REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

Misc Civil Appli 285 of 2006

REPUBLIC…….....…….....…APPLICANT

VERSUS

THE INSTUTUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA.....RESPONDENT

EX PARTE

JOY VIPINCHANDRA BHATT T/A JV BHAT & COMPANY.....APPLICANT

JUDICIAL REVIEW

q Professional Misconduct - a person acquitted of misconduct,

q Disciplinary Committee - later finding the person guilty of matters – not subject of complaint to Council of Institute of Certified Public Accountants of Kenya

q Whether investigation of matters outside complaint breach of rules of natural justices, and illegal.

q The Accountants Act, [Cap 531, Laws of Kenya]

q Disciplinary Committee can only act upon matters referred to it;

q Disciplinary Committee acts unlawfully if it goes beyond its mandate.

q Guidelines on Professional Ethics and Code of Conduct – not law unless first promulgated as legislation;

q A statutory tribunal cannot delegate its authority or mandate to an outside person, expert or otherwise than in the course of hearing.

R U L I N G

By a notice of Motion dated and filed on 7th July 2006 the applicant herein one **Joy V. P. Vipinchandra Bhat T/A J.V. Bhatt & Company** (the Applicant), sought the following orders against Respondent herein the Institute of Certified Public Accountant of Kenya (the Respondent)-

1. An order of Certiorari to remove into this Court and quash the decision made by the Institute of Certified Public Accountants, the Respondent herein on or about 30th January 2006 to

reprimand the Applicant under section 31(b) of the Accountants Act.

2. An order of Mandamus directed to the Respondent requiring the said respondent to dismiss the complaint lodged against the applicant by the liquidator of Shoewind Industries Limited by his letter dated 4th November 2004."

The Application was grounded upon the statutory statement and the Affidavit Verifying the Facts in the Statement, filed together with the Chamber Summons for leave to bring the said judicial review proceedings and which leave was granted on 5th July 2006.

The Application was opposed through the Replying Affidavit of Caroline J. Kigen sworn on 30th August 2006, and filed on 31st August 2006. The Applicant swore and had, filed on 13th September 2003, a Supplementary Affidavit in response to the Replying Affidavit of Caroline J. Kigen on behalf of the Respondent and disputing the admissibility of the said Replying Affidavit as the deponent thereof Caroline J. Kigen was not a member of the Respondent's Disciplinary Committee (the Committee) and therefore had no personal knowledge of the matters which the Committee may or may not have taken into account in the course of the adjudication of the complaint.

Counsel for the Applicant and the Respondent also filed written submissions and cited many authorities to buttress their respective positions and arguments. The facts are not in dispute and may briefly be summarized as set out under.

The Applicant is a Certified Public Accountant Kenya duly registered under Section 26 of the Accountants Act, (Cap 531, Laws of Kenya). A person so registered is subject to the Disciplinary Provisions of Sections 28-32 of the said Act. Section 29 establishes the Disciplinary Committee, and Section 30 empowers the Committee to make an inquiry into the complaint and make recommendations of its findings under section 31 to the Accountants Registration Board established under Section 11 of the Act. Section 32 of the Act enables the Board to deal with a Report made pursuant to Section 31 of any professional misconduct. The board has made powers under Section 32 including the power to reprimand a member – s.32(1) (b)

The Applicant's case is that he ought not to have been reprimanded because he had been acquitted of the charges or complaints against him, namely:-

(a) Conducting his professional duties as Receiver of Shoe Wind Industries Ltd (in liquidation) ("**Swil**") in a grossly negligent manner in terms of Section 28(1) the Accounts Act (Cap. 531) and,

(b) Failing to be "**straightforward and honest**" in the conduct of his professional services contrary to Statement of the Guide on Professional Ethics and Integrity (hereinafter referred to as "**the said two charges").**

The Applicant's contention that he had been acquitted of the two said charges is borne out by Exhibit "**CJK4**" referred to in para 4 of the Replying Affidavit of Caroline J Kigen, which says-

"**19 THAT the committee upon considering the submissions by the member and his Advocate made findings outlined in a report to the Council of the Institute a copy whereof was forwarded to the member**

by a letter dated 23rd February, 2006"

The said letter of 23rd February 2003, has attached to it an extract of the report forwarded by the Disciplinary Committee to the Council. A copy or extract of the Report had apparently been requested for by the Applicant's Advocate: Under Minute **1:1.4:D/62/04 Joy v. Bhatt Reg. No. 1225** (**Joy Bhatt**

Company and Karlik V. Bhatt & Co.) entitled **findings by the committee** p.17, the Disciplinary Committee concluded as follows:-

"**The member did not set out the basis upon which he relied on the recommendations above. He did not emerge as the ultimate decision maker by relying on information supplied by the debenture holder's agents. Guided by the opinion report prepared by an expert, the Committee concluded that the receiver's conduct fell short of the expected standards of professionalism. The efforts applied by the member to comply, the fact that there was no evidence to suggest that the member was dishonest and the required standard of proof were considered and a unanimous decision that the member was not grossly negligent reached."**

From the above extract, it is clear that the Applicant had been cleared of the two complaints made to the Institute by SWIL, there was no evidence either that the Applicant was **dishonest** or that he was **grossly negligent.** That conclusion was unanimous. The Committee however made another charge – called "**falling short of the expected standards of professionalism.**" The Committee made this charge not on its volition or steam but with the help of "**an opinion and report prepared by an expert**."

The Applicant correctly contends, **firstly** that he was never given notice of a charge called "**falling short of the expected standards of professionalism,**" **secondly**, even if he had been charged with such an offence, he had never been given an opportunity to confront and cross-examine his accuser or **thirdly** to be heard by the Disciplinary Committee. The Applicant concludes, again quite correctly, that he has been condemned without being heard, and the Respondent has been prosecutor and judge rolled into one. The Applicant therefore contends that the action of the Respondent is not merely contrary to and in breach of the rules of natural justice, but is also patently illegal.

Illegality and ultra vires

Let us first deal with the aspect of illegality. Section 28(1) of the Accountants Act, says "**A member of the Institute is guilty of professional misconduct if he commits any of the acts described in subsection 28(1) (a) – (r) which include being guilty of gross negligence in the conduct of his professional duties (s.28 (i) (h), and a charge of not being** "**straight forward and honest**" although not specifically mentioned in the said Section could be regarded as a circumstance in a charge of many of the other instances defined as professional misconduct – such as failure to disclose family interest in a matter for which he was giving an opinion on financial statements {(s.28(1) (j)}.

My understanding of the other instances of professional misconduct do not include or suggest "**conduct short of expected standard of professionalism**". Paragraphs 3 and 4 of the Replying Affidavit of Caroline J. Kigen refers to Section 7 of the Accountants Act, which sets out the powers and objectives of the Institute including **inter alia** power "**to promote standards of professional competence and practice amongst members of the Institute [(s.79(c)], and that pursuant to such objective, the Respondent in seeking to regulate the conduct of its members had promulgated the "Guide to Professional Ethics and the Explanatory Notes to the Guide to Professional Ethics which along with section 28 of the Accountants Act comprise the code of conduct for professional accountants in Kenya"**.

The said Replying Affidavit correctly depone in paragraphs 5,6, and 7 to the establishment of the Committee under section 3 of the Act and to the procedure set out in the Fifth Schedule, and recites that the Committee is not bound by the rules of evidence.

The answer to these considerations is that the Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorized to do by statute. **Firstly** the minister is authorized by Section 41 of the Accountants Act to make regulations – "**prescribing anything which is required to be or which may be prescribed under this Act, and for carrying out or giving effect to this Act**" The Replying Affidavit did not say when, or under what Gazette Notice or subsidiary legislation the minister made legislations called "**a Guide to Professional Ethics and Explanatory**

Notes to the Guide to Professions Ethics" which along with Section 28 of the Accountants Act comprise the Code of Conduct for Professional Accountants in Kenya. The Committee could not therefore apply those guidelines at the same level as Section 28 of the Act. Those guidelines, useful as they are, are not law and have no force of law, unless first enacted into law.

Secondly the Disciplinary Committee has no statutory authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say – "**where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee which shall inquire unto the matter**" and Section 31(1) - on the completion of an inquiry under Section 30 into the alleged professional misconduct of a member of the Institute, "**the Disciplinary Committee shall submit to the Council a report of the inquiry**"…….put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "**conduct short of expected standards of professionalism,"** and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary committee acted unlawfully

Thirdly there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers the Disciplinary Committee or indeed the Respondent, to delegate its

Ad-judicatory functions to unnamed experts. Indeed, there is no provision for post-facto hearing **ex parte** of undisclosed communications over the subject matter of an inquiry to an unknown Expert. Put differently, a statutory tribunal may seek an expert opinion within the confines of a hearing inter partes. It cannot however delegate its authority or mandate to an outside person, expert or otherwise. In point of fact, an expert on ethical conduct would most probably have pronounced himself/herself disqualified to engage in post hearing of a disputed matter and declined to proffer any opinion on the matter, and in disregard of the law.

Fourthly, there is no offence called "**conduct short of expected standards of professionalism"** under Section 28(1) of the Accountants Act. The Committee's finding of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to what Lord Diplock referred to as the tribunal asking itself the wrong questions, and taking into account wrong considerations. Referring to the break through (in matters of Judicial Review) in the **Anisminic vs Foreign Compensation Commission** [1969] I ALL E.A. 203 in the O'Reilly vs Mackman [1982] 3 ALL ER 1124 at p.1129 Lord Diplock said:-

"**The break through that the ANISMNIC made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a "*determination*" within the meaning of the empowering legislation was accordingly a nullity".**

Error of law by a public body is a good ground for judicial review. In **R. vs Barnet London Borough Council ex p. Nilish Shah [1983] 1 ALL ER. 226, Lord Carman** said at p. 240.

"**It is now settled law that an administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in the law."**

So as stated above, the Disciplinary Committee acting as a statutory tribunal can only do that which it is expressly or impliedly authorized to do by statute. In making the adverse finding against the Applicant, the Disciplinary Committee did not act within its statutory powers. In very significant respect it acted **ultra vires** its powers and in breach of its responsibilities. Consequently the Council could not

act on illegality under section 31(1) of the Accountants Act, to either reprimand a member, or reprimand him with a publication of the reprimand in the Gazette, or the cancellation of registration or suspension or a practicing certificate. The Councils' purported reprimand of the Applicant on the basis of an illegal finding is equally illegal and **ultra vires** its powers under section 31(1) of the Accountants Act. An illegal finding can only beget an illegal decision. The Council acted against its own statute by following recommendations of the Disciplinary Committee which patently breached the words of statute, s.28 of the Accountant Act.

OF PROCEDURAL IMPROPRIETY

In order not to lose sight of what the Council had directed the Disciplinary Committee to inquire into in terms of section 30(1) of the Act, I once again set out the complaints against the applicant namely-

(I) Conducting his professional duties as a receiver of SWIL in a grossly negligent manner in terms of section 28(1)(n) of the Accountants Act (Cap 531),

and

(II) Failing to be straightforward and honest in the conduct of his services contrary to Statement I of the Guide to Professional Ethics Integrity"

I have already observed that the Disciplinary Committee found no evidence against the Applicant and absolved or "**acquitted**" him of those complaints by SWILL.

Having acquitted the Applicant the Committee went **suo moto** on an exploration of what it thought, and quite wrongly I should add, were new and legitimate charges against the Applicant, and which it thought again wrongly, arose from the Applicants evidence. These new charges were that:-

(a) The applicant failed to advertise individual items of plant, machinery, motor vehicles, stocks furniture and equipment which "denied a vigorous market the opportunity to competitively fix a price therein;

(b) The Applicant failed to file periodic returns required under the companies Act or to furnish a detailed account of his operations during the period of his receivership and,

(c) Although the Applicant did not hire or pay Mr. Sarjeet S. Channa CPA (K) and Mr. Hitish Bharadia (who were appointed by the Debenture – Holder to conduct an in depth analysis) he (the Applicant) relied on their report dated 14th February 2002 in making the following decisions:-

(i) to advertise the slipper plant for sale in October 2002,

(ii) to obtain a further Ksh.40 million funding from the Debenture holder

(iii) **to dispose of stock described as slow moving stock**.

The Disciplinary Committee on the basis of its consideration of these new issues, came to the conclusion that as a result of relying on information supplied by the Debenture – Holder's agent, "**the Applicant did not emerge as the ultimate decision maker**." The Disciplinary Committee, apparently "**guided by the opinion and report prepared by an expert**" whom the Disciplinary Committee had consulted between the conclusion of the oral hearing and delivery of their other findings concluded that "**the receivers (Applicant's) conduct fell short of the expected standard of professionalism**" and resolved that "**in view of the shortcomings in a few respects of the assignment the member (the Applicant) should be reprimanded in accordance with section 31 (1) (b) of the Accountants Act."**

Several issues arise from the above contention. **Firstly**, according to paragraph 17 of Caroline J.

Kigen's Replying Affidavit it was on the above evidence that the Disciplinary Committee found that there was no evidence to suggest the member was dishonest and the required standard of proof were considered and a unanimous decision that the number was not grossly negligent, reached.

Secondly, the Disciplinary Committee has no power either under the Act, or the Fifth Schedule to take its proceedings out of a formal setting to an expert who was neither a member of the Disciplinary Committee nor a witness at the Committee's deliberations on 16th August 2005 as per the Replying Affidavit of Caroline J. Kigen. **Thirdly** the Respondents letter of November 24, 2005 merely informed the Applicant's Counsel that "**Following the attendance by the applicant and his Advocate before the Committee, it was directed that the matter be referred to an independent insolvency practitioner for an expert opinion to aid the Committee in making a decision. The expert's report is expected to be discussed at a working scheduled for 6th December 2005"**.

The said letter then goes on to say, "**it is anticipated the Committee will then conclude the matter. In this regard, we shall keep you posted after 6th December 2005 meeting".**

There is no averment in the subsequent paragraphs of Caroline J. Kigen's Affidavit that the Respondent reverted to the Applicant's Advocate. Worse, there are no particulars in **MIN.1.1.D/62/04 Joy V. Bhatt Reg. 1225 Joy V. Bhatt and Karlik V. Bhatt**), that a direction was given to refer the complaint or evidence for an expert's opinion. So the question is, who decided or directed to refer the matter to an expert? If the Committee did so, such a decision might be termed as "**ex-judicial**" for an expert's role would only have been useful if it was sought and received within the confines of the inquiry, with the concurrence and satisfaction of the Applicant.

Rule 5(1) (b) and rule 2 of the Fifth Schedule that the Disciplinary Committee is not bound by the rules of evidence, or that the proceeding of the Disciplinary Committee shall be held in camera does not come to the Respondent's succour in the Applicant's accusation against it of procedural impropriety.

What the Respondent ought have done, after having informed the Applicant's Advocate per letter of 24th November, 2005 that the Committee had decided (wherever the direction came from and quite also illegally), to refer the complaint for expert's opinion, is to recall a sitting of the Disciplinary Committee together with the expert, and the expert's report and subject the report to inquiry by the Applicant or the Applicant's Counsel. Having excluded the Applicant and his Counsel from the decision to refer the matter to an expert, the very least the rules of Natural Justice expected would have been a notice to the Applicant of the expert's finding and a request for a response from the Applicant or the Applicants Counsel. In the absence of both notice, to and hearing of the Applicant, the Respondent was not only in violent breach of those cardinal rules of natural justice but was also in a violent and reckless abuse of statutory power, an entirely irrational and perverse decision.

It was a violent breach of the rules of natural justice they are so called because in the absence of some statutory provision as to how the persons who is to decide is to proceed, the law will imply no more than that the **substantial requirements of justice** shall not be violated. The decision maker is not a judge in the proper sense of the word but he must give the parties an opportunity of being heard, before him and stating their case and their view. He must give notice that he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom authority is not given by law. There must be no malversation of any kind. There could be no decision within the meaning of the statute if there was anything of that sort done contrary to the **essence of justice** - that phrase carries what is generally regarded as "**natural justice**" not even the Constitution ousts the principles of natural justice.

These statements have been echoed throughout the last two centuries in such cases as-

1. Leason vs. General Medical Council (1889) 43 Ch.General ch. Div. 366, CA at page 383, by Bowen L.J.

2. **Local Government Board vs Arlidge [1915] A.C. 120** where Hamilton L.J. at p. 130 said of the

phrase "**contrary to justice as an expression sadly lacking in precision**" so it may be and perhaps it is not desirable to attempt to force it into any procrustean bed, but the statements which I have quoted may at least be taken to emphasize the essential requirements that the tribunal should be impartial and that the Medical Practitioner who is impugned should be given full and fair opportunity of being heard **General Medical Council Vs Sparkman[1943] 2 ALL ER. 337**, per Lord Wright at p.343

3. **R. vs City of Westminster Assessment Committee ex parte Grosvenor** House (Park Lane), Ltd [1941]110 LJKB 6, CA.

4. **R. Vs. Deputy Industrial Injuries Commissioner ex - parte Jones** [1962] 2 ALL.ER 430, QBD.

These principles have been applied and re-echoed in a variety of circumstances – **R. VS Industrial Injuries Commissioner ex parte Moore [1965]1ALL ER, 81**, **Exp Taylor of National Union of Seamen [1967], Ch. D, Sabey and Co. Ltd vs Secretary of State for the Environment & others [1978] ALL ER. 586 OBD,** In that very helpful guide, Prof. Fordham Book – **Judicial Review Handbook (3rd Ed.)** para 60 5 Cap 850 – 872, he refers to Lord Morris apt words in **MALLOCH VS ABERDEEN CORPORATION** [1971] LWLR. 1578, 1588F. "**what would be the point of giving some a right to be heard while denying him any knowledge as to what he would be heard about".**

Here at home, we constantly refer to the lucid judgment of Sir Peter O'connor P. in the case of **Hypolito Cassaino de Souza vs Chairman and Members of Tanga Town Council [1961] E.A. 337 at p. 388 and David Onyango Oloo Ongango vs Attorney General** the Nairobi Law Monthly September 1987.

On this ground alone therefore the decision of the Council ought to be quashed. But there is another ground why the decision would be quashed, abuse of Statutory Power, irrationality and perversity.

OF ABUSE OF STATUTORY POWER, IRRATIONALITY AND PERVERSITY

I discuss this point because of the real spectre that the Respondent is determined to convict the Applicant by "**hook or crook**" as Mr Inamdar learned Counsel for the Applicant put it in his written submissions. How else does one explain, the Respondent's taking the extra steps quite outside the inquiry proceedings to seek an insolvency expert's opinion on the evidence already before it, keeping the applicant away from the expert, without disclosing the particulars of the expert, and keeping away the expert report from the Applicant. In the absence of a rational explanation, one must conclude that the decision to refer the inquiry to a party who was not a member of the Disciplinary Committee and thus expand the inquiry outside provisions of Statute can only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power.

In **Republic vs Commissioner for Co-operatives** ex-parte **Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd [1999]I E.A. 245 at p.249 the Court of Appeal said- "It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably".,** " **No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily capriciously or in bad faith".**

Today as Professor Fordham says in his book **Judicial Review Handbook,** (3rd Ed) Para, 51.1 p.751-2 **abuse of power** as well as **bad faith** have fast become the **root concept** that informs judicial review.

CONCLUSION

Whether looked at from the point of view of breach of the rules of natural justice, illegality, abuse of statutory power or sheer irrationality and utter unreasonableness, the finding of guilty and reprimand upon the Applicant was illegal, it is null and void, it means it has no legal effect. In the English case of **BODDINGTON VS BRITISH TRANSPORT POLICE [1992] 2 A.C. 143** delivering his speech from the Woolsack Lord Irvine L.C. said

"**Subordinate Legislation, or an administrative Act is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or which is impugned, is presumed to be good until pronounced to be unlawful, but is then recognized as never having had any legal effect at all.**

Lord Irvine concluded, "**An *ultra vires* Act or subordinate legistration is un lawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever."**

The **latin** used to say **ex nihil nihil est**, nothing can come out of nothing, nor can legality be conferred upon a patently unlawful decision of the Disciplinary Committee either by the Committee, or the Council of the Respondent. In the premises, the Respondent's decision of 30th January 2006 adopting the Disciplinary Committee's findings against the applicant and recommendation to administer a reprimand against the Applicant for failing to meet "**expected standards of professionalism"** is illegal, null and void, and consequently of no legal effect.

The remedy of Certiorari goes to quash the decision of an inferior court, tribunal, person or body of persons, which either acted in breach of the law or in excess of its jurisdiction. As explained at length above, the Disciplinary Committee had no statutory mandate to expand its inquiry and seek opinions from persons who were neither members of the committee or mandated under the Act, or Fifth Schedule to be consulted or to give such expert opinion(s).

There shall therefore be an order of certiorari calling into this Court, and quashing the decision of the Respondent's Council to reprimand Applicant. The same order would also have issued on the grounds of breach of the rules of natural justice, illegality statutory abuse of power as well as the grounds of irrationality and in this case perversity.

The remedy of mandamus does not lie. Mandamus is a command from the High Court to the subordinate court, or body or authority to do that which it has not done as required by law to do. The Respondent has already done what it was by statute required to do, to carry out an inquiry. It has done so, and came to conclusions it did, which have been quashed or nullified by the remedy or order of certiorari.

In the premise, the Applicant succeeds in his Motion of 7th July 2007, the Applicant shall also have the costs of the said motion.

Dated and delivered at Meru this 4th day of April 2008

M. J. Anyara Emukule

JUDGE.