EDWIN GUMBO
and
BRUCE EESON
and
ZIMBABWE STOCK EXCHANGE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 29 July 2003 and 28 July 2004

Opposed Court Application

Advocate *E.P. De Bourbon*, for the applicant
Advocate *R Y Phillips*, for the respondent

GOWORA J: The applicants were , suspended from the Stock Exchange as a result of a decision by the first respondent that they were not suitable persons to remain registered as stock brokers. I n this application they are seeking a review of the decision of suspending him to be set aside on the following grounds:

(a) gross unreasonableness,

(b) bias, interest in the cause, and

(c) irrationality.

The background to this dispute is as follows. The applicants are both executive directors of Continental Securities Trading (Pvt) Ltd, hereinafter referred to as the company. Both applicants are registered with the respondent as stockbrokers in terms of section 31 (4) of the Zimbabwe Stock Exchange Act [*Chapter 24:18*] hereinafter referred to as the 'Act'. The respondent is a body corporate which is established in terms of the Act, and which is managed by a committee responsible for the management of all its affairs. The committee consists of five members appointed in terms of s 5 of the Act.

In July 2002 the two applicants were requested by the committee to give explanations of certain transactions which they had conducted on behalf of the company with particular reference to their purchase and sale of Old Mutual shares. It transpires that the company had purchased the shares which it was offloading on the stock exchanges of London and

Johannesburg. A response from the applicants resulted in the committee of the respondent soliciting further information from the applicants and the company. The committee was not satisfied with the responses from the applicants and as a result resolved unanimously to suspend the three from further trading on the stock exchange and at the same time wrote to the Registrar of the stock exchange recommending that the registration of all three be cancelled. Although the applicants were advised of the resolution by the committee verbally on 8 November 2002, the letter confirming the decision was not addressed to them until 11 November 2002. This application is to have the decision to suspend them from the stock exchange set aside. I propose to deal with the matter on the basis of the issues that are examined in the heads of argument filed on behalf of both parties to the dispute.

At the outset Mr *Phillips* on behalf of the respondent sought leave to tender a supplementary affidavit adduced to on behalf of the respondent after the answering affidavit had been filed and both parties had in fact filed their heads of argument. He sought reliance on the authority of Herbestein & Van Winsen, on the grounds that special circumstances existed which would justify the admission of the affidavit at this stage. He submitted that the factor that would entitle the respondent to seek the admission of the affidavit was the existence of new facts which did not exist at the time that the respondent filed its opposing affidavit and therefore which facts the respondent could not have dealt with at the time the affidavit was deposed to and filed. He submitted further that the court had a wide discretion, and that in the exercise of that discretion the court would require a reasonable explanation as to why the facts were not put in the affidavit.

Mr *de Bourbon*, on the other hand submitted that the affidavit was not relevant, and further that although it could be admitted, it was up to the court to decide whether or not it was admissible.

The affidavit that is sought by the respondent to be admitted at this stage was deposed to by one Barfoot. He describes himself as a consultant to the Zimbabwe Stock Exchange. He was deposing to the affidavit in the absence of Emmanuel Haggai Munyukwi, the Chief Executive Officer of the respondent who was, at the time of deposition, on a business trip outside the country. He further states that the facts that he is deposing to were in his personal knowledge and further that he had the authority of the respondent to depose to the same.

In substance he states that after the filing of papers in this matter there had been relevant developments, of which the court should be made aware. He stated that upon receipt

by the registrar of the respondent's notice of 8 November 2002, the registrar had invited the two applicants to make representations in writing in terms of s35 (3) (a)(1) of the Act. Thereafter the registrar had on 21 January 2003, indicated her intention to proceed with the cancellation of the registrations of the applicants as stockbrokers. A copy of the letter of the registrar of the same date is annexed to his affidavit. Subsequent to this, on 29 January 2003, the applicants noted an appeal against the deregistration to the minister in terms of s 39 of the Act, which is confirmed by a letter addressed to the registrar by Continental Securities dated 21 February 2003.The appeal was dismissed by the minister as appears from a letter addressed to the applicants on 3 July 2003 by the registrar. Ultimately it was the contention of Barfoot that the decision to set aside the applicant's suspension would have no practical effect.

Order 32 Rule 235 of the Rules of the High Court provides that after an answering affidavit has been filed no further affidavits may be filed without the leave of the court or a judge. In their book, the Civil Practice of The Supreme Court of South Africa, the learned authors, Van Winsen, Cilliers and Loots at page 360 4 ed, state that if new facts come to the knowledge of the respondent after he has availed himself of the opportunity of filing affidavits, the court will accept affidavits dealing with those facts which are tendered after applicant's replying(answering) affidavits have been filed, but will require satisfactory information that the facts in question came to the respondent's knowledge in the manner stated or alleged.

The respondent's opposing affidavit was signed on 9 December 2002, which is the same day that it was filed. An answering affidavit was filed on the applicants' behalf on 2 January 2003. The registration of the two applicants was cancelled by the Registrar on 21 January 2003, and the appeal to the minister was in turn dismissed on 3 July 2004. In my view the facts in the fourth affidavit came to light after the respondent had filed its opposing affidavit, and there is justification for its admission.

I turn now to the merits of the application.

The founding affidavit for the application was sworn to by the first applicant in the following terms.

He is a registered stock broker and is registered as such with the respondent in terms of Section 31 of the Zimbabwe Stock Exchange Act [*Chapter 24:14*]. The first and second applicants are directors of Continental Securities Trading (Pvt) Ltd which until 21 February 2003 was the first applicant herein. It has since filed a notice of withdrawal and tendered costs herein. The first applicant has authority to represent second applicant in these proceedings. The

deponent's authority to represent the second applicant is confirmed in an affidavit filed by the said second applicant.

In July 2002 the applicants were requested by the Committee to provide an explanation of the purchase and sale of shares in Old Mutual being conducted on behalf of the company. The shares in question were being traded on the stock markets of Johannesburg and London. The query by the committee was in relation to the use of the parallel market rate in the purchase of the shares. The query was responded to the effect that the use of the parallel rate was not irregular as the money was being brought back into the country and that therefore there was no prejudice occasioned to the country.

On 9 October 2002 the respondent sent a letter to the first and second applicants requesting information on certain trades in shares that they had executed. The applicants responded by letter dated 10 October 2002. Again in October 2002 the respondent sent them a query regarding the Nicoz-Diamond initial public offer (IPO). There was an allegation that when an application for the purchase of shares was submitted some of the applicants were fictitious. The applicants explained to the committee that it would have been impossible for the company to detect that some of the applicants for the purchase of the shares were fictitious as the applications were made at the eleventh hour and were in turn voluminous and that this was an industry wide problem and was not confined to the company alone. It was also deposed by the applicant that prior to the applications being submitted the second applicant had actually advised the Chief Executive Officer of the respondent that, there was a possibility that some of the applications could be fictitious due to time constraints and that therefore the issuing house and the transfer secretaries could do the vetting of applicants and that the Chief Executive Officer of the respondent had acceded to this request and the applicants were confounded that after this communication, the respondent could allege that the applicants had been guilty of conduct likely to bring the respondent into disrepute.. The applicants furnished the committee with proof that they were not in fact the beneficiaries of the fictitious applications and that in fact the issue of fictitious applications was an industry wide problem, and the Chief Executive officer of the respondents had himself given them examples of other brokers who had submitted fictitious applications, and yet no action had been taken against the stockbrokers in question.

In October, the applicants were again requested to explain the conduct of the company regarding the issue of the sale of Old Mutual shares both internally and externally, which

allegedly was done in contravention of rule 2 of the Reserve Bank requirements, which requires that shares can only be sold outside the country at a price higher than that obtaining within the country. The respondent was advised that the price outside Zimbabwe was higher and it would appear that the explanation had at the time been found to have been satisfactory. There was a further allegation relating to the returns to the Reserve Bank which was alleged not to have been done in full. The applicants pointed out that the ultimate person to render returns were the transfer secretaries. The applicants were also alleged to have failed in submitting returns for purchases for their own account, and it was the averment of the first applicant that the respondent had been advised that returns were only due three months after the end of the financial year.

A further allegation against the applicants was that trading in Camco, which had been a division of the company, and other related accounts had been widely abused. It was the position of the first applicant that the division was used for the benefit of a few wealthy clients and their funds were managed by the applicants and a response had been provided in relation to the excess trading profit queried by the respondent. The allegation against the excessive trading in Camco by the two applicants had also been responded to, in that they had been no trading for themselves in Camco.

On 6 November 2002, the applicants were verbally advised by the respondent's Chief Executive Officer that they had been suspended from the Exchange with effect from that date. On 11 November 2002 they queried why there had been no written notification to them of the suspension, whereafter they were then given letters advising them that they had been suspended with effect from 8 November 2002. According to the first applicant the letter of 8 November addressed to the registrar of the Stock Exchange contains new allegations which are at variance with the ones that had been investigated by the committee. The applicant then lists the new complaints appearing in the letter. It is his view that the addition of the departure from the original investigation and the failure to raise the stated allegations before suspending them was a breach of natural justice. It was also, he states, grossly unreasonable of the respondent to have departed from the original grounds for investigation and to come up with new and fresh grounds. In addition the applicant states that there was possible bias on the part of the Committee given the fact that some of the members of the committee were themselves stockbrokers who would be competitors for the same business and clientele as the applicants. He stated that the composition of the committee in fact shows that 70% of the members are

stockbrokers, who would have an interest in the outcome of the investigations as they are competitors.

It was his prayer that decision by the respondent should be set aside.

The opposing affidavit by the respondent was deposed to by one Emmanuel Haggai Munyukwi, who states that he is the Chief Executive Officer of the respondent. He confirms that the Committee of the respondent consists of two persons appointed by the minister in accordance with the provisions of s 5 of the Act, and five members of the Stock Exchange. He confirms further that both applicants are registered members of the Stock Exchange.

The deponent states that the committee described above monitors the activities of all members of the Stock Exchange. He was instructed to investigate the activities of the applicants and the company, and pursuant to a report he submitted to the committee, at an extra-ordinary meeting of the committee held on 5 November 2002, the committee unanimously resolved that:-

> "The Zimbabwe Stock Exchange apply to the registrar for the deregistration of Continental Stockbrokers (Pvt) Limited, Mr E Gumbo and Mr B Eeson. It was agreed that once this had happened, Mrs Mpofu would be requested to appoint a person to wind up the affairs of Continental Stockbrokers. It was recommended that the chairman brief Mrs Mpofu and that the Zimbabwe Stock Exchange approach Messrs Honey and Blackenberg regarding the de-listing of the Brokers and company(sic)"

Pursuant to the resolution therefore, the respondent on 8 November 2002, wrote to the registrar in terms of s 35 of the Act, requesting the registrar to withdraw the registration of the applicants and the company, due to allegations of their having contravened the Act and rules and usages of the Zimbabwe Stock Exchange. A copy of the letter to the registrar was annexed to the affidavit as were various other correspondence with the applicants and Nicoz-Diamond.

The deponent states that he had noted the huge number of applications submitted by the applicants with irregularities. He states that in a memorandum dated 22 October 2002, the first applicant had admitted that they had been negligent and more care should have been exercised on their part. The applications had been accompanied by cheques from the applications amounting to an excess of $ 426 million and it was inconceivable that the applicants had not looked at the applications and not checked them. During the investigative process he had put to the applicants that they were required to submit details of purchases for their own account annually, and they had admitted that they had not complied with this requirement.

In relation to Camco, it was his averment that the respondent had not been made aware of its existence prior to the investigations which had commenced with the trading in Old Mutual shares. He states that the $ 7 billion worth of assets that Camco was alleged to have should be reflected in the accounts of the company prior to its date of incorporation, He added that the committee considered that the profit of $ 38 million in share dealing by Camco excessive in terms of Zimbabwe usage and it was likely to lead to manipulation of the market. His view was that the applicants and the company had admitted that the profit from Old Mutual shares by Camco had been for the benefit of the company which statement was at odds with their statement that the three did not own Camco.

He averred that the applicants had failed to pay stamp duty, and he also denied that Old Mutual shares could during 2002, command a higher price on the London Stock Exchange, if the official exchange rate were used. Both the Reserve Bank and the respondent were of the view that in trading in Old Mutual shares the applicants had contravened rule 2 of the bank's regulations, and thus had brought the respondent into disrepute.

Consequently the respondent had good reason to believe that the conduct of the applicant required further investigation by the registrar in terms of s53 of the Act, which was why the matter was then referred to her. He stated that immediately after the resolution was passed by the committee, the applicants were suspended as is required by s 35(1)(ii) of the Act until such time as the registrar would have acted in accordance with the provisions of the Act..

With regard to the application itself the witness deposed that there had been no proceedings or decision made by the committee or anyone else. The registrar was still to determine whether or not the registration should be cancelled, and that decision lay with the registrar, who had yet to make it. It was his view that there was no basis for the application as there was nothing to review. In his view therefore this court did not have the jurisdiction to entertain the application for review. He continued that as there had been no decision there cannot have been any irregularity. He denied that the fact that five members of the committee were themselves members of the Stock Exchange pointed to bias on the part of the committee. In addition the composition of and qualification for the committee was prescribed by the Act, and the committee did no more than comply with its provisions. He prayed for the dismissal of the application with costs.

Mr *de Bourbon* on behalf of the applicants, submitted that the nature of the decision before the court was subject to review. He contended that before the Registrar could act there

must be notification in terms of s 35 (1). In order to comply with the provisions of section 35 the committee must conduct an investigation before considering what provisions of the Act have been contravened and if it was the duty of the stockbroker to comply with the provision in question In his view, the committee had a number of initial decisions that it had to make. It had to consider guilt of the stockbroker beyond a reasonable doubt. If however, as appeared in the affidavit of Munyukwi, the correct position was that the committee did not make a decision, then that amounted to a concession and it would mean that they had not found the applicants guilty. The committee was in his view, obliged to consider whether the registration of a stockbroker should be cancelled or not, which consideration is dependant on the degree of misconduct on the part of the registered stockbroker. In the event that the committee did not consider the misconduct as serious then there would be no report to the registrar. The committee was also obliged to give reasons and the statement by Munyukwi that there had been no decision determined the matter as the Registrar cannot act of his own volition and proceed to cancel the registration.

He further submitted that there was no formal meeting by the committee as there were no minutes to evidence the meeting if such had taken place. There was thus no record of the proceedings and the only conclusion that the court could reach is that the fourth affidavit is not relevant. Further the court should conclude that the committee did not meet and therefore did not reach a decision.

Camco was, according to him, initially a division of Continental Securities before being incorporated as a company. The statement by Munyukwi regarding the decision related to facts not submissions. He said that the investigation instead of being carried out by Munyukwi was done by Barfoot who is not a member of the committee and additionally there is no evidence that the applicants were accorded an opportunity to be heard. There was no record of the proceedings that was produced. There was therefore no evidence of when and how the committee reached its conclusion. The relevance of the fourth affidavit therefore must be premised on the basis that the committee acted in terms of the law. If how the jurisdictional base is not found then everything done by the committee is null and void. The committee would have no power to suspend in terms of s35, if the suspension had been done in terms of s36 the committee would have had the power. A decision had to be made whether there has been contravention of the Act. from paras a) through to h) and then the suspension occurs. The committee in order to consider the cancellation of their registration of the applicants, had to

find them guilty of contravening all the paragraphs mentioned in the allegations. If however, the respondent made the conclusion that the applicants were guilty, then the conclusion was irrational.

The decision of the Minister was in his view extraordinary, in that it was conveyed by the person whose very decision had been the subject of an appeal to the Minister.

Regarding the issue of Nicoz-Diamond, it was common cause that either of the applicants made duplicate applications and also that over 90% of the applications came in at the last opportunity during the last hour. The condition imposed on the entire stock exchange that an applicant should submit one application made it difficult to vet the applications in one hour. The market is very competitive and if the committee was acting fairly it would have placed before the court evidence that this was an industry wide problem. He added that the vetting process allowed by Munyukwi had resulted in the withdrawal of applications valued at $181 million.

On specific sections he submitted that as regards section 55 of the Act, the majority of deals were between the applicant and other brokers as opposed to clients. In relation to the payment of stamp duty, the responsibility for that obligation has been accepted by Continental securities. The failure to render submissions of sales and purchases in accordance with the provisions of s 61 was an industry wide problem. In addition, the returns were only due by the end of March 2003 and yet the report from Munyukwi had resulted in the committee suspending the applicants prior to the time that the submissions were due.

The possibility of bias could not be discounted as there were within the committee persons with the same financial or business interests as the applicants.

He concluded that the court could not second guess on which of the allegations the applicants had been found guilty by the committee as three of the grounds had been dropped by the time the matter came up for hearing. He submitted that the proceedings by the committee were in breach of the rules of natural justice, and therefore the application for review should be granted with costs.

In response, Mr *Philips* submitted that the applicants' registration as stockbrokers was cancelled, and that an appeal was then lodged by them in terms of the Act which appeal was then dismissed. The deregistration was therefore not suspended. He contended further that with the dismissal of their appeal, the application for review had been overtaken by events, and that

therefore the Minister'' decision was the one that ought to have been taken on review. In addition he argued that the applicants were not seeking a review but a declaratur which would not do away with future litigation. In issuing the declaratur, the court had to have regard to section 14 of the High Court Act. It was his further contention that the setting aside of the suspension would have no effect on the position of the applicants, as it was the decision of the Minister that should be taken on review. He added for measure that courts did not determine litigation on a piece meal basis. He stated that when the review was filed the applicants were under suspension as the Registrar had not at that stage determined the matter. He further stated that the Registrar was not bound by what the committee of the stock exchange said. In his view, the Registrar before deciding whether or not the registration of a stockbroker should be cancelled had to have an enquiry.

As regards the merits of the review, he argued that the suggestion by the applicants that because five members of the committee were, like the applicants themselves stockbrokers with interests to protect, was not true. According to him the test is whether or not the person concerned had an interest in the proceedings and was so biased or whether there was a real likelihood of bias. He pointed out that the committee was set up by Parliament in order to protect the interests of the investing public and to monitor the conduct of stockbrokers. Parliament, had apparently provided in s5(1)(b) of the Act, that five members of the committee should be members of the stock exchange. In terms of the Act, a member is defined to mean a registered stockbroker or one who has been admitted by the committee to membership of the stock exchange as an associate member or non broking member. It was also pointed out that at no stage prior to these proceedings had the applicants mentioned the issue of possible bias on the part of the committee. The fact that five of the seven members in the committee were themselves stockbrokers, so his argument went, was testimony to the fact that only a stockbroker was best qualified to monitor the affairs of other stockbrokers. As examples he mentioned lawyers who sit on the disciplinary proceedings of other lawyers as well as doctors who also sit on proceedings involving other doctors. He contended that for such professionals to sit on those disciplinary proceedings was not suggestive of bias merely due to the fact that they belonged to the same profession.

He added that there must be present something that showed that led to the inference, which was missing in the case before the court. He dismissed the suggestion by the applicants that in view of the members of the committee belonging to the same profession as themselves,

it could not be overlooked that they had had the licences cancelled in order to get rid of the competition and get the business for themselves.

Mr *Philips* submitted that the suggestions by the applicants that they were not given an opportunity to comment to the before the committee made certain findings which were to their detriment were not correct as they were not borne out by the facts appearing in the record. He points to the handwritten questionnaire by Barfoot, the response by both applicants, which bears the signatures of both, and the recommendation of the committee to the registrar, which latter document he says contains the applicants response to Nicoz-Diamond IPO in full as proof that in fact they were given an opportunity to make representations. The recommendation, he argued also dealt with the contravention by the applicant of s55 of the Act, s61 breaches of Rule6.01 and s17 of the Stamp Duties Act..

Mr *Phillips* denied the suggestion on behalf of the applicants that the decision was irrational. He submitted that the composition of the committee and the requirements of the Act as a whole ensured that only what constituted disgraceful conduct within the profession would warrant cancellation of the registration. The standard as to what constituted disgraceful conduct was according to him placed on the committee by the legislature. It was contended that from the composition of the Act as a whole and the committee it was obvious that the legislature considered the committee as the best qualified body to judge what is disgraceful conduct in the profession and that therefore provision is made by the Act for the committee members to be appointed by the minister.

Mr *Phillips* further argued that although the deponent to the opposing affidavit states that no proceedings had taken place there was a decision that had been made., but in fact what is meant to be conveyed by that statement is that the applicants had been suspended, which is a fact. He submitted that there was on the papers a reviewable decision, and that decision was made by the committee of the respondent. In support of the decision of the committee he tabulated the failures by the applicants to comply with various provisions of the Act. He pointed out that as regards the Nicoz-Diamond IPO the applicants had withdrawn an application whose total value was $181 000.00 which was found to be a false application. In relation to Camco, he submitted that this was a division of the employer of the two applicants, and that the committee after considering the evidence before it, had rightly concluded that the applicants had contravened the Act. He contended further that the applicants had admitted negligence in their capacities as stockbrokers and that on that ground alone the committee

would be entitled to suspend them in terms of s35(1)(b)(ii). Further, he argued the applicants had contravened the following sections of the Act, 35(1)(c),35(1)(h),55,61, Rule 6:01, and s17 of Act 23:09.

Regarding the alleged contravention of sections 51 and 65 of the Act, it was his submission that the committee had to be satisfied on their evidence of the two breaches.. He said there was clear evidence of a failure on their part to pay stamp duties and commission. He concluded by saying that there was evidence of contravention of the Stock exchange Act, the Stamp Duty Act the Reserve Bank rules and admitted negligence on the part of the applicants. In his view any one of the alleged breaches was sufficient to warrant their suspension. The application was in his view unmeritorious and should be dismissed with costs.

I turn now to the merits of the dispute between the parties.

IN LIMINE

The respondent contends that the application by the two applicants is ill-founded as the respondent has not made a decision, which decision they are asking this court to set aside. The decision to cancel the registration as argued by Mr Phillips is made by the Registrar and therefore all that the respondent's committee does is to express an opinion which is then transmitted to the registrar for a final decision. All that the respondent provided was the evidence for the Registrar to act upon, and it was not the function of the respondent to determine the guilt of the miscreant, which function was solely that of the Registrar. It was further submitted that the Act made it mandatory for the committee to suspend the stockbroker until such time as the registrar would have acted on its recommendation.

In addition, when one has regard to the fourth affidavit it now clear that the decision to cancel the registration of the applicants has been made by the registrar and an appeal to the minister has since been dismissed as being unmeritorious. Consequently it is argued an order setting aside the suspension will have no effect on the decisions of the registrar and the dismissal of the appeal by the minister.

Mr *de Bourbon* however contended that the nature of the decision which was the subject of the review proceedings was capable of being reviewed. He went on to say that before the Registrar could act in terms of s 35(3) of the Act, he must receive notification from the committee in accordance with the provisions of s 35(1). Before notifying the Registrar, went the argument, the committee must carry out an investigation in order to consider which provisions of the Act would have been infringed and if it was the duty of the stockbroker to

comply with the section in question. He argued further that the committee had to consider guilt beyond a reasonable doubt If the committee says it has not made a decision, then it would mean that it has not considered anything. He said that the committee must also consider cancellation of the registration and that the degree of misconduct must be such that the cancellation is warranted. He argued that the committee had a number of initial decisions that it had to make and it was not there merely to push paper from one person to the next. It was his contention that the committee in terms of s 35 of the Act, acted in a quasi-judicial function which therefore rendered its decisions subject to review process. He added that s 35(1) requires the committee to meet and consider whether a registered stockbroker had committed the acts listed in subsection (1) and thereafter conclude that the registration of the stockbroker should be cancelled. If the committee is of the view that the misconduct is not serious then there would be no requirement that a report be made to the registrar. Where however, notification has been decided on then the committee informs the registrar and the stockbrokers and suspends them. He contended that s 35(1) (ii) requires that reasons be given and further that the statement by Munyukwi that there had been no decision made determines the matter as the registrar cannot act on his own volition. The jurisdictional basis of his decision was put into place by the decision of the committee. If however the committee did not make any decision then it followed that the basis for his acting as he did was missing. He stated further that the fact that the decision as to whether or not to cancel the registration lies with the Registrar does not mean that the committee has no decision to make and thus is not obliged to hold a meeting.

On this point the enquiry is in my view two-pronged. The first is to determine whether the committee of the respondent made a decision as a result of which the applicants were suspended and if that decision by the committee is subject to the review process as envisaged in s 27 of the High Court Act [*Chapter 7:06*]. The next step is to consider what effect if any, the cancellation of the registration and the dismissal of the appeal have on the proceedings to review the suspension.

Section 35 of the Act provides in the following terms;

"If the Committee considers that a registered stockbroker-

(a) is not a suitable person to remain registered; or

(b) ----------

(c) has contravened any provision of this Act with which it is his duty to comply; or

d) has been guilty of-

(i) disgraceful conduct; or

(ii) negligence in his capacity as a registered stockbroker;

or

h) has failed to pay any moneys due by him to the Exchange or the Fund; or

and that the registration of the registered stockbroker should be cancelled, the Committee shall forthwith-

(i) notify the Registrar and the registered stockbroker in writing of its opinion and the reasons therefore; and

(ii) suspend the registered stockbroker from practice until the registrar has acted in terms of subsection(3)

The ambit of the obligations of the Committee hinge upon the meaning of the word 'consider' as it appears in context. The Oxford Dictionary of current English defines the word as follows; contemplate mentally, esp in order to reach a conclusion, examine the merits of, look attentively at, take into account, show consideration or regard for, have the opinion that. In *Neale v Mayor, East London* 1935 EDL 225, GANE J in considering the definition of the same word had this to say at 230;

> 'Does it make any difference that the meeting was called to 'consider' the question of reduction? Probably the most common meaning of the word 'consider' is to ponder, to contemplate, to reflect upon. No one will contend that this meeting was confined to silent and Buddhistic reflection. At the very least the question could have been considered through the medium of speeches for or against the suggested reduction. But I think that a very common meaning for the word 'consider' especially when it is used in relation to public business, is 'to argue pro and con', 'to consider by means of debate', generally with an implication that a decision will be taken as a result of such argument and debate.'

I am therefore much inclined toward the submission by Mr de Bourbon that the committee is not there to push paper. It is required in terms of the Act to ponder and deliberate. It must examine the merits of the allegations leveled against the registered stock as against the evidence that has been gathered or is available in support of those allegations. The committee must then debate the evidence available in order to come to a decision as to whether there has been an infringement of the provisions concerned. It must then make a finding on the facts that the allegation on the situations referred to in subsection (1) of section 35 have been proved and that its conclusion following thereon is that the registration of the stockbroker be cancelled,

and thereafter notify the registrar thus triggering the cancellation process in motion. Thus the committee makes a decision that the registered stockbroker has acted contrary to the provisions of s 35 of the Act, and it is this decision that is a purcursor to the process of cancellation, which cannot happen in the absence of a decision by the committee to that effect. The suspension of the registered stockbroker is in terms of the Act, a statutory consequence arising from the decision of the committee that the registration be cancelled. It is a peremptory duty imposed on the committee by the statute. Whether or not the decision to suspend is out of the discretion of the committee, does not in my respectful view detract from the statutory power of the committee to determine whether or not there has been conduct on the part of the registered stockbroker which in terms of the Act justifies that his registration as such be cancelled. The section grants the committee the power to make decisions which prejudicially affects the rights and interest of a registered stockbroker.

The question that then confronts us is whether or not the nature of the decision by the committee is such that it is reviewable. It was the contention of Mr *de Bourbon* that in exercising its functions under the Act the committee was acting in a quasi-judicial capacity which rendered its decisions subject to judicial review. He added, however, that even if the committee had acted in a purely administrative capacity, still its decision would be subject to the review process. The distinction between judicial and administrative functions as a ground for review has been done away in our law. What is of import is whether or not the administrative body in exercising its statutory functions has acted fairly. In Logan v Morris NO & Ors 1990 (2) ZLR 65 at 68 McNALLY JA stated the following;

> "This Court has indicated in such cases as *Patriotic Front –ZAPU v Minister of Justice Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC); 1986 (1) SA 532(ZS) that: 'whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectations of the subjects or citizens, the jurisdiction of the Courts is not ousted. The private rights, interests and legitimate expectations of the citizens subject to judicial review acts of the executive which would otherwise oust the jurisdiction of the courts' (at p 313G-H).
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> See also *Public Service Commission v Tsomondo* 1988 (1) ZLR 427 (SC), where we spoke of an individual's "legitimate expectation" that he would be treated fairly.
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> These are indications of a developing approach to the validity of administrative acts in which the old distinction between quasi-judicial acts on the one hand and purely administrative acts on the other, has been swept away. Quite apart from the cases referred to by counsel, the whole matter has now been restated in clear and simple

terms, as far as the Roman-Dutch law is concerned, by CORBETT CJ in *Administrator, Transvaal & Ors v Traub* 1989*(4)* SA 731(A). In considering an earlier dictum in which the distinction had been made, he said (at p 763H):

'This *dictum* appears to define "quasi-judicial" in terms which the decision has upon the individual concerned. On this basis a classification as quasi-judicial adds nothing to the process of reasoning: the court could just as well eliminate this step and proceed straight to question as to whether the decision does prejudicially affect the individual concerned. As I have shown, traditionally the enquiry has been limited to prejudicial effect upon the individual's liberty, property and existing rights, but under modern circumstances it is appropriate to include his legitimate expectations. In short, I do not think the quasi-judicial/purely administrative classification, relied upon by counsel, is of any material assistance in solving the problem presently before the Court'"

Wade in his book Administrative Law 6 ed comments thus at page 636:

"But certiorari and prohibition will issue in respect of any exercise of statutory power which involves a true legal decision or determination, such as the grant of a licence or the issue if a search warrant. They will lie where there is some preliminary decision as opposed to a mere recommendation, which is prescribed in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself. Where a telegraph operator was entitled to claim compensation for telegraphist's cramp on production of a certificate from a medical officer specified in the Act, the refusal of a certificate by a different and unauthorised medical officer was quashed as being so much waste of paper. The court thus removed what would otherwise have been a legal obstacle to claiming a certificate from the proper officer. In the same way certiorari was granted to quash a medical certificate stating that a boy was an imbecile and incapable of benefiting from attendance at school, when one of the signatory doctors had not himself seen the boy and the question was, in any case, for determination by the Board of Education under the Act. Even a report may be quashed if it is substantially a decision rather than a recommendation, e. g. where the Act provides that it shall be final. There is no magic in the word 'report'. The question is whether some issue is being determined to some person's prejudice in law."

In *casu*, it cannot be gainsaid that the committee made a decision, irrespective of whether or not it was a final decision. The decision that it made put into motion a chain of events that ultimately led to the cancellation of the applicants' registration. It was a decision that prejudicially affected the rights and interest of the applicants. It would be, in my respectful view, be absurd to find as submitted by the respondent, that the decision of the committee is not liable to judicial review, as such a finding would lead to an injustice being done. It would put the decisions of the committee outside the realm of court interference and thus oust the decisions from jurisdiction of the courts. Statutory bodies have the duty to act fairly and the

only manner in which that can be ensured is by the decisions it makes under the Act being subject to the scrutiny of the courts.

That is however not the end of the end of the matter. In terms of the affidavit of Barfoot, subsequent to the notification of the suspension of the applicants, the registrar proceeded to cancel their registration, which cancellation was effected after representations had been sought from the two applicants. An appeal was lodged by both to the minister in terms of the Act, which appeal was ultimately refused.

It is the contention of the respondent that it is the decision of the registrar which ought to have been taken on review, as the registration of the two applicants has now been cancelled and that even if this court were to hold that the decision of the committee to suspend both applicant had been unprocedural resulting in the suspension being set aside, that would not assist the applicants as their deregistration would still stand. In the event, contends Mr Phillips on behalf of the respondent, the consideration of the decision of the committee would serve no useful purpose. He further argued that the applicants' deregistration had not been suspended and that in effect what the applicants were seeking was not a review but a declaration which would not do away with future litigation. In issuing the declaration therefore the court had to have regard to the provisions of s 14 of the High Court Act. He maintained that at the time that the suspension was taken on review the registrar had not yet determined the issue of the cancellation of their registration. In determining the registration the Registrar was not bound by the decision of the committee and had in terms of the provisions of the Act have an enquiry into the suitability of the applicants remaining registered as stockbrokers.

The duties or obligations of the registrar are prescribed as follows in the Act:

3) Upon receipt of a notification made in terms of subparagraph (i) of subsection (1) or a request made in terms of subsection (2) as the case may be, the registrar may-

(a) cancel in the Register the registration of the registered stockbroker concerned:
Provided that-

i) where the registrar-

(a) has received notification in terms of subparagraph (i) of subsection (1); and

(b) proposes to cancel the registration of the registered stockbroker concerned;

(i) he shall notify the registered stockbroker concerned in writing of the proposal referred to in paragraph (b) and the reasons therefor and afford that registered stockbroker an opportunity of showing cause to the contrary by means of representations in writing;

(ii) in the case of a request(not applicable)

or

b) decline to effect the cancellation referred to in paragraph (a)

Clearly, from a reading of that subparagraph, the Registrar is enjoined in terms of the Act, to consider the matter on the merits and make his own determination as to whether the registration of a registered ought to be cancelled. The Registrar has a discretion which is exercisable independent of the notification or the finding by the committee on the need for cancellation. It would appear that the Registrar indeed called for submissions from the applicants and then proceeded to determine the matter on the basis of the evidence placed before her by the committee, as well as the written comments she had solicited from the applicants.

The effect of the cancellation of the registration as stockbrokers of the applicants is that their names have been deleted from the register of stockbrokers. An order setting aside would not affect that position and would not result in the names of the applicants being reinstated in the register. In my view the application to set aside the suspension has been overtaken by events. The decision that decided the fate of the applicants, is that of the Minister in refusing to upset the decision by the registrar to cancel the registration of the two. Setting aside the suspension would therefore be an academic exercise which would be of benefit to no-one. It would in fact be a *brutum fulmen* and of no assistance or benefit to anyone. It would not as correctly submitted by Mr *Phillips*, stop further litigation between the parties. In view of the decisions by the Registrar and the Minister, it is not the final process in the status of the applicants which has been determined beyond the suspension. I am therefore not inclined to deal with the merits of the application.

The application is therefore dismissed with costs.

Messrs. Gill, Godlonton & Gerrans, applicant's legal practitioners

Messrs. Honey & Blanckenberg, respondent's legal practitioners