

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MC NO. 326 OF 2016**

**IN THE MATTER OF SECTION 36 OF THE JUDICIATURE ACT AND JUDICIAL  
REVIEW RULES**

**AND**

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS**

**UGANDA NATIONAL CHAMBER OF COMMERCE.....APPLICANT**

**V**

**ATTORNEY GENERAL.....RESPONDENT**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**RULING**

The applicant through Kampala Associated Advocates sought the following orders in judicial review.

1. A declaration that the directions by the Minister of Trade, Industry and Cooperatives in respect to the affairs of the applicant including the management, constitution and its elections are unjustifiable and unlawful.
2. An order of certiorari against the Minister quashing her decision /directive to cancel the applicant's Annual general meeting/Elections.
3. An order prohibiting the Minister from implementing the said impugned directive/decision.

4. A permanent injunction barring the Minister from interfering with the affairs and management of the applicant or repeating the impugned actions.

The respondent opposed the application through the affidavit in reply of Elisha Bafirawala.

Mr . Augustine Idoot of Kampala Associated Advocates appeared for the applicant while the respondent was represented by Mr. Richard Adrole SSA.

Both counsel filed written submissions that I have carefully considered.

### **The applicant's case**

It was the applicant's case presented through the affidavit of Olive Kigongo that she is the President of the applicant company which is a private company limited by guarantee and regulated by its memorandum and Articles of association. According to the deponent, the applicant issued a notice of invitation to delegates to the 38<sup>th</sup> Annual Delegates Conference for the 16<sup>th</sup> December 2016 where elections for positions in the company were to be conducted.

By letter dated 24.11.2016, the Permanent Secretary to the Ministry of Trade, Industry and Cooperatives invited the applicant for a meeting on 29.11.2016 which the applicant's executive declined to attend principally because the applicant was a private legal entity not subject to the control of the ministry. The decision not to attend this meeting was communicated by the applicant's acting Secretary General in a letter dated 28<sup>th</sup> November 2016.

Subsequently on 30.11.2016, the Minister issued a statement cancelling the Annual Delegates Conference and the planned elections until all concerns of stakeholders are addressed, among other directives.

The deponent complains that the Minister acted in excess of her powers .

### **The respondent's case**

The affidavit in reply does not dispute the letter by the Permanent Secretary and statement issued by the Minister but avers that it was the applicant's concerns for security raised in a letter dated 27.10.2016 that prompted the Minister's responses.

The respondent avers that the Minister exercised her powers both in public interest and by virtue of the powers conferred by the National Trade Policy.

Furthermore, that the Minister acted on information provided by Uganda Registration Services Bureau dated 25.11.2016 which is charged with the responsibility for supervision of companies under the Companies Act. The Registrar General in that letter required the applicant to furnish him with the members register as there was none on record. The last date for submission of this register was 30.11.2016.

The applicant framed two issues for trial

1. Whether the Minister of Trade, Industry and Cooperatives has powers to issue the impugned directives against the applicant.
2. Whether the applicant is entitled to the reliefs prayed.

## **The law**

The authority of **Mugabi Edward v Kampala District Land Board High Court MC. No. 18 of 2012** cited by counsel for the applicant gives a clear exposition of the principles for the court to consider before granting prerogative orders in judicial review. In that case, Justice Bossa as she then was quoted a text book on **Administrative Action by Hilary Delony Maxwell** at page 5 and 6 where the author states as follows:

*'Judicial review is not concerned with the decision itself but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and jurisdiction is exercised in a supervisory manner. ..not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.'*

**Halsbury's Laws of England 4<sup>th</sup> edition** vol. 1(1) page 100, states that

*'Judicial review is designed to prevent the excess and abuse of power by public authorities . In most cases powers of public authorities are conferred by statute. It is therefore statutory power that judicial review is primarily concerned with.'*

### **1. Whether the Minister of Trade, Industry and Cooperatives has powers to issue the impugned directives against the applicant.**

The thrust of counsel for the applicant's submissions is that the Minister acted illegally when she issued the impugned directives. He submitted that the applicant is a private company in which the government is not a

shareholder and cannot be the subject of its control. Furthermore that the Companies Act does not confer any authority on the Minister and that Ministerial power is either vested or lacking but cannot be assumed.

It was further counsel's submission that the National Trade Policy is silent on the Minister's authority.

The gist of counsel for the respondent's submissions is that the Minister acted in public interest to intervene in the affairs of the applicant. He cited article 43 (2) of the Constitution in support.

That the Minister's action was in response to the request for support by the chairperson of the applicant and to information provided by URSB on the absence of a members' register .

### **Resolution of the issue**

It is not disputed that the applicant is a company limited by guarantee and regulated by the Companies Act. The heading to the memorandum of association describes the company as one limited by guarantee and with no share capital. In para. 5 of the memorandum, it is stipulated that in the event of winding up, each ordinary member undertakes to contribute not more than 5,000/ for payment of debts and liabilities.

The applicant is described in the affidavit in support as a private company . Whether a company is a private company or a public company is a matter of law.

A private company is defined by section 5 of the Companies Act 2012 as

1. A company that restricts the right to transfer its shares and other securities
2. Limits the number of its members to 100 not including its employees.
3. Prohibits invitation to the public to subscribe for any shares or debentures.

Under section 6, a company that does not fall under section 5 is a public company.

Para. 4 of the articles of association of the applicant provides that the number of members shall be unlimited.

By para. 6 of the articles of association, membership is open to:

- Individuals who operate a business registered with the Registrar General; pay government taxes; have business premises and are eighteen years old or above.
- Commercial , industrial or mining firms, partnerships;
- Cooperatives ; private companies with limited liability; public companies and statutory bodies conducting business in Uganda and foreign companies that have established place of business in Uganda.
- Members who pay a one time registration fee of 10,000/ and an annual subscription fee of 100,000/. These have voting rights but not eligible for election to executive office or directorship.

By virtue of para. 6 of the articles which gives the company a wide membership base to include foreign companies, and the non limitation on the number of members in para. 4 of the articles, as well as the invitation to members of the public to become members by payment of subscription fees, the applicant is a public company by operation of law.

### **The impugned Minister's directives**

On 27.10.2016, the applicant wrote to His Excellency the President that although she expected 200 delegates to the conference scheduled for 16.12.2016, she was concerned that with a membership of over 10000, more would attend on the invitation of Mr. Rugasira. She therefore requested that HE intervenes and declares the move to invite thousands of people contrary to the Applicant's constitution and finally sought guidance on how best to guarantee security of the delegates and successful election of office bearers.

Prompted by the applicant's concerns and concerns of intending contestants, the Permanent Secretary of the Ministry of Trade, Industry and Cooperatives called stakeholders including the applicant and intending contestants for a meeting on 29.11.2016 in a letter dated 24.11.2016.

On 28.11.2016, the Ag. Secretary General of the applicant wrote to the Permanent Secretary that the applicant would not attend the meeting which the writer deemed contrary to the applicant's 'instruments'.

The meeting called for 29.11.2016 by the Permanent Secretary went as planned .

On 30.11.2016, the Ministry issued a press statement on the forthcoming National Chamber of Commerce and Industry elections in which the Minister noted that she had received a petition from different stakeholders on the upcoming elections .

The release reads in part as follows:

*' as a Ministry responsible for Trade, the National Trade Policy charges me with responsibility of ensuring an enabling and conducive trade policy and regulatory environment for business growth and competitiveness.*

*Yesterday 29<sup>th</sup> November I convened a meeting of all stakeholders including : executive members of the chamber, representatives of business community and relevant government agencies in order to review their concerns with respect to the forthcoming elections of the chamber.*

*During the meeting, members raised issues on the election process including gaps in the Constitution, number of delegates to represent various districts, the legitimacy of the current chamber executive to organize the elections and security concerns among others.*

*After discussing the above issues, together with the stakeholders , we have agreed on the following resolutions:*

- *To postpone the elections until the identified gaps are addressed.*
- *To form an interim committee comprising the Permanent Secretary Ministry of Trade; Attorney General and Solicitor General; chamber of commerce; Uganda Registration Services*



*Bureau; private sector/business community and the Electoral Commission.*

- *The committee shall*
  - *Appraise the constitution*
  - *Develop the voter's register of the delegates and*
  - *constitute a committee to organize and conduct free, transparent and fair elections.*
  
- *The current chamber executive to stop conducting any further transactions until a new executive is on place.'*

Having reviewed the process that led to the press statement of 30.11.2016, I find that the Minister was moved both by the applicant who was concerned for security at the upcoming elections and other contestants for the elections to call a meeting of stakeholders . These included the business community who are eligible for membership of the applicant by virtue of article 6 of the articles of association of the applicant; and relevant government agencies . The applicant 's executive stayed away from this meeting going by their letter of 28.11.2016.

It was this consultative process that resulted in the position taken by the Minister to

- postpone the upcoming elections;
- constitute a committee
  - a) to study the applicant's constitution

- b) develop a register for members of the applicant who would participate in the elections and
- c) organise and conduct free, transparent and fair elections.

I find no procedural impropriety in this process as all parties were accorded a right to express their views . The fact that the applicant stayed away from this meeting means they cannot legitimately complain that they were not given an opportunity to be heard.

### **National Trade Policy and executive powers and constitutional authority .**

The Minister invoked her mandate as the minister responsible for trade and for operationalizing the National Trade Policy to call a meeting after she was moved by some concerned citizens and after the applicant's President expressed security concerns about the upcoming delegates conference . Moreover, one of the objectives in the memorandum of association of the applicant is

*'to promote and protect trade, commercial and industrial interests of Uganda and members in particular'*

which objective brings the applicant under the Minister's docket.

The fact that Mrs. Kigongo was concerned that thousands of people would come for the meeting uninvited coupled with the resolutions of the meeting with stakeholders is evidence of a looming crisis that had to be contained.

The question is whether the Minister had the powers to communicate and enforce these resolutions which translated into ministerial directives.

Whether they are resolutions or directives, the fact remains that the press statement carries Ministerial authority.

The Minister responsible for Trade whose key actors are potentially members of the applicant could not sit back after she received a petition from aggrieved members of the applicant and the applicant herself.

The Minister under the policy has a duty to ensure trade and business is carried out in a conducive environment. Therefore, the Minister acted within her mandate when she convened a meeting of stakeholders, generated consensus and communicated the resolutions arrived at through the media.

Counsel for the applicant argued erroneously, that the applicant is a private company and therefore its affairs were managed within the framework of the memorandum and articles of association and the Companies Act.

While it is true that the applicant's affairs are managed within the framework of the memorandum and articles of association, the applicant is subject to the 1995 Constitution as amended that empowers the Cabinet in article 111(2) to formulate and implement policy of government. The Minister's actions are grounded in the National Trade Policy and therefore she did not exceed her powers.

### **Members register**

Counsel for the applicant submitted that it was the Registrar General who was empowered to act on the issue of the voter's register and not the

Minister. Section 122 of the Companies Act provides for inspection of the register by any member of the company. By letter dated 25.11.2016 the registrar general called on the applicant's executive to avail a members register before 30.11.2016. There is no evidence that this was done.

The absence of a members register is a fundamental flaw when elections was the main subject of the upcoming conference. Section 144 of the Companies Act confers on members to demand a poll of members which right will be realised only when there is a members register.

The absence of a register means the members are not known and therefore decisions of the annual meeting would not carry legitimacy.

The Minister lawfully addressed this anomaly and rightly directed that a register of members be generated.

### **Right to participation in the electoral process**

By admission of Mrs. Kigongo, membership of the applicant is 10,000 but participation is limited to 200 members or 2% of the members. Such a situation contravenes company law principles that prioritise good governance, accountability of directors and makes the Annual General Meeting the final authority on company affairs.

Therefore, the directives of the Minister for an appraisal of the applicant's constitution ;generation of a members register and the conducting of free , fair and transparent elections were lawful .

## **Public interest**

Counsel for the respondent further submitted that the rights of the applicant fall under the category of derogable rights in article 43 and the Minister was entitled to intervene in the public interest.

Article 43 (1) of the Constitution stipulates that

*In the enjoyment of rights and freedoms prescribed in this chapter(3),*

*No person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*

*(2) public interest under this article shall not permit*

*c) any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable in and demonstrably justifiable in a free and democratic society or what is provided in this Constitution.*

I find that this argument cannot be discussed and a conclusion reached in an application for judicial review. For that reason, I will not discuss public interest as a reason for the intervention by the Minister.

## **Remedies**

After finding that the Minister did not exceed her ministerial authority when she invoked the National Trade Policy to intervene in the affairs of the applicant, I dismiss the application and make the following orders:

1. The directives in the press statement issued by the Minister of Trade, Industry and Cooperatives did not exceed her authority and they are lawful.
2. The current leadership of the applicant shall remain in control of its affairs except that it shall not make major policy decisions or sell or transfer company property until a new executive is in place.
3. Costs of this application to the respondent to be paid out of the applicant's funds .

**DATED AT KAMPALA THIS 20<sup>TH</sup> DAY OF JUNE 2017.**

**HON. LADY JUSTICE H. WOLAYO**