

PATRICK MURRAY TOPHAM v THE VALUATION SURVEYORS
REGISTRATION BOARD (1981) Z.R. 320 (H.C.)

HIGH
MOODLEY,
14TH
(1980/HK/225)

COURT
J.
OCTOBER, 1981

Flynote

Civil procedure - Appeal - Valuation Surveyor's Registration - Refusal of application to register by Minister- Whether appeal lies.

Civil procedure - Appeal - Registration - Refusal to register by Minister - Remedy where no right of appeal stipulated.

Civil procedure - Registration - Valuation Surveyor's Registration - Minister vested with absolute discretion to allow - Whether writ of certiorari issuable against Valuation Surveyors' Board .

Registration - Valuation Surveyor's Registration - Refusal to register by Minister - Whether appeal lies - Valuation Surveyor's Act No. 34 of 1976, s. 13.

Headnote

The applicant is a registered architect by profession.

Prior to the Valuation Surveyors Act No. 34 of 1976, he together with other registered architects, had operated as valuation surveyors' by way of their qualifications and experience under Cap. 825 of the Laws of Zambia which specifically recognised valuation as a function within the architect's sphere of competence.

In August, 1979, he applied to the Valuation Surveyors' Registration Board for registration as a valuation surveyor under the Valuation Surveyors Act. No. 34 of 1976. In May, 1980, the applicant received a letter from the Permanent Secretary of the Provincial and Local Government Administration Division, informing him that his application for registration had been considered by the Minister and was unsuccessful.

By an originating notice of motion, the applicant sought an order of certiorari to bring up and quash the decision rejecting his application by the Valuation Surveyors' Registration Board. The basis for his contention was that the decision of the Minister was wrong and that by virtue of his qualifications and vast experience, the decision to reject his application took into account matters which ought not to have been taken into account. He contended that as his qualification and experience

p321

were adequate for efficient practice as valuation surveyor, he was therefore qualified to be so registered.

Held:

- (i) Section 13 of the Valuation Surveyors Act, No, 34 of 1976 provides a right of appeal to any person who is aggrieved by decision of the Valuation Surveyors' Board. But the section does not confer a statutory right of appeal upon an applicant who has been aggrieved by a decision of the Minister,
- (ii) In the absence of any right of appeal the only remedy available is to proceed by way of an application for a writ of a certiorari.
- (iii) Where the Minister is vested with an absolute discretion regard to applications for registration and the Valuation Surveyors' Registration Board merely plays a consultative role, the writ of certiorari does not lie against the Board.

Cases referred to:

- (1) Rex v Electricity Commissioners; ex parte London Electricity Joint Committee Co., (1920)
1 K.B.D. 171 at 204-205.

Legislation referred to:

Valuation Surveyor's Act No. 34 of 1976, ss. 4, 8, 9, 11 and 13.

For the applicant: Chishimba, of Forrest Price & Co. Kitwe.

For the Respondent: Coovadia, of J.B. Sakala & Co. Ndola as agents for Solly Patel Hamir & Co., Lusaka.

Judgment

MOODLEY, J.:

By an originating notice of motion, the applicant Patrick Murray Topham seeks an order of certiorari to bring up and quash the decision of the respondent Valuation Surveyors' Registration Board which, on the 13th May, 1980, had, rejected an application by the applicant to be registered as a valuation surveyor.

The applicant is a registered architect by profession and operate under the name of Topham Revensdale Associates. In his affidavit he deposes, inter alia, that prior to the Valuation Surveyors Act No. 34 of 1976, he together with other registered architects, had operated as valuation surveyors by way of their qualifications and experience under Cap. 825 of the Laws of Zambia which specifically recognises valuation as a function within the architects sphere of competence. On or about the first week of August, 1979, he applied to the Valuation Surveyors' Registration Board for registration as a valuation surveyor under the Valuation Surveyors Act No. 34 of 1976. The said application was acknowledged by the Secretary of the Board on 14th August, 1979. On the 13th May, 1980, the applicant received a letter from the Permanent Secretary of the Provincial and Local Government Administration Division, informing him that his application for registration had been considered by the Honourable Minister and ad been unsuccessful. The applicant now

p322

contends that he had reason to believe that the decision of the Minister was wrong and that by virtue of his qualifications and vast experience aforesaid the decision to reject his application took into account matters which ought not to have been taken into account. He contends that from the

qualifications and experience he has acquired which were adequate for efficient practice as valuation surveyor, he was qualified to be registered as a valuation surveyor.

The Valuation Surveyors Act No. 34 of 1976 provides for the registration of valuation surveyors and for matters connected with or incidental thereto. Section 4 of the Act provides for the establishment of a Valuation Registration Board. Section 6 empowers the Board with the approval of the Minister, by statutory instrument, to make rules concerning, *inter alia*, the procedures to be followed by persons applying for registration; the suspension of registration and the de-registration of valuation surveyors; and the maintenance and improvement of the status and qualifications of valuation surveyors. By section 9 the Board was required to keep and maintain a register to be known as the 'Register of Valuation Surveyors' wherein was entered in respect of every person to be registered as a valuation surveyor, his name and address, qualifications, date of registration and such other particulars as may be prescribed by regulations.

Section 11 provides:

"A person shall not be registered as a valuation surveyor unless on the date of his application for registration, he has attained the age of twenty-one and has -

- (i) passed such qualifying examination as the Minister may, after consultation with the Board, prescribe; and
- (ii) completed such period of such practical training in the work of a valuation surveyor as the Minister may, on the recommendation of the Board, consider satisfactory; or
- (iii) acquired such qualifications and experience as the Minister, may, after consultation with the Board, consider to be adequate for efficient practice as a valuation surveyor.'⁷

Section 13 provides:

"Any person aggrieved by decision of the Board, may within twenty-eight days of receiving a copy of such decision, appeal to the High Court, and the High Court may make such order thereon as it thinks fit."

The decision of the Minister rejecting the application was conveyed to the applicant through a letter addressed to him by the Permanent Secretary of the Provincial and Local Government Administration Division of the Office of the Prime Minister. The letter addressed to the applicant and dated 13th May, 1980, reads as follows:

"I refer to your letter reference No. PMTpmc dated 11th January, 1980, which you have applied for registration, as a Valuation

p323

Surveyor under the Valuation Surveyors Act No. 34 of 1976.

Your application has been carefully examined by the Honourable Minister under Section 11 (b) of the Valuation Surveyors Act. I regret to inform you that it has been unsuccessful.

Yours faithfully,
J.A. SAKALA,
Permanent Secretary.

When the motion came before this Court on the 19th June, 1981, Mr Coovadia for the respondent Board took a preliminary objection. He submitted that the applicant should not be allowed to proceed by way of certiorari since as an aggrieved party he had not exhausted the remedy available to him under section 13 of the Valuation Surveyors Act of 1976, which gives an applicant a statutory right of appeal to the High Court if he was aggrieved by a decision of the Board. The Court further invited both counsel for the applicant and the respondent Board to address the Court on the question whether certiorari was an appropriate remedy in these proceedings. This invitation was prompted by the fact that the Court had to consider whether the applicant could properly move the Court for an order of certiorari and whether certiorari was the proper legal remedy available to the applicant in the circumstances of this case.

A brief resume of the law governing the writ of *certiorari* may be of some assistance. Paragraph 147 of Halsbury's Laws of England (fourth edition) reads as follows:

"*Certiorari* lies, on the application of a person aggrieved, to bring the proceedings of an inferior tribunal before the High Court for review so that the Court can determine whether they shall be quashed, or to quash such proceedings. It will issue to quash determination for excess or lack of jurisdiction, error of law on the fact of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury."

In this book entitled *Judicial Review of Administrative Action*, (3rd edition), the learned author S.A. de Smith states at page 340:

"The orders will issue against inferior courts against administrative tribunals, against local authorities and other statutory bodies and also against individual officers discharging public functions. They will issue against departments of State and individual Ministers but it is often assumed that they will not lie against the Crown because the orders are commands of the Court disobedience to which is a contempt punishable by attachment."

Paragraph 252 of Halsbury's Laws of England (3rd edition) reads:

"*Certiorari* will issue to quash the determination of any body of persons having legal authority to determine questions affecting the

p324

right of subjects and having the duty to act judicially. *Certiorari* lies only in respect of judicial, as distinguished from administrative acts.

Paragraph 114 of the same volume states as follows:

"The orders of *certiorari* and prohibition will lie to bodies and persons other than courts *stricto sensu*. Any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, is subject to the controlling jurisdiction of the High Court of Justice, exercised by means of these orders. It is not

necessary that it should be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of, and are not in accordance with the practice of, a court of law. It is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition. A body may be under a duty, to act judicially (and subject to control by means of these orders) although there is no form of *lis inter partes* before it; it is enough that it should have to determine a question solely on the facts of the particular case, solely on the evidence before it, part from questions of policy or any other extraneous considerations. Moreover an administrative body, whose decision is actuated in whole or in part by questions of policy, may be under duty to act judicially in the course of arriving at the decision. Thus, if in order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, if at some stage of the proceedings leading up to the decision there was something in the nature of a *lis* before it, then in the course of such consideration and at that stage the body would be under a duty to act judicially. If, on the other hand, an administrative body in arriving at its decision had before it at no stage any form of *lis* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under duty at any time to act judicially. Even where the body is at some stage of proceedings leading up to the decision under a duty to act judicially, the supervisory jurisdiction of the Court does not extend to considering the sufficiency of the grounds for or otherwise challenging the decision itself."

Paragraph 115 of the same volume states:

"The duty to act judicially may arise in widely differing circumstances which it would be impossible to attempt to define exhaustively. The question whether or not there is duty to act judicially must be decided in each case in the light of the circumstances of the particular case and the construction of the particular statute."

In *Rex v Electricity Commissioners; Ex Parte London Electricity Joint Committee Co.* (1920) [1924] 1 K.B.D. 171 at pages 204-5 Atkins, L.J., stated as follows:

p325

"The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorised proceedings of the commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the divisional court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained Courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record of the order of the Court to be sent up to the King's Bench [Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be

recognised as, courts of justices. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

I now come to the preliminary objection taken by Mr Coovadia. He contends that an order of certiorari is not available to the applicant since the applicant had failed to exhaust his statutory right of appeal as provided for by section 13 of the Valuation Surveyors Act. 1976. In relation to his submissions I wish to cite the following passage from the book *Judicial Review of Administrative Action* (3rd edition) where the learned author states at page 374:

"The existence of a right of appeal to the courts from a tribunal's decision does not deprive the courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the Court."

"An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy or to have exercised any right of appeal to a court of law; but it is not the practice of the court to exercise its discretion in favour of an applicant if he has already lodged an appeal to a court against the decision and the appeal is pending. If an order is subject to appeal within a specified period, the court has a discretion to adjourn an application to quash it until the appeal has been determined or the time for appealing has expired."

"On the principles that ought to regulate the exercise of judicial discretion when alternative remedies are available there is not great deal of English authority, but it is thought that the following propositions are acceptable."

p326

(i) "The court must be prepared to take into account all the circumstances of the case; including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and the conduct of the applicant.

(ii) If an applicant claims to be aggrieved by a decision made without jurisdiction or in breach of the rules of natural justice, the fact that he has not taken advantage of a statutory right of appeal should normally be regarded as irrelevant.

(iii) If an applicant claims to be aggrieved by a decision exhibiting an error of law (not going to jurisdiction) and has a statutory right of appeal to a court, recourse to appeal is the appropriate remedy and he may be refused certiorari for this reason. However, the court retains jurisdiction to award *certiorari* to quash; and the refusal of certiorari is not the only way of encouraging resort to appeal.

(iv) If an applicant seeks an order of certiorari after having appealed unsuccessfully, certiorari may be refused where he has failed to raise objections to jurisdiction or to complain of breach of natural justice at an earlier stage when in full possession of the facts. If he has raised these (or other) questions on appeal and then raises them again on his application for certiorari, the court must consider whether, in all the circumstances, it is right to allow the applicant two bites at his cherry. Recent practice clearly indicates that where the

proceedings impugned were a nullity, an award of certiorari will not readily be denied."

I have already referred to the letter written to the applicant by the Permanent Secretary of the Ministry of Provincial and Local Government Administration Division. That letter informed the applicant that the Minister after due consideration in terms of Section 11 (b) of the Valuation Surveyors Act No. 34 of 1976 had rejected his application for registration as a Valuation Surveyor. Section 13 of the Act provides right of appeal to any person who is aggrieved by a decision of the Board. The Act does not state whether a right of appeal is available to any person who is aggrieved by decision of the Minister. It is apparent that section 13 of the Act does not confer statutory right of appeal upon an applicant who has been aggrieved by decision of the Minister as in the instant case. In the absence of any right of appeal, it would appear that the only remedy available to the applicant in this case was to proceed by way of an application for a writ of certiorari. In those circumstances, Mr Coovaa's preliminary objection fails.

I now come to the new question, namely, whether a writ of certiorari is in fact available to the applicant in the circumstances of this case. Section 11 of the Valuation Surveyors Act, *inter alia*, provides that a person was not to be registered as Valuation Surveyor unless on the date of his application for registration he had attained the age of 21 years and had acquired such qualifications and experience as the Minister might after consultation with the Board consider to be adequate for efficient practice

p327

as valuation surveyor. It is crystal clear from this section that the decision making authority in respect of an applicant for registration as a valuation surveyor is the Minister and not the Valuation Surveyors Registration Board. When confronted with an application for registration, it is the Minister who has to determine whether the applicant has acquired such qualifications and experience which he considers to be adequate for efficient practice as the valuation surveyor. The Minister might consult the Valuation Surveyors Registration Board in regard to the adequacy of the qualifications and experience of the applicant for efficient practice as a valuation surveyor but the Minister is not bound by or obliged to accept the opinion of the Board. The decision is that of the Minister alone and not that of the Board. The Minister is vested with an absolute discretion in regard to applications for registration whereas, the Valuation Surveyors Registration Board merely plays a consultative role. The Minister's decision rejecting the application for registration was communicated to the applicant by the Minister's Permanent Secretary and not by the respondent Board.

I find that the respondent Valuation Surveyors Registration Board was not directly involved in the actual decision as to whether or not the applicant should be registered as a valuation surveyor apart from being available to consult with the Minister on the subject; and that it was the Minister who was solely responsible for determining whether an applicant for registration had acquired such qualifications and experience adequate for efficient practice as a valuation surveyor. It would appear to me that the action against the respondent Board was misconceived. I hold that the writ of certiorari was not available to the applicant since the decision complained of was not that of the respondent Board but that of the Minister and in those circumstances the Valuation Surveyors Registration Board was wrongly cited as the respondent in these proceedings. Accordingly, the application for writ of *certiorari* is dismissed.

Application dismissed

YONAH BANDA v