IN THE HIGH COURT OF UGANDA

MISC. CAUSE NO. 244 OF 2016

JOHN KIZITO……..APPLICANT

V

BANK OF UGANDA……RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

The applicant through his advocates Agaba & Co applied for judicial review of a decision of the respondent .

The orders sought are reproduced below:

1. that the decision of the respondent declaring the applicant as not being a 'fit and proper' person to hold the position of Chief Executive Officer' or to be a Board member of the Board of Directors of Finca Ltd, be declared inconsistent with the principles of natural justice and be accordingly quashed.
2. The respondent be compelled to issue communication to the applicant advertised in the press rescinding its decision.
3. An injunction restraining the respondent from issuing any further orders as herein impugned on the facts set out in this application .
4. General , exemplary and punitive damages for the loss and inconvenience suffered .

The respondent was represented by Mr. Masembe Kanyerezi and Mr. Mika Mugerwa of MMAKS advocates while Mr. Balinda appeared for the applicant.

The application was brought under the Judicial review rules and sections 36, 37 and 38 of the Judicature Act.

At the commencement of the hearing four issues were framed for trial . These were:

1. Whether the applicant's complaint in relation to the respondent's finding is susceptible to judicial review

2. Whether this application is barred by section 86 of the Micro Finance Deposit Taking Institutions Act 5 of 2003. (MDI Act).
3. Whether the decision of the respondent communicated by letter dated 16.8.2016 deeming the applicant as no longer satisfying the fit and proper criteria set out in the MDI Act was in breach of the principles of natural justice.
4. Remedies.

Initially, I determined that the first two issues would be argued and determined before the next segment of the case was heard because they had the potential to dispose of the case. On further reflection, I directed that counsel file written submissions on all issues as they were intertwined which was done.

I have considered submissions of both counsel and studied in depth authorities cited. I have also considered the submissions in response to a specific question put by the court to the parties , that is , at what stage the respondent can declare a person not fit and proper to be in a management position of a MFDT institution.

a) Whether the applicant's complaint in relation to the respondent's finding is susceptible to judicial review

It was argued by counsel for the applicant that the impugned decision was made in exercise of quasi judicial powers under the MDI Act that gives the respondent powers to clear persons before appointment to head financial Institutions and that it was pursuant to those powers that the letter dated 16.8.2016 was issued.

Counsel for the applicant further submitted that the applicant seeks to quash a decision of a statutory body exercising statutory functions which violate constitutional rights of the applicant in particular article 44 (c) on the right to a fair hearing; article 42 on the right to be treated fairly and article 40 on economic rights. He cited **Hypolito de Souza v Chairman and Members of Tanga Town council [1961] 1 EA 377** in support.

Para 4 of the motion is reproduced below:

> *'the actions of the respondent were high handed, unlawful, manifestly unjust, indefensible and ought to be set aside'*

It was counsel for the respondent's submission that judicial review is concerned with the quasi judicial process and not the propriety of the decision . Furthermore, that the court is concerned with unfair treatment and not whether the decision was right or wrong and that therefore, the complaint is not justiciable under judicial review. **He cited Chief Constable of North Wales Police v Evans [1982] ALL.E.R 141** in support.

The decision complained of is contained in a letter dated 16.8.2016 addressed to the applicant by Mrs. J. Bagyenda Executive Director Bank of Uganda .

The contents are reproduced below:

> ***Removal from Senior Management Team and Board of Directors of FINCA (U) ltd.***
>
> *During the onsite inspection of FINCA (U) ltd as at April 2016, Bank of Uganda noted that you, as the Executive Director, received preferential interest rate of 14.5% and 21.5% for fixed deposits of sh. 100m on various occasions when the rates offered by FINCA ltd were 12.5 % and 16.5 % respectively. As executive director, the preferential offer constituted conflict of interest and a breach of trust on your part.*
>
> *Your actions have put you in a situation of non compliance with the law governing financial institutions and rendered you unsuitable to continue serving as the chief executive officer and member of the board of directors of FINCA U ltd under the 'fit and proper' criteria.*
>
> *Therefore , pursuant to section 22 and 24 of the MDI Act , you are hereby removed from management and board of directors of FINCA (U) ltd with immediate effect.'*

The applicant complained that the decision has rendered him unemployable in any financial institution yet it was taken without according him the right to a fair hearing.

The decision complained of was in exercise of statutory authority of the respondent to supervise financial institutions. Under the MDI Act, the respondent has wide powers over micro finance deposit taking institutions like FINCA (U) Ltd where the applicant was the ED.

The respondent is authorized to issue licences to micro finance institutions to carry out business.

Prior to issuing a licence, section 7 of the MDI Act imposes a duty on the respondent to among other things, take into account the kind of persons who will operate the business. Hence, section 7 (a) authorizes the Central Bank to have regard to whether the institution will be operated responsibly by persons who are fit and proper for involvement in micro finance business in accordance with criteria in the second schedule to the Act when issuing a licence.

Para 2 (b) and (c) of the second schedule places a duty on the respondent to consider

- *if the persons to run the business have contravened provisions of any Act designed for the protection of members of the public against financial dishonesty or incompetence or mal practices ;*

  Or

- *taken part in any business practices that in the opinion of the Central Bank were fraudulent, prejudicial or improper.*

In section 23 of the MDI Act, a person shall be disqualified from heading a financial institution if he does not meet the fit and proper criteria described in section 7 of the Act. Therefore sections 7 and 23 read together, guide the respondent in arriving at decisions on the competence of persons to manage institutions under the MDI Act.

It is in the exercise of the respondent's supervisory function conferred by sections 56 and 58 of the Act , that the respondent removed the applicant from management of FINCA .

The issue under review is whether the actions of the respondent are susceptible or amenable to judicial review.

Both counsel cited pertinent authorities in support. In **Chief Constable of North wales Police v Evans [1983]3 ALL E R 143,** the House of Lords held that judicial review is intended to protect individuals from abuse of power by authorities both judicial and quasi judicial but it is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions.

The House of Lords went further to state that the function of the court is to ensure the individual receives fair treatment.

Article 42 of the Constitution confers on every person the right to be treated fairly by public bodies or officials and a further right to apply to court for a remedy if treated unfairly.

The respondent is a public body and it took a decision against the applicant in exercise of statutory duty.

Therefore, that decision is amenable to judicial review and this application is properly before the court.

Whether the application is barred by section 86 of the MDI Act.

Section 86 confers immunity on the respondent in the exercise of its functions under the Act except where it is in bad faith. It was the submission of counsel for the respondent that the applicant had not pleaded bad faith and therefore it was bad in law. He cited **COA Civil Appeal No. 35 of 2007 Bank of Uganda V COWE** in support , where the Court of Appeal held that an applicant had to plead and prove bad faith to bring an application for judicial review against the respondent within the exception to section 86.

Counsel for the applicant submitted that the applicant pleaded in para 4 of the notice of motion that the respondent's actions were ' **high handed, unlawful, manifestly unjust, and indefensible'**, which according to counsel, amounted to bad faith or mala fide. It was counsel's contention that para 4 of the motion brought the application within the exception to section 86 of the MDI Act .

These words import the notion of bad faith. It would have been better for the applicant to expressly use the words '*bad faith'* but in the interests of determining all issues in controversy, the words used will suffice to impute bad faith.

Therefore, this application falls within the exception to the immunity conferred on the respondent by section 86 of the Act.

Whether the principles of natural justice were violated by the respondent.

The applicant's main contention is that he was declared not fit and proper to hold position of ED of FINCA by the respondent without being heard. In para 8 of his affidavit in support, the applicant avers that he was surprised to receive the letter dated 16.8.2016 and yet he had never been invited to respond to any allegations.

In response, the respondent through the affidavit of Charles Owiny Okello contended that the applicant was expected to maintain a fit and proper status as required by section 7(4) (a) and 23 (2) of the MDI Act but failed to do so when he acted in a manner that disclosed lack of probity and sound judgment when he placed deposits of personal funds with FINCA at rates higher than those laid out in the subsisting approved policy.

The respondent relied on an internal audit report that found this anomaly. The audit report is marked annex. B and entitled **Global Corporate Audit FINCA Uganda –Special Review May 2016** while the responses to the audit by the applicant are contained in annex. A.

In his affidavit in rejoinder, the applicant does not dispute existence of the internal audit report except that he maintains it was a draft report and still subject to further procedures by internal management of FINCA.

It was the submission of counsel for the applicant that although the respondent was backed by statutory authority to supervise financial institutions, it had to follow the principles of natural justice with respect to right to a fair hearing.

Counsel for the respondent submitted that the internal correspondence between the audit team and the applicant showed that he was given an opportunity to respond to the audit findings. Annexture A (i) letters dated 6th and 13th May 2016 refers.

I have examined in depth the authorities cited by both counsel .

The MDI Act confers supervisory powers on the respondent not only at the stage of licensing but also when the institution commences operations and at all times thereafter.

Under section 55 of the Act, the respondent exercises its supervisory function among other methods, through

Inspection and analysis of corporate accounting, financial and non financial records prepared and maintained at the premises of the institution concerned; and

Any other lawful means.

Under section 56 , the respondent is empowered among other powers,

- *to require any officer , employee or agent of the institution to produce any of the institution's , corporate accounting, financial and non financial records;*
- *to require any officer , employee or agent of the institution to explain any entry in the institution's books , records, accounts or documents.*

Under section 58, the respondent is empowered , among other powers,

- *to instruct the institution to suspend or remove any director , officer or employee from his or her duties ;*
- *Remove or suspend any person from the management of the affairs of the institution.*

It seems to me that the MDI Act stipulates in clear terms how supervision is to be carried out by the respondent .

The respondent may utilize any of the methods in section 55 to carry out its supervisory powers. It is not mandatory that the respondent must call for an explanation from the concerned officer of the institution except where the respondent does not have sufficient information at its disposal.

In this case, the respondent had audit reports, notwithstanding that they were draft reports on which it relied to take corrective measures .

Wade on Administrative Law , Clarenden press, states that generally, a hearing is oral but that in some cases, it may suffice to give an opportunity to make representations in writing, provided the demands of fairness are met. In **Wiseman v Borneman [1969] ALLER 275**, the commissioners of Inland revenue issued notifications to tax payers and the tax payers delivered

to them statutory declarations, and the commissioners prepared counter statements that were then submitted to a tribunal as required by the relevant Act. The tribunal was to take into account these documents to determine whether there was a prima facie case for proceeding with the matter. On appeal, the House of Lords held that the tribunal followed the procedure laid down by the Act and it did not act unfairly or contrary to the rules of natural justice.

This case is on all fours with the present case where the respondent followed the procedure laid down in section 55, and examined audit reports by its 'agents ' since the internal auditors are appointed with the respondent's approval. The said auditors gave an opportunity to the applicant to explain the anomalies they discovered hence according him an opportunity to be heard.

The principles of natural justice were observed by the respondent through their agents, the internal auditors.

It is irrelevant that the audit report was not final . As the supervisor, the respondent was not duty bound to wait for a final report provided it was satisfied there was a prima facie case of impropriety.

The fit and proper criteria described in the second schedule to the Act places a responsibility on the applicant to at all times to be above board . Para 2d provides that the respondent , in determining whether a person is fit and proper, considers if the person has taken part in any business practices that are *in the opinion* of the Central Bank *' fraudulent, prejudicial, or otherwise improper whether unlawful or not …'.*

Therefore, the submission by counsel for the applicant that the respondent ought to have waited for a final audit report is not sustainable in light of the wide discretion given to the Central Bank by the second schedule.

The respondent had the authority under the second schedule to make a decision based on the draft report once it was of the opinion that the applicant's conduct was improper.

I find that the applicant was accorded fair treatment before the respondent determined that he be removed from management of FINCA. The third issue is resolved in favour of the respondent.

Remedies

Ideally, I should not discuss this issue because the applicant has been unsuccessful on the substantive issue but I will say a couple of things.

The applicant complains he was declared not 'fit and proper' to hold a senior management position . The letter complained of reads in part

> *'your actions have put you in a situation of non-compliance with the law governing financial institutions and rendered you unsuitable to continue serving as the Chief Executive Officer and member of the Board of Directors of FINCA (U) ltd under the fit and proper criteria.'*

The letter did not declare the applicant 'not fit and proper' as he wanted this court to believe, but he was removed from management because he did not fit that criteria. Had he been declared not fit and proper, he would have been entitled to damages for defamation notwithstanding that the respondent was successful on the substantive issue. This is because section 58 only authorizes removal but does not authorize declaration that someone is unfit. The fit and proper criteria is to guide the respondent in arriving at a decision but should not be used to describe that person as it can substantially constrain that person from securing employment in future , let alone, the stigma that goes with it.

In the result, this application is dismissed with costs to the respondent.

DATED AT KAMPALA THIS 13TH DAY OF JANUARY 2017.

HON. LADY JUSTICE H. WOLAYO

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