A 328/98

B K A OPPERMANN vs THE PRESIDENT OF THE PROFESSIONAL HUNTING ASSOCIATION.

Hannah. J

1999-12-14

ADMINISTRATIVE LAW

Voluntary Association - Rights of members to be found in the rules, if any. - Court not entitled to go behind the rules and revise or alter them so as to make them more reasonable or consonant with ideas of fairness.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

B.K.A. OPPERMANN APPLICANT

and

THE PRESIDENT OF THE PROFESSIONAL

HUNTING ASSOCIATION OF NAMIBIA RESPONDENT

CORAM: HANNAH, J

Heard on: 23-11-1999

Delivered on: 14-12-1999

JUDGMENT

HANNAH, J: The applicant seeks an order setting aside two decisions of the Executive Committee of the Namibian Professional Hunting Association together with certain ancillary relief. For the sake of convenience I will refer to that association as "NAPHA". The applicant was an extraordinary member of NAPHA and the decision which precipitated this application was a decision made by the Executive Committee on or about 12th November, 1997 to expel him from the association. However, almost eleven months earlier, namely at the end of December, 1996 the Executive Committee had conditionally suspended the applicant's membership and he also seeks to have this decision set aside. The respondent concedes that the applicant is entitled

to have the expulsion decision set aside and the only dispute between the parties relates to the conditional suspension.

The history of the matter is briefly as follows. The applicant carries on business as a taxidermist. NAPHA's constitution provides that persons with a special interest in trophy hunting can become extraordinary members and in 1988 the applicant applied for and obtained membership of the association. By signing a declaration of membership he bound himself to NAPHA's constitution. On 18th September, 1996 NAPHA wrote to the applicant stating that the Executive Committee had been receiving more and more complaints from the applicant's customers about delay in receiving trophies, damaged trophies and trophies not being received at all. The applicant replied asking for details of the complaints. NAPHA responded by letter dated 23rd October stating that the applicant should have knowledge of the complaints and then provided the names of seven customers with an outline of what each was complaining about. It also asked the applicant to comment on those complaints before the end of November and to state whether they have been or are being resolved. On 15th November the applicant addressed a letter to NAPHA dealing with the complaints but apparently this letter was never delivered. Then by letter dated 30th December the Executive Committee informed the applicant that he was suspended from the association until the complaints were satisfactorily resolved. The reasons given for the decision were that the applicant had failed to comment on the complaints by the end of November as required in the letter dated 23rd October and had failed to resolve the complaints. In the absence of the applicant one of his employees replied to this letter and when the applicant's secretary returned from holiday she faxed a copy of the applicant's letter dated 15th November to NAPHA. When the applicant returned from holiday he wrote protesting his

suspension stating that the decision was unlawful. The applicant then instructed an attorney to act on his behalf.

The attorney wrote to NAPHA stating that although the applicant was entitled to bring an application in the High Court to have the decision to suspend him set aside his instructions were to explore, on a without prejudice basis, an amicable withdrawal of the suspension. NAPHA replied on 7th April, 1997 stating that the Executive Committee was willing to listen to any representations but its demand that the complaints set out in its letter dated 23rd October be resolved still stood. There then followed certain communications between the applicant's attorney and NAPHA culminating in a letter dated 3rd July from NAPHA to the attorney stating that if the complaints were not sorted out before 1st August the applicant would be expelled. The letter also stated that complaints were still being received but it did not identify them. In his reply to this letter the attorney asked for a final list and details of complaints and although there was no reply to this letter the attorney did attend a meeting held by the Executive Committee in August. NAPHA undertook to write to each complainant in order to ascertain whether his complaint had been satisfactorily resolved and asked that the applicant do likewise. Details of two new complaints were handed to the attorney. The applicant deposes that he did indeed write to, or contact, the various complainants and he annexes to his affidavit a copy of one of the letters which were written. However, whilst the applicant was waiting for replies to his letters NAPHA wrote to him on 12th November informing him that the Executive Committee had unanimously decided to expel him from the association as from 1st November, 1997.

In his founding affidavit the applicant claims that the actions of NAPHA and its Executive

Committee, and in particular the expulsion from the association, have seriously and prejudicially affected his taxidermy business and have reflected adversely on his character. The respondent does not dispute this claim but avers that any damage the applicant has suffered is of his own making.

Expulsion and suspension are dealt with in Clause 5 of NAPHA's constitution. The material sub-clauses are the following:

> "5.5 Expulsion occurs
>
> 5.5.1 if the member of the Association still remains in arrears with the membership fee for one year, despite having received two reminders,
> 5.5.2 in the case of serious and repeated violations of the constitution or disregard of resolutions binding upon the Association, after being cautioned in writing without success,
> 5.5.3 due to dishonourable conduct within or outside the confines of the Association,
> 5.5.4 in the case of other serious reasons affecting the discipline of the Association.
>
> 5.6 The expulsion, which comes into effect immediately, is decided upon by the executive committee by simple majority. Before the executive committee takes such a decision, the member is granted a period of at least four weeks to respond to the accusations levelled against him. The member must be informed about the expulsion order by means of a registered letter spelling out the reasons in detail.
>
> 5.7 It is possible to appeal against this decision to a tribunal by depositing N$200. The written appeal must reach the executive committee within one month of the expulsion order. During the tribunal the member is granted the opportunity to defend himself in person.
>
> 5.8 if the executive committee is of the opinion that a member is consciously violating the constitution, decisions or resolutions of

> the Association, disciplinary proceedings may be initiated against such member. Taking into consideration all evidence put before the committee, the executive committee may discipline the accused by reprimanding or warning him, suspending his membership or expelling him from the Association (permanently or temporarily).
>
> 5.8 Should the member fail to appeal against the expulsion order or not do so in time, he has no legal grounds to claim in court that his expulsion was unlawful."

In his founding affidavit the applicant sets out quite wide-ranging grounds for setting aside NAPHA's decision to suspend him but several of these overlap. Essentially his case is, and this was the case argued by Mr Coetzee on his behalf, that the Executive Committee did not act in accordance with the association's constitution and, in any event, acted unfairly and in breach of the rules of natural justice in that it failed to formulate a charge against him, it failed to notify him of any charge, it failed to give him notice of disciplinary proceedings and accordingly failed to give him the opportunity to be heard. I will elaborate on the foregoing but before doing so will deal with the question whether, in terms of the constitution to which the applicant bound himself, the Executive Committee was required to formulate a charge, notify him of such charge and afford him a proper hearing, as Mr Coetzee contends to be the case.

It seems to me that clause 5 makes a clear distinction between expulsion on the one hand and reprimand, warning and suspension on the other. Where expulsion is being considered a member must be granted a period of at least four weeks to respond to the accusations levelled against him and it is implicit in this that he must be informed of the accusations or charges. It would appear that in the case of expulsion a member is not given a right to appear before the Executive Committee but he can appeal to a tribunal against any expulsion order which the Executive

Committee may make. It is clear that the expelled member can appear before the Tribunal in person to defend himself. In terms of clause 8.8.1 of the constitution the tribunal consists of a lawyer and two members of the association who may not be members of the Executive Committee. Presumably, the thinking behind this particular procedure in the case of expulsion is that the Executive Committee will normally be complainant, prosecutor and judge in the first instance therefore an aggrieved member is given the opportunity to present his case thereafter to an impartial tribunal.

By way of contrast, clause 5 provides for no such machinery in the case of reprimand, warning or suspension. Presumably, the founding members of the association who adopted the constitution took the view that in the case of these sanctions they were of such an insignificant nature when compared to expulsion that it was unnecessary to provide that charges be formulated and communicated. It was simply left to the Executive Committee to act on whatever evidence it had before it. What is the effect of this on the application I have before me?

A similar situation arose in *Bekker v Western Province Sports Club (Inc.)* 1972(3) SA 803(C). Theron, J. had the following to say at 811 A to F:

> "This raises the question as to whether the procedure adopted by the committee, which allowed it to come to a decision possibly bearing so inequitably on the applicant, could conceivably have been correct.
>
> When it falls to the committee of a club, or of a trade union, or of some other voluntary association of persons who have subscribed in one way or another to a constitution, to investigate a complaint or charge of misconduct against any of its members which may result in disciplinary measures requiring to be taken in terms of

> the constitution against the accused member, the committee concerned proceeds to act in the capacity of what is termed a domestic tribunal. It does not, of course, become converted into an ordinary court of law and is accordingly not obliged to follow the procedure or to apply the technical rules of evidence observed in a tribunal of that nature. As a general rule, however, it is incumbent upon the committee, while so sitting as a domestic tribunal, to give effect to certain elementary but fundamental principles of fairness which underlie our system of law - as they do also, for instance, the law of England. These principles are sometimes (compendiously but not very accurately) described as the principles of natural justice. For present purposes all that need be said about them is that they include the following:
>
> (a) that the person charged or complained about must be afforded a hearing by the committee; and
>
> (b) that he must have due and proper opportunity of producing his evidence and stating his contentions on all relevant points
>
> - cf. *Martin* v *Durban Turf Club and Others* 1942 A.D. 112 at p. 126. It is an obvious pre-requisite for the application of these two principles that timeous and proper prior notice of the charges or complaints which the committee concerned is proposing to investigate should be furnished to the person charged or complained about.
>
> Where a domestic tribunal is bound to observe the fundamental principles of justice to which I have just referred but fails to do so, the Supreme Court has power to intervene at the instance of an aggrieved party and set its proceedings aside on review."

But then at 812 C to 813 B the learned judge continued:

> "I have stated above that, as a general rule, it is incumbent upon the committee of a voluntary society, when pursuing disciplinary enquiries into the conduct of members of the society, to give effect to the two fundamental principles of fairness or justice mentioned by me. But I should add now that the members of a society can contract in such a way as to make this general rule inapplicable. When forming or joining the society or amending

its constitution, they can agree (whether expressly or impliedly) that such domestic tribunal (if any) as may have been decided upon shall be at liberty to ignore the dictates of natural justice, in some or even all of the classes of case falling within its jurisdiction. Whether or not the members have done so, will usually be apparent from the rules of the society, by which they have agreed to be bound. In *Martin* v *Durban Turf Club and Others, supra* (where the appellant, a jockey licensed by the Jockey Club of South Africa, had complained about the procedure followed at a meeting of the stewards of the Durban Turf Club which had resulted in his being "warned off for a period of six months), the late Mr. Justice TINDALL, after formulating the principles of fairness to which I have already referred, remarked (at p 126-7 of his judgment):

'The said test of fundamental fairness, however, must be applied with due regard to the nature of the tribunal or adjudicating body and the agreement, if any, which may exist between the persons affected. In the present case the tribunal's jurisdiction really depends on a contract between the appellant and the Jockey Club. The appellant applied for and accepted a licence stated to be subject to the rules and regulations of the Jockey Club, and he is bound by the rules relating to enquiries.'

The learned Judge of Appeal then proceeded to quote with approval certain passages from the judgment of MAUGHAM, J., in the English case of *Maclean* v *Workers Union,* 98 L.J.Ch. 293: (1929) 1 Ch.D. 602, where it was held that no relief could be afforded to the plaintiff, who had been expelled by his trade union, as the Courts had only a limited jurisdiction over domestic tribunals and could not give relief to members of associations on whom hardship was worked by decisions given honestly and in good faith under the rules of such associations, even though the rules were unfair or unjust. The first of the passages so quoted by TINDALL, J.A., appears to me to be particularly apposite to the matter presently before me:

'It seems to me reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract, and that the material terms of the contract must be found in the rules. It is true that Lord ESHER in *Allison v General Council of Medical Education and Registration,* (1894) 1 Q.B. 758, appears to have invoked the principle of public policy. I need not consider whether that principle would be held at the present time to be properly applicable even in the case of a tribunal established by the Medical Act, 1958 (21 and 22 Vict. C.90). In the case I have before me - and I may add in such a case as a power of expulsion in a member's club - it seems to me reasonably clear that the matter can only depend on contract express or implied. If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the

Courts would interfere with such a rule on the ground of public policy."

Theron, J. then considered the relevant rule of the respondent club and concluded that a member may be suspended without being afforded a prior hearing.

Although *Bekker's* case *(supra)* received no mention by either counsel during argument I think the principle involved was recognised by Mr Coetzee who, in his written argument, submitted that the Court should adopt a wider and more liberal approach to the review of decisions made by private organisations especially when the decisions relate to disciplinary matters. In support of this argument Mr Coetzee referred to *Baxter: Administrative Law* at 341 where the following appears:

> ".....the private nature of the agreement has enabled some courts to adopt a more *expansive* view of the scope of review. They have seemed more prepared to read into the agreement provisions of fairness and reasonableness as these concepts are interpreted at common law.
> No doubt the wider or more liberal approach to judicial review is based partly on the realization that members of private organizations often have little choice over the terms of their agreements at all, including those relating to penal and disciplinary provisions. It is submitted that this view is much more realistic."

Various cases are referred to in support of the foregoing proposition but I do not find them of much assistance. For example, reference is made to *Crisp v South African Council of the Amalgamated Engineering Union* 1930 AD 225 where Wessels, J. A. said at 238:

> "If, therefore, a party aggrieved has a complaint against the act of an official or committee of a voluntary society he must bring this complaint before the proper domestic tribunal appointed for that purpose by the rules of the society, and if the tribunal or tribunals

> act *bona fide* according to the rules and according to the dictates of natural justice, the law Courts will not interfere; but if they do not do so the aggrieved person can always resort to the Courts of law to have his rights vindicated or a wrong remedied. No voluntary arrangement can take that right away. In such cases Courts of law will not allow their jurisdiction to be ousted."

However, these observations were not approved in *Martin* v *Durban Turf Club and Others* 1942 AD 112 and, in my respectful view, for good reason. Why should the Courts go behind the rules of a voluntary association and revise or alter them so as to make them more reasonable or consonant with ideas of fairness? And I do not think that the applicant can derive any assistance from Article 18 of the Constitution. This provides:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

I will accept that the respondent is an administrative body for the purpose of Article 18 and that it is therefore required to act fairly and reasonably but, in my view, its actions must be judged in the context of its rules. As I have already indicated, clause 5, by necessary implication, clearly excludes the formulation and communication of charges when it comes to reprimand, warning or suspension and no doubt this was decided upon by the founding members of the association for good reason. Presumably, it was considered that these particular sanctions could be imposed summarily because the member being disciplined would himself be in a position to remedy the complaint made against him. And when one turns to the facts of the present case one finds that to be precisely the situation. The Executive Committee first apprised the applicant of its concerns about the number of complaints being addressed to the association about the service

ne was providing to customers. At the request of the applicant it provided details of the complaints. It also asked him to comment on the complaints before the end of November, 1996 and to state whether they have been or are being resolved. The end of November came and went but no comments were received. The applicant was suspended from the association until the complaints were satisfactorily resolved. What is unfair or unreasonable about that? The applicant had the remedy in his own hands. All he had to do was to show that the complaints had been satisfactorily resolved and the suspension would then be lifted. If it was not then in that case he could seek relief from this Court, but in my judgment, not by attacking the suspension itself as he has sought to do in this application. I therefore find myself unable to grant the relief sought in relation to the suspension. In these circumstances I find it unnecessary to deal with certain other arguments advanced on behalf of the respondent as to why the relief sought should not be granted.

As for the costs, the applicant was obliged to bring the application to obtain the relief regarding his expulsion and I consider he is entitled to the costs of drafting the Notice of Motion and the founding affidavit. Save for that, costs will be awarded to the respondent.

For the foregoing reasons it is ordered:

1 • (a) That the decision of the respondent to expel the applicant from the Namibian Professional Hunting Association communicated to him in a letter dated 12th November, 1997 is set aside;

(b) That the said decision is declared to be null and void and of no force or effect.

(c) That the applicant is declared to be still an extraordinary member of the Namibian Professional Hunting Association.

2. That the relief sought in prayer one of the Notice of Motion is refused.

3. That the respondent pays the applicant's costs of drafting the Notice of Motion and the founding affidavit;

4. That save for the costs referred to in 3., the applicant pays the costs of this application.

HANNAH, J

For the Applicant: Advocate G.S. Coetzee and with him Advocate J.A.N. Stryd

Instructed by: Messrs Chris Brandt Attorneys

For the Respondent: Advocate T.J. Frank, S.C.

Instructed by: Messrs P F Koep & Co