

DAVISON CHIROMBO
versus
PUBLIC ACCOUNTANTS AND AUDITORS BOARD

HIGH COURT OF ZIMBABWE
OMERJEE J AND MUSAKWA J
HARARE, 30 November 2006

Civil Appeal

Mrs J. Zindi, for the appellant
Mr D. Mehta, for the respondent

MUSAKWA J: This is an appeal against the decision of the Public Accountants and Auditors Board (hereinafter called the Respondent) that was communicated to the Appellant on 16 June 2005.

The Appellant is a member of the Institute of Chartered Secretaries and Administrators in Zimbabwe as well as being a registered public accountant. He is also the managing director of Chiro Consultants (Pvt) Ltd who conduct the business of “Accountants ,Company Secretaries, Income Tax Consultants, Computer Services and Executors of Estates”.

The record shows that on 1 August 2003 the respondent wrote to the Appellant advising that it had received a report that Chiro Consultants (Pvt) Ltd had issued three audit certificates to some companies when they were not registered as public auditors. The Appellant was requested to withdraw such certificates and to give an assurance that he would not continue such practice. In a letter dated 29 August 2003, Chiro Consultants (Pvt) Ltd acknowledged receipt of the 1 August letter and advised that the managing director was out of the country and that they had commenced investigations into the matter.

The Respondent received another report to the effect that on 31st August 2003 Chiro Consultants (PVT) Ltd had issued an audit certificate to MM Trading Company (Pvt) Ltd. On 8 October 2003 the Respondent wrote to the Appellant in respect of this audit certificate and asked for a reply to be submitted before 17 October 2003. On 14 October 2003, the Appellant wrote to Respondent confirming that Chiro Consultants (PVT) Ltd had issued

audit certificates to some named companies. The Appellant also enclosed copies of letters he had written withdrawing the audit certificates. The Appellant apologized and stated that some of their accountants were of the view that public accountants could issue audit certificates to non-governmental organizations and private companies. He also gave an assurance that this would not happen again and requested that there be no prosecution. When he was informed about the institution of investigations by the disciplinary committee Appellant replied that he abided by the contents of his letter to the respondent.

Following investigations by the aforementioned committee it was found necessary to charge the Appellant with contravening bye-law 56.6 of the Institute of Chartered Secretaries and Administrators of the United Kingdom Bye-laws of 1999 and the Royal Charter (hereinafter called the ICSA), which makes it an act of misconduct for a member to: “.....*behave, by doing something or not doing something, in a way which might bring discredit on the institute.*”

The Respondent referred the matter to the Institute of Chartered Secretaries and Administrators in Zimbabwe in terms of section 34 of the Public Accountants and Auditors Act [*Chapter 27:12*]. That section provides that each constituent body shall be responsible for the professional conduct of its members in the first instance. The matter was heard before the Divisional Disciplinary Committee which found appellant guilty of the offence charged and ordered that:

- (a) He be suspended from the Institute for two years whilst he continued to pay subscriptions, and
- (b) His practising certificate be withdrawn.

The decision by the Disciplinary Committee was upheld by the International Disciplinary Tribunal in London on 11 August 2004. On 30 December 2004, the Appeals Tribunal upheld the conviction but altered the sentence as follows:

- (a) that Appellant be suspended from the Institute of Chartered Secretaries and Public Accountants and Auditors Board for six months.
- (b) that Appellant pays a penalty equivalent to three years subscription to the Institute of Chartered Secretaries And Administrators And Public Accountants and Auditors Board amounting to \$1455.

(c) that Appellant be issued with a strong letter of reprimand and a warning not to commit a similar offence.

The decision by the Appeals tribunal was upheld on appeal by the Public Accountants and Auditors Board on 1 June 2005.

In his submissions before the Respondent on 14 April 2005 the Appellant raised the issue of the applicability of the ICOSA. However, in the notice of appeal filed with the court on 15th July 2005 the Appellant did not raise that as one of his grounds of appeal. In heads of argument filed on behalf of the Appellant it was submitted that it is unclear whether the Institute of Chartered Secretaries and Administrators (U.K) is a constituent body in terms of the Public Accountants and Auditors Act.

It is my considered view that this matter stands or falls on whether the ICOSA apply within this jurisdiction. I am mindful that the Appellant did not raise this issue in his grounds of appeal to this court. However, a court is entitled to raise such an issue on its own accord. Support for this proposition is found in the case of *Zimbabwe Newspapers (1980) Ltd v Ndlovu* 2000 (1) ZLR 127 (S) in which at page 129 SANDURA JA had this to say:

“The question which now arises is whether the Tribunal was entitled to raise an issue which neither party sought to rely upon, and determine the matter before it on that basis. I am certain that it was entitled to do that. Having discovered that the 1994 code had not been registered, the Tribunal could not be expected to ignore the fact that the disciplinary proceedings conducted against Kalani in terms of that code were a nullity.

That conclusion is supported by the decision in S v Prinsloo 1970 (3) SA 550 (O). The English translation of the headnote of that case reads as follows:

*"Invalid proceedings are by nature void **ab initio** and a court of appeal ought not to hesitate to intervene **mero motu** and set such proceedings aside. It would indeed be unpardonable to ignore the proved fact of invalidity merely because it is not raised in the F notice of appeal, because thereby the court would assure that justice will not be done and would thereby ignore its fundamental duty."*

Subsequently, in Musara v Zinatha 1992 (1) ZLR 9 (H) at 13F-H ROBINSON J, commenting on Prinsloo's case supra, said:

*"Although, admittedly, Prinsloo's case is a criminal case, I consider that the same approach should be adopted by the court in a civil case where, on the papers before it - the more so where those papers seek a declaratory order - an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void **ab initio** on some technical ground would, I agree, be to ignore the court's fundamental duty to see that justice is done which, after all, is the duty which the layman expects the courts to discharge."*

In view of the above observations, the court raised the issue with counsel for the Respondent during the course of the hearing. Mr Mehta, for the Respondent submitted that the ICSA apply in this jurisdiction by virtue of section 3 of the Public Accountants and Auditors Act which provides for constituent bodies. Section 3(1) of the Public Accountants and Auditors Act provides for constituent bodies that are set up for purposes of the Act. It is significant to note that it provides for:

"(a) the Zimbabwe branch of the Chartered Association of Certified Accountants incorporated by the Royal Charter in the United Kingdom;
(b) the Zimbabwe branch of the Chartered Institute of Management Accountants incorporated by the Royal Charter in the United Kingdom;
(c) the Institute of Chartered Accountants of Zimbabwe established by the Chartered Accountants Act [Chapter 27:02];
(d) the Institute of Chartered Secretaries and Administrators in Zimbabwe established by the Chartered Secretaries (Private) Act [Chapter 27:03]
(e) the Institute of Public Finance and Accountancy, a locally incorporated company limited by guarantee."

However, there is no provision for the Zimbabwe branch of the Institute of Chartered Secretaries And Administrators incorporated in the United Kingdom. There is only the Institute of Chartered Secretaries and Administrators in Zimbabwe established by section 3 of the Chartered Secretaries (Private) Act [Chapter 27:03]. For disciplinary purposes section

33(1) of the Public Accountants and Auditors Act provides that the Board may make by-laws which prescribe rules of professional conduct to be observed by registered persons. Subsection (2) provides that each constituent body may make rules governing the conduct of its members who are registered persons provided that such rules shall be consistent with the rules made by the Board.

Further, in terms of section 43(3) of the Public Accountants and Auditors Act the by-laws shall not have effect until they have been approved by the Minister of Justice, Legal and Parliamentary Affairs and published in the *Gazette*. Section 25(3) of the Chartered Secretaries (Private) Act is similarly worded. To govern the professional conduct of members of the respective institutions, there is in place the Chartered Secretaries (Disciplinary) By-Laws, Government Notice 101/1975 and the Public Accountants And Auditors (Professional Conduct) By-Laws, Statutory Instrument 144/1997. Both were approved by the Minister. The Public Accountants and Auditors Act also has provisions for criminal offences by unregistered persons.

The Chartered Secretaries (Private) Act, the Public Accountants and Auditors Act and the respective subsidiary legislation have no provision for incorporation of the ICSA. It follows then, that the ICSA under which charges were preferred against the Appellant do not apply within this jurisdiction. Therefore the wrong charges were preferred against the Appellant and consequently the proceedings become a nullity.

Accordingly, in view of the above findings it is ordered that the conviction and sentence under the Institute of Chartered Secretaries and Administrators Charter and Bye-Laws of the United Kingdom be and is hereby set aside with costs.

OMERJEE J: agrees

Kantor & Immerman, appellant's legal practitioners

Atherstone And Cook, respondent's legal practitioners