aforementioned;

Enquiry by Council into Charges of Unprofessional Conduct

[42] The Respondent's arguments also touched on Section 16 of the same act the Accountants Act of 1985 and Section 16 states as follows;

1) Subject to this section, the 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, compliant 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; and

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.

2) **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.**

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

4) **The Council may, prior to any enquiry, conduct a preliminary investigation of a person concerning any charge, complaint or allegation of unprofessional conduct made against him.**

5) **For the purpose of conducting any inquiry by the Council under this section, the Council shall consist of not less than two of it's members together with a law officer appointed by the Attorney General for this purpose.**

[43] The Applicant argues aforementioned speaks to the preliminary stages of what should happen when one is charged and/or a complaint is laid against for being in violation of the **Accountants Act**. The Applicant contends that this did not happen pertaining to the Applicant before it was removed from the register of audit firms, which is greatly unfair and peculiar. In Applicant's case, there is no evidence to show that there was a council set up to deal with the Applicant's case as per the dictates of the aforementioned Act. Applicant insists that such an omission further waters down the *bona fides* of the

decision of the 1st Respondent. Further thereto, in the very same Act, Section 16 thereof speaks to the sanctions and also fortifies the assertions made in Section 15 that the charged and/or complained against should be given an opportunity to state his/her case before the inquiry, Applicant argues.

[44] Section 16 states as follows;

"Matters for and procedure upon inquiry by council

(1) A person who has been found after inquiry held by the Council under this Part to be guilty of unprofessional conduct, may be;

(a) Cautioned or reprimanded;

(b) Suspended for a specific period from practicing or performing acts specially pertaining to that person's profession;

(c) Fined, up to maximum as determined by the Council from time to time;

(d) Removed from the register ; or

(e) Sued, in default, in a Court for the enforcement of the Council's Order, or sued for the recovery of any fines or other monies imposed by or due to the Council or Institute.

(Replaced by A.5/200).

(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"

(Attached hereto is a copy of the Accountants Act, 1985 marked annexure "NLA 9).

[45] In it's replying affidavit the Applicant argued that despite the belated discovery of the Amendment Act of 2011, there is still merit in the Application. Section 15 (1) of the Amended **Accountants Act of 2011** states as follows;

> ***There is hereby established a disciplinary committee which is appointed by the Minister which is responsible for enquiry to any charge or complaint on allegations of unprofessional conduct.***

[46] The argument advanced by the Applicant therefore is that the sanction of removing the Applicant was not taken by the disciplinary committee established in terms of Section 15 (1) of the Amendment Act of 2011.

ADJUDICATION

Raising of new issues on the replying affidavit

[47] The 1st Respondent after receiving the replying affidavit applied for leave to file a further affidavit to respond to the alleged new issues that were raised by the Applicant in its replying affidavit. Despite that it is undesirable for an Applicant to raise new issues in its replying affidavit, as the Respondent has a single opportunity to answer[3]. I allowed the application. In any event, the 1st Respondent in my view, elected not to make an application strike out the offending paragraphs. But opted respond to them.

[48] The court is empowered in its discretion to permit the filing of further affidavits. [4] I accordingly exercised that discretion on the basis that no prejudice would be occasioned to the Applicant, as it was also allowed to respond to the further affidavit which was filed by the 1st Respondent.

[49] It is on that basis, that I do not deem it proper that the issue of raising new issues by the Applicant in its replying affidavit should still be considered as a live issue. Those new issues were responded to by the 1st Respondent, after leave was granted.

Relief sought on the notice of motion

[50] Sight must not be lost on what the Applicant pray for in the notice of motion. I find it deserving to recap the nature of the prayer sought by the Applicant.

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[3] *See* Masina & another v Mdluli & others (588/2018) [2019] Ngwane Mills (PTY) LTD vs Swaziland Competitions Commission &4 others Case No. 2589/11.

[4] Reference in this regard is made to Rule 6 (13) of the Rules of court.

[51] Other than the customary prayers related to urgency, in prayer 3 the Applicant has crafted it's prayer as follows;

> *3. That the conduct by Respondent of removing the Applicant in the register of audit firms on the 11th July 2022, be hereby declared as unlawful and contrary to the Accountants Act of 1985.*

[52] What comes out from the above prayer is that the Applicant seeks a declaratory order. The conclusion is made from the wording of the relief sought being that the basis of the declaratory is the conduct of the 1st Respondent of removing the Applicant from the register of audit firms. It is this conduct that must be declared as unlawful and contrary to the Accountants Act of 1985. In administrative law, the advantage of a declaration is that it is an efficient remedy against ultra vires action by governmental authorities of all kinds. If the court will declare that some action, either taken or proposed, is unauthorized by law that concludes the point as between the Applicant and the authority[5]. The import of this statement from the learned author, presupposes that the Applicant must make a case for the offending's conduct to be declared as ultra vires.

[53] Again, the import of this prayer is that the basis of the declaratory order hinges on the contravention of a specific legislation which is the Accountants Act of 1985. The Applicant has conceded in its replying affidavit that it's reliance on the old Act which was amended was as a result of ignorance of the existence

[5] See H. W. R. Wade: Administrative law stated at page 595

of the Accountant Act of 2011. I cannot help but to flag the old idiom that ignorance of the law is no excuse.

[54] In prayer 5 the Applicant seeks the following order;

"5. That the Applicant be allowed to trade/or carry on business as an audit firm pending the finalization of this proceedings;".

[55] By design, the way in which this prayer is framed, is intended to be an interim order of some sort. Why I conclude so, is the interim tone that is inherent in this prayer. It clearly states that "*pending the finalization of this proceedings*". I am sure *"these"* was intended though, instead of this. That makes one to deduce that the Applicant is before court, to seek an order that it be allowed to carry on business as an audit firm, whilst the matter is being determined. When one reads all the prayers, the Applicant has not sought that the 1st Respondent's decision be set aside.

[56] The perusal of the founding affidavit the Applicant points to the direction that the basis for this order, hinges on the fact that the Applicant was not accorded the right to administrative justice, contrary to Section 33 of the Constitution of the Kingdom of Eswatini. The offensive conduct being that the Applicant was not accorded the right to be heard in accordance with the requirements imposed by law. A closer reading of the Section 33 of the Constitution, stipulate that the person must be appearing before an administrative body. The contention in the matter at hand, is that there was no need for the Applicant to

appear in the first place, let alone before and administrative body. The read on being that the "person" who would have appeared, has no *locus standi* in *judicio* to do so. In-fact, the other argument is that the 2011 legislation does not refer to a person, but to a member. I am inclined to agree that the definition of member in the Accountants Act, could only have meant to a member registered as such. Even if Applicant is a corporate entity, that member who practices in the audit firm who should have been called to appear must have been one registered as an auditor. The Applicant is an audit firm. The evidence before me points to the direction that there is no registered auditor practicing with the Applicant who would have appeared before the disciplinary committee in the circumstances.

[57] The requirements as stated by relevant law being that the 1st Respondent contravened Section 15 of the Accountants Act of 1985.

[58] It is proper that a survey of this Section be made. Section 15 states the following;

1. The Council may inquire into any charge or complaint to allegation of unprofessional conduct against a person registered under this act.

[59] In sub-Section 2 further imposes on the Registrar of the Institute to first. in writing, advice the person concerned of the nature of the charge, complaint or

allegation made against him and giving reasonable opportunity of exculpating himself in writing and producing written evidence as he may desire. Even before I consider the applicability of this Section on the order sought by Respondent it is common cause that this Section were replaced by a new legislation being the Accountants Act of 2011. I do not find it prudent to proceed and access the applicability of this provisions when clearly, they are irrelevant as there is a new legislation that has repealed the current provision.

[60] By saying so, does not derogate from the principle that the Applicant is before court having premised its case on the old Act. Be that as it may, in light of the leave to file a further affidavit have been given to the 1st Respondent, I will proceed to evaluate the hybrid arguments made in the replying affidavit of the Applicant.

[61] The issue of the 1st Respondent conduct being *ultra vires* its own enabling statute, is brought for the first time in the Applicant's replying affidavit.[6] With regard to the issue of prayer 2, the Applicant sought to cure its ignorance of the Accountants Act of 2011, by premising its argument for the failure to follow procedure on the part of the 1st Respondent on the flouting of Section 19, 20 and 22 of the Accountants Act of 2011. This again was made on the replying affidavit.

Flouting of Section 19, 20, and 22 of the Accountants Act of 2011

[6] See paragraph 2 at pages 121 to 122 of the book of pleadings - paragraph 32.2

[62] The Applicant has argued strenuously that as part of the basis why the Applicant's removal from the register of audit firms must be uplifted and set aside, is that Section 19, 20 and 22 of the Amendment Act has been flouted.

[63] Section 19 of the Act, states as follows;-

Powers of the Disciplinary Committee

19. (1) if after due inquiry the Disciplinary Committee determines that:-

(a) a member whose conduct is the subject of its enquiry had been guilty of professional misconduct;

(b) it would be contrary to the public interest to allow the member to continue to practice as such because of any mental or physical disability; or,

(c) the member is not guilty of professional misconduct and is not suffering from any mental or physical disability which would affect that members' ability to practice,

The Disciplinary Committee shall recommend to the Council that the member be:-

(i) Cautioned or reprimanded;

(ii) Suspended for a specific period from practicing or performing acts specially pertaining to that member's profession;

(iii) Fined, up to a maximum as determined by the Council from time to time;

(iv) Removed from the register; or,

(v) Declared innocent of the allegations.

(2) If the subject matter of an allegation of professional misconduct also constitutes or is likely to constitute grounds for criminal proceedings, the Disciplinary Committee may in consultation with the Council, postpone its consideration of or decision of the matter until such criminal proceedings have been finalized.

(3) No civil or criminal proceedings against a member shall be constructed as precluding any disciplinary proceedings under this Act.

(4) The Disciplinary Committee shall inform the Registrar and the Council and the Council within fourteen days of any recommendation made under this section.

[64] The Applicant's argument in relation to the flouting of this section of the Act hinges on that it is not the disciplinary committee that exercised the powers to remove it from the register, but it is the Executive director of the 1st Respondent. As the Act correctly state, the powers to enquire are vested in the disciplinary committee. The composition of the disciplinary committee is accordingly set out in section 15 (1), which includes that the chairperson must

be a person of a high repute. Like the other members, must be appointed by the Minister. Amongst the members, must be a person that has served as a Judge of the High Court or Industrial Court or served as a Law Officer has who practiced as a Lawyer for a period of 10 years. Therefore, the argument is that it is the Chief Executive Officer of the 1st Respondent that effected the removal of the Applicant from the register, not the disciplinary committee as the law stipulates.

[65] A closer reading of the aforesaid provision, especially section 19 (1) (a) of the Act, presupposes that, first, there must be an enquiry. Second, of a member whose conduct is subject to it's enquiry. The problem with the issue before court is that there could not have been an enquiry if the Applicant is not a member. The Act clearly defines who a member is. It separates members into two (2) categories; a registered Accountant and an Auditor. The conclusion here is that, there could not have been a member who could have been disciplined by the disciplinary committee formed under Section 15 (a) if there is no resident auditor practicing with the Applicant at the moment.

[66] Section 12 of the same Act, prohibits against practicing as an Auditor if you are not registered as one. The Act states as follows;

> *"No person who is not registered under Section 9 sub-section 3 as an Auditor and who does not have an office or place of business in Swaziland shall be entitled to practice as an Auditor".*

[67] I therefore find credence in the argument by the 1st Respondent that, the Applicant despite being a company, the deponent to the affidavit in support of the current application before court is Mr Edgar Ndallahwa. He has failed to prove that he has the requisite expertise and qualification to perform the duties of an Auditor in the firm. Alternatively that the Applicant has resident auditor[7] who may not necessarily be a director of the Applicant who may have been entitled to then either seek relief from the above Honorable Court or even appear before the disciplinary committee to be disciplined. He himself could not have been called to appear because he is not a member as long as he is not registered as a member under Section 9 (3), which is the section that refers to professionals that are registered as Auditors.

[68] It is also my observation that the Act expressly states that it is the auditor that must first have an office and a place of business. In the matter at hand, the Applicant is a company but there is no registered member that practices in the Applicant who may have been called and subjected to the processes outlined in Section 19 and against whom the powers set out therein could have been exercised.

[69] I will proceed to evaluate Section 20. It stipulates as follows;

[7] The re reliance on Dr Lawrence Sibandze has turned out to be a big egg splash on eh Applicant's face so to speak because Dr Sibandze has deposed to an affidavit stating that his signing off arrangement pertains to pending work that he had not finished before resigning. He refutes categorically that there is some sort of arrangement that he will be the resident auditor of the Applicant or that he will generally supervise or sign off audit work.

Powers of the Council

20. (1) The Council shall inform the person who lodged a complaint and the member concerned of its decisions within thirty days of the recommendation of the Disciplinary Committee.

(2) The Council may sue, in default, in A Court for the enforcement of the Council's Order, or sue for the recovery of any fines or other monies imposed by or due to the Council or Institute.

(3) The Council may order a person who is or has been cautioned, reprimanded, suspended, removed, fined or sued in terms of Section (1) to pay such reasonable costs and expenses as the Institute may have or likely to incur in connection with such inquiry by the Council.

(4) 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 from the Register.

(5) After an application to the High Court in terms of section 21 has been dismissed or the period during which such an application may be made in terms of this Act has expired, the Council may publish in the Gazette a report of the findings and of any penalty imposed by it at an inquiry held in terms of this Part.

[70] The argument by the Applicant is almost similar to the argument advanced in respect of Section 19. The Applicant argues that the 1st Respondent usurped powers of the disciplinary council by unilaterally effecting the removal of the Applicant as an audit firm from the register. Yet those powers are reserved for the council in terms of the Act. The short fall of this argument is that, the

Section 20 (1) recognizes that the council shall inform the person who launched a complaint and the member (my own underlining) concerned, of it's decision. First, in the matter at hand the person who reported the compliant was the Applicant's own resident Auditor[8]. Secondly, there was no member that the council could have informed because the issue here was not an issue of a member having engaged in a professional misconduct. The issue was a question of the corporate entity being the Applicant, not constituting itself of members registered in terms of the Act. Also, the issue was a non-auditor signing financial statements for certain clients.

[71] The aforesaid Edgar Ndallahwa who appears in annexure **"NLA 15"** is a registered Accountant, who is registered with the 1st Respondent in terms of S 9 (2) not S 9 (3) which relates to Auditors. It is on that basis that I do not see how was Section 20 was flouted.

[72] I will now proceed to consider Section 22. Section 22 states as follows;

Removal from, and restoration to, Register.

22. (1) ***A member who has been suspended or whose name has been removed from the Register under this Part shall not practice as a public accountant and the registration certificate of that member shall be***

[8] Reference in this regard is made to annexure "EIA 4" found at page 90 of the book of pleadings. This letter is in the Applicant's own letter-head dated the 5th October 2021, wherein the Applicant was advising that the audit firm was breaching Section 9 (1) and 12 of The Accountants Act of 1985.

deemed to be cancelled until the period of suspension has expired or until that member's name has been restored to the Register in terms of section 16 (1).

(2) A member whose name has been removed from the Register may make application in writing to the Registrar for the restoration of his or her name to the Register.

(3) The Council shall within, thirty days after the receipt by the Registrar of the application, hold an enquiry to consider such application.

(4) The provisions of sections 18 and 20 (3) shall, in so far as is applicable, apply to such application and enquiry.

(5) The Registrar shall remove the name of any person from the Register on written application made by such person and on proof to the satisfaction of the Registrar that no disciplinary proceedings are being contemplated or have been instituted against such person.

[73] This argument must fail for the same reasons of its reference to a member. I have already opined that the Applicant does not qualify to be member in so far as its current composition does not reflect that there is an Auditor practicing under it who is registered in terms of Section 9 (3). It is on that basis that I am disinclined to uphold the argument that Section 22 has been flouted.

First Respondent's action being ultra vires

[74] The other question that the court must determine which forms part of the main argument by the Applicant is that the manner in which the 1st Respondent was removed from the register of audit firms was unlawful. As such the 1st Respondent acted *ultra vires*. He who has a right to sue in an action is said to have a *locus standai,* in such action and vice versa. The opposing Respondents have placed the Applicant's *locus standai* squarely into dispute. The test is whether the Applicant has a direct personal interest in the suit to be considered in his course. In **Minister of Safety and Security Vs Lupacchini and others [2015] JOL 33825 2** connotations of the expressions were aptly identified. It was well said that in it's primary sense it refers to the capacity to litigate or that is the capacity to sue or to be sued. It was correctly pointed out that towards the capacity to litigate is of course not the same as the capacity to act there is usually a close correlation between them. In it's secondary sense the expression denotes whether a person has a sufficient interest in the subject matter of the case to be allowed to bring or defend the claim.

[75] This argument is actually related to the previous one, in the sense that the court must first ascertain who should have been subjected to the disciplinary committee? Is it the Applicant as a company or the auditor that would have been sought to be disciplined and subsequently removed from the register of auditors registered in terms of S 9 (3).

[76] The Accountants (amendment) Act 18 of 2011 in Section 9 defines a member to mean a person registered in terms of Section 9 of the Act. The Applicant bases it's argument on the issue of *ultra vires* on two grounds. First, being that

1st Respondent's Executive director was not the appropriate person to have taken the decision to remove the Applicant from the list of auditors. Second, that in terms of Section 19 there is a procedure that must be followed before an auditor is removed from the register. Which includes the convening of a disciplinary committee in terms of Section 19 of the Amendment Act. Hence, the failure to follow that process deprived the Applicant's right to administrative justice, which directly also flouted Section 33 of the Constitution of the Kingdom of Eswatini.

[77] The 1st Respondent on the other hand, argues *contra* that, the Applicant could not have been subjected to the procedure as set out in Section (1) of the Amendment Act. This section states as follows;

> "***Procedure upon enquiry***
>
> *18 (1) a member who's conduct is subject of an enquiry under this part, shall be given an opportunity to appear by himself or by herself or with a legal practitioner to answer the complaint or allegation and to produce the evidence of any other person in support of his or her defence".*

[78] The 1st Respondent argues therefore that, the Act makes provision for the *audi-alteram-partem* principle against wayward members. The argument is developed further that the Act highlights that disciplinary action can only be taken against registered members of the 1st Respondent for various complains including an allegation of professional misconduct.

[79] The 1st Respondent argues therefore that the above provision of the Act is not applicable to the Applicant because the Applicant is not a member that can be subjected to the procedure as set out in Section 18 (1) simply because the definition of a member applies to a natural person who is qualified as an auditor. Yet the Applicant is a company. Further, the disciplinary committee could not have conducted an enquiry against a company whose only member is registered in terms of Section 9 (2) not Section 9 (3).

[80] In the entire set of papers before me, the Applicant does not dispute that currently there is no auditor who is a member of the 1st Respondent who is in it's employ. What the Applicant argues is that, it has made arrangements for a member to sign off it's financial statements and to basically fill in the void of a resident auditor. Unfortunately, the person that Applicant avers it has made arrangements with, is Dr Lawrence Sibandze. He has completely denied the existence of such an arrangement[9]. What comes out clearly is that he refutes that he is a resident auditor of the Applicant and that he in a position to fulfil the legal requirement as prescribed by the Act. In the face of this denial, the very basis on which the Applicant justifies it's compliance with the law, the Applicant's case fails. If this court would grant the order sought, it would mean the court is countenancing illegality.

[9] *See* the confirmatory of Dr Lawrence Nsibandze at page 84 of the book in paragraph 3.3, where he says; "I am either employed nor engaged by the Applicant in any official capacity as an auditor".....

[81] It is my considered view, that the reference of a member in the Act could not have included a corporate entity that does not have a registered member in it's employ. First, in Section 18 (1) the legislation recognizes that a member should be given an opportunity to appear himself or herself. This depicts gender hence I consider it to be referring to natural persons. Second, there are specific professional qualifications that must be possessed by the member. Those qualifications can only apply to a natural person, it is on that basis that I agree with the 1st Respondent arguments that Section 18 (1) of the Accountants Amendment Act could not have been applicable to the Applicant. If that is the case, then the 1st Respondent could not be held to have acted *ultra vires* when the requirements that are cited are not applicable to a corporate entity as the Applicant. Therefore, it makes perfect sense that if there is no member against whom the disciplinary committee can conduct an enquiry, what is it that the 1st Respondent could have done in the circumstances?

1st Respondent's Function

[82] In terms of Section 6 (1) of the Act, the 1st Respondent's function is to take such lawful steps as it may deem necessary in order to maintain the dignity and status of the profession of accountants and auditors in Eswatini. More pertinently, Section 6.1 (j) is instructive as follows:-

> *"6. Functions of the Institute*
>
> *6.1 (j) Do all things that are conducive or incidental to the attainment of such powers."* (Underlining my emphasis)

Additionally, the learned authoritative writer **C. Hoexter**[10] states as follows:-

> *"As a general rule, express powers are needed for the actions and decisions of administrators. Implied powers may, however, be ancillary to the express powers, or exist either as a necessary of reasonable consequence of the express powers. Thus, what is reasonably incidental to the proper carrying out of an authorized act must be considered as impliedly authorized".* (Underlining my emphasis).

In terms of the Interpretation Act[11] an implied power is defined under Section 10 as follows:-

> *"Implied power.*
>
> *10. (1) Where a law confers a power on a person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing".* (Underlining my emphasis).

[83] The import of the above is that the 1st Respondent has implied powers to do all things and take all necessary actions incidental to realise its functions. This includes removing the firm from the register due to the fact that a complaint

[10] C. Hoexter Administrative law in South Africa (2015) 43 to 44
[11] Act 21 of 1970

cannot be made against a firm that does not have a registered auditor in its employ.

[84] On the total evaluation of the arguments before me, I am inclined to agree with the 1st Respondent arguments. Due to the aforegoing reasons, the Applicant's application must fail and it is dismissed.

Costs

[85] Having ruled that the Applicant's application must fail in it's entirety. The next question to determine is the question of costs at a punitive scale. The Applicant had applied that if it's succeed the application must be with costs. The 1st Respondent rides on the same argument and argues that it had been candid with the Applicant and gave it an opportunity to comply with the provisions of the Act as indicated in various letters of correspondence between the parties. 1st Respondent also argues that the Applicant has made an attempt to abuse court process by seeking to circumvent and to transgress express an provision that a non-Auditor should not practice as an Auditor. In the process, tried to get the Applicant to be registered contrary to the provisions of the law. As such, it seeks the costs to be granted at the scale sought by the Applicant.

[86] In the Supreme Case of **JOMAS CONSTRUCTION (PTY) LTD VS KUKHANYA CONSTRUCTION (PTY) LTD**[12]. His Lordship the Chief

[12] (48/2011) [1211] SZSC 2 (21March 2012)

Justice as he was then the Chief Justice Ramodibedi, at paragraph 17 states as follows;

> *"There are several grounds upon which the court may grant an award of costs on attorney and client scale. The list certainly is not exhaustive. It includes dishonesty, fraud, conduct which is vexatious, reckless and malicious, abuse of court process, trifling with the court, dilatory conduct, grave misconduct, such as conduct which is insulting to the court or to counsel and the other parties".*

[87] In my considered view, I do not think in as much as the court has found against the Applicant that it has litigated dishonestly, frivolously, vexatious, or recklessly. In-fact it has advanced attractive arguments. It is just that they are legally flawed when one properly applies the law to the arguments. Further, as it would appear from the order, the wording of the advert that was published by the 1st Respondent leaves a lot to be desired. It does not appear from the advert *ex-facie* that the audit firm is removed from the register in its capacity as an audit firm and it's free to practice in so far as the other services it offers are concerned. Yet, in the affidavits before court the 1st Respondent states clearly that the removal only pertains to the Applicant in its function as an Auditor. Applicant can still trade as registered Accountants and the other services that it offers. The members of the public may have been confused and misled into thinking that the Applicant has been completely removed from the register, yet it has been removed in so far as audit services are concerned.

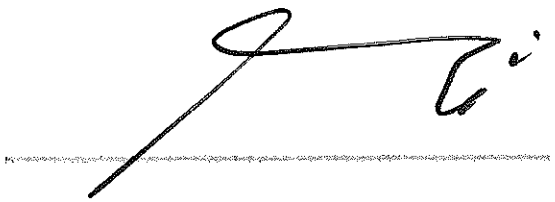
[88] I am also in agreement with the 1st Respondent argument, that the 1st Respondent has a duty to protect the public and accounting profession generally. As such the publication of the notice was in the furtherance of it's function and in the circumstances and absence of member in it's employ, there is no basis for the Applicant to interpret such a publication as an act of tainting it's image. When in fact it's continued existence as an audit firm without an auditor is unlawful. In fact as compared to the publication tainting it's image the publication seeks to protect gullible members of the public.

[89] It is on that basis that as it would appear from the orders hereunder that the court orders that the advert be re-worded and published again so that it provides clarity to the members of the public that the Applicant is removed from the register of the 1st Respondent as an audit firm only.

ORDER:

(i) The Applicant's application is hereby dismissed with costs at an ordinary scale.

(ii) The 1st Respondent to publish a re-worded notice which unequivocally states that the Applicant may continue to trade in respect of other services that are not audit related.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant:	Mr M. Tengbeh
	S.V. Mdladla & Associates
For the Respondents:	Mr L. Ndlovu
	MJ Manzini & Associates