

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2021/00280

In the matter between:

ALFREDA WENTWORTH

APPLICANT

and

INSTITUTE FOR CHARTERED ACCOUNTANTS

FIRST RESPONDENT

PUBLIC ACCOUNTANTS' AND AUDITORS' BOARD

SECOND RESPONDENT

Neutral citation: *Wentworth v Institute of Chartered Accountants* (HC-MD-CIV-MOT-REV-2020/00280) [2022] NAHCMD 166 (4 April 2022)

Coram: RAKOW, J
Heard: 7 February 2022
Delivered: 18 March 2022
Reasons delivered: 4 April 2022

Flynote: Administrative law - Applications and motions – Review application – Administrative action – Public Accountants' and Auditors' Act 51 of 1951 – The establishment of the Institute of Chartered Accountants of Namibia - powers of the Institute of Chartered Accountants of Namibia – limitation of the powers of both the Investigation Committee and the Disciplinary Committee of the Institute of Chartered Accountants of Namibia. Reviewability of matters – Institute of Chartered Accountants not public body performing public functions.

Summary: The applicant lodged a review application, wherein it implored this court to set aside the decision of the Institute of Chartered Accountants of Namibia. The applicant was employed as Chief Executive Officer at Hangala Prescient where she was dismissed after she confessed to the fraudulent activities, as a result of financial irregularities that occurred at the company while she occupied a position of trust and admitted guilt. Her previous employer then laid a complaint with the first respondent, who subsequently dealt with the complaint in terms of its By-laws. After conducting the disciplinary process, the first respondent made a decision to revoke the applicant's membership for a period of eight years.

The applicant now seeks to declare the decision of the first respondent to exclude her as its member as unlawful and/or invalid, she seeks the court to review and set aside this decision. She further seeks an order directing the first respondent to reinstate her membership retrospective to 29 June 2020, which is when the decision was taken.

The applicant based her application on her assertion that the Investigation Committee exercised powers it did not have. She is of the view that both the Investigation Committee and the Disciplinary Committee have certain limited disciplinary powers relating to the imposition of sanctions, and such powers can only be exercised upon a contravention of a punishable offence as provided for in by-law 30.

She further contended that, a member can only be found guilty of a punishable offence after a proper enquiry, and by-law 12(d) requires viva voce evidence, or evidence under oath. The applicant contends that the first respondent's disciplinary committee had 'no evidence' of any punishable offence, that no charges were put to her, as she was not required to plead to any charges, and that no evidence was led at the hearing against her.

Held that, onus to prove its case for judicial review rests on the applicant and as such the applicant must show the court that good grounds exist to review the conduct of the first respondent.

Held further that, the first respondent is not a public body, as it is not established by the Public Accountants' and Auditors' Act. The definition for the Institute which was

inserted by Act 10 of 1994, did not provide for a legal framework for the creation of the Institute.

Held that, the disciplinary process conducted by the committee was fair as there is no specific process prescribed in the By-Laws which demands that an accused person should formally plead, nor is there a requirement or evidence to be lead. The applicant was given the opportunity to be heard, and the process was explained to her.

ORDER

1. The application is dismissed with costs.
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REVIEW JUDGMENT

RAKOW, J:

Introduction

[1] This is a rule 65(4) application in terms of which the applicant seeks to review and set aside a decision of the first respondent, made on 29 June 2020. The applicant also seeks certain declaratory and interdictory orders to the extent set out in the Notice of Motion. The first respondent's disciplinary committee found the applicant guilty and a sanction was imposed namely the applicant's exclusion from membership for 8 years as of 30 June 2020. The applicant seems to only challenge the procedural fairness of the disciplinary process, in that, the first respondent acting through its sub-committees, acted *ultra vires* in accordance to its own procedures.

The Notice of Motion

[2] The notice of motion sets out the relief being sought as follows:

- Declaring the decision of the first respondent issued on 29 June 2020 excluding the applicant's membership as unlawful and/or invalid;

- Reviewing and setting aside the decision of the first respondent issued on 29 June 2020 excluding the applicant's membership;
- Directing the first respondent to reinstate applicant's membership retrospective to 29 June 2020 within 7 days from date of this Order.

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- Costs in the event of opposition, including the costs of one instructing and one instructed counsel.

Background to the current application

[3] The parties set out the history of the matter in their respective affidavits, for the sake of brevity I will reiterate it all verbatim.

[4] In her affidavit, Ms. Wentworth states that she was suspended from her employment as Chief Financial Officer for the company known as Hangala Prescient and summarily dismissed without a disciplinary hearing being conducted on 15 October 2018. On 1 November 2018, the first respondent received a formal complaint against the applicant from Hangala Prescient, more specifically Dr. Leake S. Hangala being an aggrieved person, relating to the suspension of the applicant from employment on 15 October 2018 as a result of financial irregularities that occurred at the company while the applicant occupied in a position of trust.

[5] The letter of complaint states that the applicant confessed to the fraudulent activities and admitted guilt. Attached to the letter of complaint, was a Letter of Suspension, Report on CEO Conduct, Report on assignment regarding financial irregularities: Hangala Prescien v/ Ms. Afreda Stramis Wentworth and Letter of dismissal of employment.

[6] On 30 April 2020, the applicant was duly informed by first respondents' secretariat, Ms. Carmen Penderis, who was duly authorised by Mr. Koos du Toit (the Chief Executive Officer at the relevant time), by way of a letter, that a complaint of improper conduct has been lodged with the first respondent relating to applicant's dismissal from her employment with Hangala Prescient during 2018 and that the complaint has been referred to the Investigation Committee with the documents listed in the letter as received from the applicant's former employer.

[7] The applicant was required in the above-mentioned letter, in terms of By-Law 11(d), to furnish the respondent within 21 calendar days with a written statement in response to the charge against her. Furthermore, applicant was notified that any explanation she elects to submit may be used in evidence against her. This letter did not contain any formulated charges against the applicant per se, and just stated the complaint received against her.

[8] The applicant, on 19 May 2020 in a letter responded to first respondent's letter dated 30 April 2020, in which the applicant did not deny guilt, but expressly admitted her guilt and raised mitigating factors. In this letter, she indicated that was not given a copy of their (presumably referring to the investigation report Hangala Prescien v/ Ms. Afreda Stramis Wentworth) findings, but knew that she had fault and she was assured that they would present all the evidence at the next meeting as they needed to conform with the finance team. She further stated that despite losing everything she decided then that she would take responsibility for what she did, she had broken her employer's and her industry's trust and therefore she took responsibility. She asked the first respondent to see her progress, regret and that she repaid her debt and took responsibility for her actions. She pleaded with them to be fair and not to impose a punishment that would take away her membership.

[9] After receiving the above letter, the Investigation Committee of first respondent met on 28 of May 2020 to discuss and consider the seriousness of the alleged misconduct together with all relevant supporting documents. The so-called admission of guilt was considered together with the other evidence. On 1 June 2020 and due to the seriousness of the complaint, Mr. Tom Newton, the Chairman of the Investigation Committee directed a letter to applicant. The letter informed applicant that the matter has been formally referred to the Disciplinary Committee of the first respondent for consideration in accordance with section 11(m) of its By-Laws. The reason was that the seriousness of the offence warranted the imposition of a fine greater than what the Investigation Committee may impose. Attached to this letter was the relevant extracts from the by-laws.

[10] Mr. Newton further informed the applicant in the said letter of the charges against her in terms of clause 30(j) and 30(l) of the by-laws as follows:

'Committing a breach of any rule of professional conduct prescribed by the council from time to time in terms of By-Law 15 and conducting themselves in a manner which, in the opinion of the investigation committee, is discreditable, dishonourable, dishonest, irregular or unworthy or which is derogatory to the Institute, or tends to bring the profession of accountancy into disrepute.'

[11] The applicant was also reminded of the fact that she will be given the opportunity to be heard on this matter and that she will be afforded legal representation.

[12] On 2 June 2020 in an email from Ms. Carmen Penderis, the applicant was again informed of her right to be heard and right to legal representation and an extract of the ICAN by-laws were attached stating:

'12(b)(iv) The Disciplinary Committee shall give such accused an opportunity of being heard before it and shall, if the accused so desires, permit such accused to be represented before it by counsel or by an attorney or by a member of the institute.'

[13] On 11 June 2020, Mr. Sven von Blottnitz, the Chairman of the Disciplinary Committee, furnished the applicant with the necessary details of the Disciplinary Committee meeting. The applicant was informed that the letter 'Notice of referral to Disciplinary Committee' was received together with applicant's acknowledgment of receipt dated 2 June 2020. The complainant was also informed that the matter has been referred to the Disciplinary Committee in terms of By-Law 11(m) for consideration and determination of the appropriate sanction. In this letter the applicant was formally charged and again informed of her right to be heard and was formally afforded the opportunity to obtain legal representation.

[14] On 16 June 2020 in an email the applicant informed Ms. Carmen Penderis that she does not require legal representation at the disciplinary meeting and that she would just like to emphasize her regret and her journey since. On 29 June 2020, the applicant's matter was dealt with. During the meeting the record of proceedings were presented and various factors were discussed and considered during which the applicant also had the opportunity to represent herself and to state her case. She

elected not to state anything further at the disciplinary meeting and never denied that she admitted guilt of the offence.

[15] On 30 June 2020, the applicant was notified that she was found guilty of the charges as described above. As a result of the seriousness of the charge, the disciplinary committee imposed a sanction upon the applicant in terms of by-law 12(h)(v) in which the nature of the sanction consists of the applicant's exclusion of membership of the Institute of Chartered Accountants for the maximum period of 10 years reduced to 8 years as of 30 June 2020. The procedure to be followed by the committee subsequent to a verdict of guilty, is captured in by-law 12(n) which states that the Disciplinary Committee shall report to the Council for reporting to members on the matter.

The legal framework for the functioning of the Disciplinary Committee

[16] The Public Accountants' and Auditors' Act 51 of 1951 legislation under which the second defendant was created, section 2 of this act deals with the establishment of a Public Accountants' and Auditors' Board and Section 27 deals with the powers of the board to discipline its members. An amendment to this act by way of Act 10 of 1994 created the first respondent by introducing the term Institute, with the meaning as per section 1, the Institute of Chartered Accountants of Namibia. Four members from the Institute have seats on the Board, the Board in turn is appointed by the Minister.

[17] Section 27 of Act 51 of 1951¹, dealing with the disciplinary powers of the Board reads as follows:

'(1) The board may investigate or cause to be investigated and, if necessary, hear any allegation or charge, of improper conduct whether prescribed or not, of which a person who is or was registered in terms of this Act is alleged to have been guilty while he was so registered and impose any prescribed punishment in respect of such a charge: Provided that in the case of alleged improper conduct which forms or which the board has reason to believe is likely to form the subject of criminal or civil proceedings in a court of law the board may postpone enquiry until such proceedings have been determined: Provided further that nothing in this section shall be deemed to affect the right of the Institute from taking

¹ The Public Accountants' and Auditors' Act 51 of 1951.

disciplinary or other action against any of its members in accordance with its constitution and rules.²

[18] Section 28³ deals with the powers of the Board to conduct an enquiry under section 27. It reads as follows:

‘(6) A person whose conduct is being enquired into by the board shall be informed of the nature of the complaint made against him and shall be entitled to appear by himself or to be represented by some other person duly authorized in writing on his behalf, and to produce evidence, call and examine witnesses on his behalf and cross-examine other witnesses.’

[19] The powers of the Institute of Chartered Accountants of Namibia to discipline members is contained in their by-laws. By-law 10 deals with the creation of the Investigation and Disciplinary Committees and then By-laws 11 and 12 with their powers. By-law 10 reads as follows:

‘The Council shall appoint an Investigation Committee and a Disciplinary Committee which shall have to powers to carry out the duties and exercise the functions granted to those committees under these By-Laws.

(a) There shall be appointed by the Council at its first meeting after taking office in each year the following committees which shall carry out the duties and exercise the functions and powers granted to them under these By-Laws;

- i. An investigation Committee which shall consist out of four members
...
- ii. A Disciplinary Committee which shall consist of not less than 4 members and not more than twelve members’

[20] The applicant was never a member of PAAB⁴ and for that reason reference to the processes relating to members of the first respondents who are also members of PAAB are not dealt with herein. The powers and duties of the Investigation Committee is set out under By-law 12. This By-law reads as follows:

‘(a) It shall be the duty of the Chief Executive Officer of the institute and the right of any member or any aggrieved person to lay before the Investigation Committee any facts or circumstances indicating that a member, former member, trainee accountant or former

² Subsection (1) was amended by Act 47 of 1956, Act 30 of 1962, Act 48 of 1984 and Act 10 of 1994.

³ Supra.

⁴ Per the definitions PAAB means the Public Accountants’ and Auditors’ Board established under section 2 of the Public Accountants’ and Auditors’ Act.

trainee accountant (hereinafter referred to as the “accused”) may have committed an offence under these By-Laws. All complaints addressed to any other officer of the Institute shall be referred by him forthwith to the Chief Executive Officer.

(b) In cases where the accused concerned is or was registered with the PAAB at the time of the alleged misconduct the Chief Executive Officer shall forthwith refer the matter to the PAAB and also forthright report such referral to the Investigation committee. In all other cases the Investigation Committee shall consider matters referred to it in terms of By-Law 11(a) above.

(c) If

- (i) The alleged misconduct does not require to be referred as in By-Law 11(b) above, or
- (ii) If for any reason the PAAB advises that it is not competent or declines to institute disciplinary proceedings; or
- (iii) If the Investigation Committee so decides;

the Investigation Committee shall fully consider the facts or circumstances under which the alleged misconduct took place. For that purpose it may carry out whatever preliminary investigations it may deem necessary and shall have the power to order the production for inspection of any books, documents and papers in the possession of or under the control of the member or former member alleged to have committed an offence.

(d) In any case where the Chief Executive Officer has *prima facie* evidence that there has been a contravention of these By-Laws, he or she may, in his or her discretion, before bringing the matter to the attention of the Investigation Committee, advise the accused in writing of the nature of the complaint and call upon him or her to furnish his or her written explanation in answer to the complaint within 21 days after the date of such notice, and at the same time warn him or her that such explanation may be used in evidence against him or her.

(e) Save where the Investigation Committee otherwise decides, a complaint shall be in the form of an affidavit, detailing in precise terms the specific acts or failure complained of, and shall be lodged with the Chief Executive Officer.

(f)

(g)

(h)

- (i) Upon receipt of a complaint the Investigation Committee may, where it is of the opinion that a prima facie case has been made for improper conduct on the part of the accused:
 - (i) Except where this has been done by the Chief Executive Officer, advise the accused concerned of the conduct imputed to him by notice in writing and afford him an opportunity of giving an explanation in writing within twenty-one days from the date of such notice and at the same time he shall be warned that such explanation or answer may be used in evidence against him.
 - (ii) at any time, and whether or not it has proceeded or also thereafter proceeds under paragraph (d) above, call upon the accused to appear at such time and place as it may determine, to explain, or elucidate, or discuss the matter without prejudice to his or her rights, only the Investigation Committee and not the accused will be entitled to call for such a meeting and the accused will not be entitled to be represented at the meeting.
- (j)
- (k) If upon receipt of the accused's explanation the Investigation Committee is not satisfied therewith or if no explanation is forthcoming, the Investigation Committee shall have full power to caution or reprimand the member of former member, or to impose a fine on the member of former member of not more than half the maximum amount that the Disciplinary Committee may impose in terms of the provisions of By-Law 12(h)(iii), or to prefer a formal complaint against the accused to the Disciplinary Committee
- (l)
- (m) If the Investigation Committee considers the offence to be so serious that it might warrant the imposition of a fine greater than half the amount that the Disciplinary Committee may impose (as determined by the Council from time to time), or suspension or exclusion from membership, the matter shall be referred to the Disciplinary Committee to be dealt with in terms of By-Law 13.'

[21] By-Law 12, covers the powers and duties of the Disciplinary Committee. This By-Law reads as follows:

- '(a) The Disciplinary Committee on receipt of a formal complaint in pursuance of By-Law 11 or otherwise shall forthwith give to the accused notice of the complaint and the way in which it intends to deal with the matter.
- (b)
- (c) Should the accused against whom any complaint is preferred neglect or fail to attend before the Disciplinary Committee at the time and place indicated in the said notice,

the Disciplinary Committee shall be entitled to proceed with its consideration of, and enquiry into, the complaint in his or her absence.

- (d)
- (e)
- (f)
- (g)
- (h) If the Disciplinary Committee is of the opinion that the accused is guilty of a punishable offence, it shall make a finding to that effect and thereupon it shall have full power to order that the member or former member concerned by
 - (i)
 - (ii)
 - (iii)
 - (iv)
 - (v) Excluded from membership or registration as a trainee accountant for a period not exceeding 10 years.
- (i)
- (j)
- (k) Notice of the finding and the decision of the Disciplinary Committee shall be given forthwith to the accused concerned.
- (l)
- (m)
- (n) The Disciplinary Committee shall report to the Council for reporting to members the conviction or finding of the Committee and shall in cases where the conviction or finding of the PAAB or any Committee thereof has been accepted include a statement to this effect, together with its decision in respect of an accused who has been reprimanded or cautioned by the Disciplinary Committee regarding the inclusion or omission of the name of the accused from the report to members. In all cases where the accused is excluded or suspended from membership, the report to members shall include his name.'

The charges leveled against the applicant and referral to the Disciplinary Committee

[22] On 30 April 2020 the applicant was informed by Ms. Penderis, on behalf of the Chief Executive Officer that a complaint was received against her for improper conduct during her employment as the CFO of Hangala Prescient and that such a complaint was referred to the Investigation Committee and she was requested to provide a written statement within 21 days, indicating her response to the charges

against her. This letter also contained extracts from the By-Laws of By-Law 11 and 30, which deals with the punishable offences.

[23] The applicant responded to this request in a letter dated 19 May 2020. She was further informed in a letter from the Investigation Committee dated 1 June 2020 that the matter was referred to the Disciplinary Committee in terms of By-Law 11(m). At this stage she was informed of the charges against her, being in breach of the By-Laws clause 30(j) and 30(l). These By-Laws reads as follows:

‘(30)(j) committing a breach of any rule of professional conduct prescribed by the Council from time to time in terms of By-Laws 15, after having been previously warned by the Council or any Committee appointed by it, continuing to commit a breach of such rules;

(30)(l) conducting himself in a manner which, in the opinion of the Investigation Committee or the Disciplinary Committee, is discreditable, dishonourable, dishonest, irregular or unworthy or which is derogatory to the Institute, or tends to bring the profession of accountancy into disrepute; and ...’

[24] The specific conclusion of the letter from the Investigation Committee reads as follows:

‘You are herewith informed that the complaint, all supporting documentation, as well as your written response have been fully considered by the Investigation Committee on 28 May 2020. The Investigation Committee has concluded that the complaint is warranted, and due to the seriousness of the complaint, the matter will now be referred to the Disciplinary Committee in accordance with section 11(m) of the by-laws for consideration and determination of the appropriate sanction.’

[25] From there the charges against the applicant were again set out together with extracts from the relevant By-Laws.

[26] In a letter dated 11 June 2020, the applicant was informed by the Disciplinary Committee that they indeed received a complaint, all supporting documentation as well as her written response for determination (of the complaint) and an appropriate sanction. She was invited to a meeting of the Disciplinary Committee and informed that she has the right to be heard at this meeting and if she fails to attend the meeting the Disciplinary Committee shall be entitled to proceed with its consideration of, and inquiry into the complaint in her absence. She was again reminded of the

charges against her. She in an email indicated that she wish to stress her regret and her journey since but will not be legally represented.

The Disciplinary Committee meeting

[27] The Disciplinary Committee met on 29 June 2020. Before the applicant was invited to address the meeting, the Committee discussed the documents and charges referred to them by the Investigation Committee. It further transpired that the committee members had a problem with the charge formulated under By-Law 30(I)⁵. They specifically referred to the letter written by the applicant and indicated that they will give her a further opportunity to address them to bring anything under their attention which she wishes to do. During the discussion with the applicant, the Chairperson of the meeting pointed out that they considered the history of the matter as well as the input she provided in writing. He also pointed out that they received a recommendation from the Investigation Committee. He invited her to have a further chance to enhance what she expressed in writing or to bring anything in addition to their attention.⁶

[28] The Plaintiff addressed the meeting and said the following:⁷

'I do not think that there is anything that I can, that I have not stated already in my response or anything missing. I am glad that I got the opportunity to also give feedback to the complaint. I have expressed my progress that I made over the last two (2) years, and I really wanted to just come here today to, not like you said, restart the process, and have a back and forth and want not, but really to just take accountability and work towards a better ending.'

[29] The Chairperson then proceeded to inform her that the committee may find her guilty and may impose any one of the prescribed sanctions on her. She was then excused whilst they deliberated the matter.

[30] The Disciplinary Committee then discussed the conduct of the applicant in more detail as well as what a possible and suitable sanction should be. She was informed in writing on 30 June 2020 that she was found guilty of contravening what

⁵ See minutes of Disciplinary Committee meeting annexure AW7 at page 24 - 30

⁶ See minutes of Disciplinary Committee meeting annexure AW7 at page 35 lines 12 - 14

⁷ See minutes of Disciplinary Committee meeting annexure AW7 at page 35 and 36 line 17 – 4.

seemingly is stated in By-Law 30(*l*) and that she was excluded from membership for a period of 8 years. The Disciplinary Committee further in line with By-Law 12(*n*) reported the outcome of the hearing to the Council for reporting it to its members.

The arguments

[31] It was argued by the applicant that the first respondent's Investigation Committee cannot act pursuant to section 11(*d*) of the by-laws as the powers conferred therein are reserved for the Chief Executive Officer. By-law 10 specifically circumscribes the powers of the Investigation Committee and Disciplinary Committee to the extent as provided for in the by-laws only.

[32] The applicant pertinently alleges that the Investigation Committee exercised powers it did not have. It was further argued that both the Investigation Committee and the Disciplinary Committee have certain circumscribed disciplinary powers relating to the imposition of sanctions. In either event though, such powers can only be exercised upon a contravention of a punishable offence as provided for in by-law 30. Evidently, a member can only be found guilty of a punishable offence after a proper enquiry, and by-law 12(*d*) requires viva voce evidence, or evidence under oath.

[33] It was further argued that the record of proceedings aptly demonstrate that the first respondent's disciplinary committee had 'no evidence' whatsoever of any offence, let alone of a 'punishable offence'. The applicant says in her founding affidavit that no charges were put to her, that she was not required to plead to any charges, and that no evidence was lead at the hearing against her.

[34] On behalf of the first respondent it was submitted that it is common cause that applicant does not seek to review and set aside a decision of the Public Accountants' and Auditors' Board established and regulated in terms of the Public Accountant's and Auditors Act 51 of 1951, but that applicant seeks to review and set aside a decision of the first respondent (Institute of Chartered Accountants of Namibia) (the "Institute"). It was further pointed out that the Institute (first respondent) is not established in terms of the Public Accountant's and Auditors Act 51 of 1951 (the Act) and there is no promulgated act or regulation which regulates its functions. It

cannot act ultra vires any act or regulation as there is none. The Act is silent with regard to the Institute and section 27 of the act only stipulates as follows:

‘... Provided further that nothing in this section shall be deemed to affect the right of the Institute from taking disciplinary or other action against any of its members in accordance with its constitution and rules.’

[35] It is therefore wrong that the applicant now wants to make out a case in its heads of argument, in that, first respondent is a public authority, which exercises a public power and therefore performs a public function. This cannot be done in its heads of argument as it should have been dealt with in the founding affidavit of the applicant. The respondent further submitted that if the court indeed finds that the matter is reviewable, they submit that it was indeed procedurally correctly done and therefore the review should be dismissed.

[36] In reply, counsel for the applicant referred the court to its common law review powers and urged the court, if it finds that the first respondent is not a state organ, to proceed and review its actions under the common law. The court was further reminded that the applicant also seeks a declarator. In essence it was argued that the applicant did not get a fair opportunity to present her case.

Legal considerations and application

[37] The onus to proof its case for judicial review rests on the applicant and as such the applicant must show the court that good grounds exist to review the conduct of the first respondent. The first step according to Mtambanengwe AJA in *Mbanderu Traditional Authority and Another*⁸ in determining Constitutional reviewability, for the lack of a better description, was summarized as follows:

‘The starting point in determining whether or not an action performed by a body is administrative, and, therefore, reviewable, is to identify the body concerned.’

[38] In this instance it is clear that the actions complained about are that of the Institute of Chartered Accountants of Namibia. It is further clear that the Public

⁸ *Mbanderu Traditional Authority and Another* 2008 (1) NR 55 (SC).

Accountants' and Auditors' Board, the second respondent made no decision in this matter. The applicant was further not a member of PAAB.

[39] In *Chirwa v Transnet Ltd and Others* Ngcobo J said the following:

'Determining whether a power or function is 'public' is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including:

- (a) the relationship of coercion or power that the actor has in its capacity as a public institution;
- (b) the impact of the decision on the public;
- (c) the source of the power; and
- (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.'

[40] The first question for determination is therefore, whether or not the first respondent, the Institute of Chartered Accountants, is a public institution? From the reading of the Public Accountants' and Auditors' Act, 51 of 1951 it is clear that the Institute was not created by this act. The definition for the Institute was inserted by Act 10 of 1994 but it did not provide for a legal framework for the creation of the Institute. Section 27(1) of Public Accountants' and Auditors' Act, 51 of 1951 recognises the power of the Institute to take disciplinary or other action against its members in accordance with its constitution and rules. When applying this to the relevant factors as set out in *Chirwa*, then it is clear that the source of the power is not legislation. It is clearly an organization established for members that qualify for registration with it and not for the general public, with the aim of protecting the integrity of their members. Weighing all the factors the court came to the conclusion that the first respondent is not a public body.

[41] This is however not the end of the matter. Although not specifically addressed in the founding affidavit, the court finds that the issue of fairness of the process was indeed raised and for that matter will continue to consider whether the process was indeed fair. In the matter of *Turner v Jockey Club of South Africa*⁹ it was held that:

⁹ *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646

'The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him.'

[42] Regarding the principle of "acting fairly" the following was quoted by Mtambanengwe AJA in *Vaatz v Municipal Council of the Municipality of Windhoek*¹⁰:

'In *Du Preez and Another v Truth and Reconciliation Commission*¹¹ Corbett CJ asked the question as to what the duty to act fairly demanded. The learned Chief Justice went on to quote what Lord Mustill said in *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL), namely:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following.

- (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
- (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
- (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
- (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
- (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.
- (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

¹⁰ *Vaatz v Municipal Council Of The Municipality Of Windhoek* 2017 (1) NR 32 (SC)

¹¹ *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) (1997 (4) BCLR 531; [1997] 2 All SA 1) at 231H – 232E

In the same context in the *Theletsane*¹² case at 206C – D Smalberger JA further commented:

“What the *audi* rule calls for is a fair hearing. Fairness is often an elusive concept; to determine its existence within a given set of circumstances is not always an easy task. No specific, all-encompassing test can be laid down for determining whether a hearing is fair — everything will depend upon the circumstances of the particular case. There are, however, at least two fundamental requirements that need to be satisfied before a hearing be said to be fair: there must be notice of the contemplated action and a proper opportunity to be heard.”

[43] It is now necessary to apply the above principles on the current matter before court. The court finds that the applicant was indeed informed of the charges against her in at least two instances. She also indicated that she wished to say no more than what she said initially in her written response when she was informed that the matter was referred to the Investigation Committee. The court further finds that the Investigation Committee referred the matter to the Disciplinary Committee with a recommendation regarding the matter because they came to a conclusion that the possible sanction which they were likely to consider would be outside the jurisdiction of a sanction which they can impose.

[44] I would like to compare this with a criminal charge which is initially raised in the Magistrate’s Court but where the possible sentence exceeds the jurisdiction of the Magistrate’s Court and for that purpose the matter gets transferred to the Regional Court. Similarly, this matter was then referred to the Disciplinary Committee.

[45] Clearly, according to the By-Laws the Disciplinary Committee has the power to deal with matters. The applicant was informed that the matter was transferred to the Disciplinary Committee as well as the charges which were leveled against her. The Disciplinary Committee discussed the matter and gave the applicant the opportunity to address them and to raise any issue she still feels necessary, with them. She maintained that she had nothing to add to what she already submitted, and upon that they convicted her on one of the charges leveled against her and imposed a sanction. This was then communicated, as the By-Laws required, to the

¹² *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A)

Board of the Institute for further distribution of the information to the members of the Institute.

[46] There is no specific process prescribed in the By-Laws which demands that an accused person formally pleas, nor that evidence must be lead. The applicant was given the opportunity to be heard, and indeed appeared before the Disciplinary Committee upon their invitation and the process was explained to her. She was also informed of the By-Laws that she broke and as such, what the charges against her were. In this instance the court finds that the process was indeed fair and in terms of the By-Laws.

[47] I therefore make the following order:

1. The review application is dismissed with costs.

E Rakow
Judge

Appearances:

Appellant:

W Rittmann
of
Rittmann Law Chambers
Windhoek

First Respondent:

P Swanepoel
of
Philip Swanepoel Legal Practitioners
Windhoek