PATRICK MURPHY & ANOTHER -v- ATTORNEY GENERAL AND TWO OTHERS

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 415 of 1993
Hearing: 20 December 1993
Judgment: 30 December 1993

R. Teutao for Appellant
C. Ashley for the Respondents

PALMER J: There are two applications which have been consolidated for the purposes of this hearing. The first application is in respect of a Notice of Motion filed on the 23rd of September 1993, which sought to have the decision of the 3rd Respondent and dated the 9th of August 1993 declared null and void.

The second application relates to an Originating Summons filed on the 26th of November 1993, which sought to have the decision of the 3rd Respondent dated the 22nd of October 1993 also declared null and void.

The ground relied on in the first application relates to an allegation of a breach of natural justice, more specifically, breach of the audi alteram partem rule. The second application has four grounds to it.

The history of the Applicants case goes as far back as 1989 when an application was first made to the Foreign Investment Board for approval of an Investment Application lodged by the Applicant, for the establishment of the Solomon Islands World War II Museum. In the affidavit of Francis Ramoifuila, Secretary to the 3rd Respondent, filed on the 9th November 1993, he stated at paragraphs 2 - 7, that the first two applications lodged by the Applicants had been rejected by the 3rd Respondent. It was only when the application had been lodged for the 3rd time, that it was conditionally approved, but this was as a result of political pressure and directives given to the 3rd Respondent. (see para. 8 of the same). The application was approved on the 27th of April 1990. On the 21st of June 1990, a Certificate of Approval was issued by the 3rd Respondent. The approved activity of the Applicants was restricted to:

(1) To collect, repair and maintain WW II relics
(2) Establish and operate a flight school aviation and maintenance trade school (subject to further endorsement by civil aviation).
(3) Establish and operate a WW II museum.

On the 23rd of March 1993, the 3rd Respondent approved a variation to the approved activity of the Applicants, to include the operation of a general workshop for the repairs of vehicles. On the 14th of April 1993 an amended certificate of Approval was issued to the Applicants.

On the 9th of August 1993, the 3rd Respondent reviewed the activities of the SI WW II Museum Project and cancelled its Certificate of Approval, with effect from the 19th of September 1993. On the 25th of August 1993 the Applicants lodged an appeal and requested that the cancellation be revoked on the ground, inter alia, that the Applicants had not been accorded their right to be heard before the cancellation was effected.

As a result of the cancellation and fearing that further action may be taken against the foreign partner in the business, Mr Murphy, the Applicants applied to the court for an interim injunction, pending an application by the Applicants against the Respondents by way of an originating summons to have the decision of the 9th August 1993 set aside.

On the 22nd of October 1993 the 3rd Respondent gave a hearing to Mr Murphy in person. The 3rd Respondent dismissed the appeal and confirmed its decision made on the 9th of August 1993.

On the 17 of November 1993, however, a summons had also been filed by the 1st Respondent seeking declarations, inter alia for the refusal of the orders sought under the originating summons filed on the 23rd of September 1993.

I will now consider the ground raised in the Notice of Motion filed on 23rd September 1993. The submission of Mr Teutao is that the decision to cancel the Certificate of Approval of the Applicants on the 9th of August 1993 had been done in breach of the audi alteram partem rule and accordingly that decision was void right from the beginning. It is not disputed that on the 9th of August 1993, at the meeting of the 3rd Respondent, the Applicants were not present.

In *Wade's Administrative Law, Sixth Edition, at page 496 and 497,* the learned author made the following comments:

"As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regards its substance, the court can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration."

Let me emphasis right from the beginning that I am dealing basically with preliminary issues of procedure and not the merits or substance of the decision of the 3rd Respondent.

In his submission before this court, Mr Ashley, submitted that the decision taken by the 3rd Respondent on the 9th of August 1993 was a proper decision. He made this submission on the basis that there was evidence before the 3rd Respondent to effect the cancellation. This he says can be gleaned from the history of the dealings with the Applicants. He says that a lot of time had been given to the Applicants to come up with the project and to get it established, but that up to the date of cancellation, no progress seemed to have been made. In the affidavit of Francis Ramoifuila filed on the 9th of November 1993, at para. 16, he referred to a copy of the 3rd Respondent's letter to the Applicants. That letter is marked exhibit FR13. That letter is dated 23 March 1993 and addressed to Mr Dominic Otuana, one of the Applicants. Paragraphs 2 and 3 of that letter read:

"The Investment Board has considered your application and decided as follows:

(1) The request for general workshop for repairs was approved.

(2) The approved period within which the principal activities of the S.I. WWII Museum has been extended for another six (6) months effective from 19th March, 1993.

Please note that the principle activities of the project have to be established within the extended period specified above. Failing to comply with this may result in a review of the project for possible cancellation."

The Applicants did have notice of what may possibly happen if no satisfactory progress was made in the operations and activities of the Project. What is significant

and crucial however to this application is that in the meeting of the 9th August 1993, the Applicants were not present to show cause to the 3rd Respondent why their Project should not be cancelled. There is also no evidence produced to say that some sort of explanations had been obtained from the Applicants. So from the 23rd of March 1993 to the 9th of August 1993, which is only a period of 5 months by the way, there is no evidence of any report obtained from the Applicants as to what had actually taken place or not, and why, if nothing was done in that period, bearing in mind that the Applicants had been given 6 months extension, and yet the meeting within which the decision for cancellation was made had been held within that period of 6 months and not after.

I am satisfied that the 3rd Respondent is a body that is not exempt from the fundamental rule of hearing both sides first. The decision to cancel will affect the rights and interests of both the Applicants and accordingly it should never be taken lightly without first giving the applicants an opportunity to be heard.

Accordingly I am satisfied that its actions on the 9th of August 1993 were in breach of what can be termed as one of the fundamental principles of natural justice; that both sides should be heard before a decision taken. The effect of such a breach is to render the decision void ab initio. This simply means that right up to the 22nd of October 1993, the Certificate of Approval of the Applicants had not been cancelled.

The hearing accorded to Mr Murphy on the 22nd of October of 1993 was in response to the Originating Summons filed on the 23rd of September 1993 by the Applicants. That was an attempt it seems to cure the defect in the failure of the 3rd Respondent to accord the Applicants a fair hearing on the 9th of August 1993, before the decision was taken to cancel their Certificate of Approval.

Did the hearing of the 22nd October cure the breach of natural justice?

The context within which the hearing of the 22nd of October 1993 must be correctly placed. The hearing was described as an appeal hearing of the Applicants, from the previous decision of the 3rd Respondent, in which a cancellation had been effected of the Certificate of Approval of the Applicants. However, because of the way that this court has ruled, that there was a breach of natural justice, and that accordingly, the cancellation was void, there could not have been any need for any appeal to consider on the 22nd of October 1993! There was no decision on the 22nd of October to appeal against. The purported decision of cancellation on the 9th of August 1993 and effective as from the 19th of September 1993 had been rendered null and void by the breach of the audi alteram partem rule.

The effect of this, with respect, in my view, is that the purported hearing conducted on the 22nd of October 1993 did not cure any defect, because legally there was really no defect to be cured at all. The Applicants had a valid Certificate of Approval on the 22nd of October 1993 and until a valid decision to cancel was made, the appeal was irrelevant. The purported appeal hearing on the 22nd of October 1993 was no hearing and accordingly a fresh hearing must be made by the 3rd Respondent.

The effect of this simply means that when the 3rd Respondent next meets to consider whether to cancel the Applicant's Project or not, it must give the Applicants an opportunity of being heard.

Having so ruled, it would not be necessary to then consider the grounds raised in the second Application. However, some comments and observations should in my view be made nevertheless, for purposes of guidance for the future.

First, the right to proper legal representation is a right that should be recognised and respected. Unless it is obvious that for one reason or another, the claim is not raised as a genuine one, but more perhaps out of say, an attempt to cause delay or defeat the purpose of justice, then it could be ignored. The circumstances of this case however, especially the history of it, and the possible consequences that could arise, in my view make it quite clear that Mr Murphy's request, that an adjournment be made so that he could be represented by a solicitor even in the hearing before the Board was quite proper, genuine, and one which should not have been taken for granted. The effect of whatever decision was going to be made by the 3rd Respondent was obviously going to be very important to the Applicant, Mr Murphy. If his appeal was to be rejected then it would mean the loss basically of their livelihood, as they had it seems spent a lot of time, effort and money on the project. When looked at from the point of view of the Applicants, the request was sincerely made with the genuine desire of being properly represented before the Foreign Investment Board.

Further, the reason why the solicitor of the Applicant was not available, should have been looked into by the 3rd Respondent. It is not disputed that at the said times the hearing was conducted, Mr Teutao was out of the country on another urgent matter. No reason was given too as to why the hearing must necessarily be heard that day. The decision accordingly of the 3rd Respondent to proceed with the hearing, although would not vitiate such a proceeding on its own, it would go in favour of the Applicant and is a matter that would be weighed together with all other relevant factors against the 3rd Respondent.

As to the second issue raised, I take note of the submission of Mr Teutao as to what was actually said in Parliament by the Second Respondent. In view of that, it

would not be proper to allow the Second Respondent to sit as Chairman, when the 3rd Respondent convenes to consider the question as to whether to cancel the Project of the Applicants or not. I note that the Vice Chairman is Hon. Andrew Nori, the Minister of Finance. I would suggest that he be appointed temporary chairman, or one of the other members of the 3rd Respondent, for the purpose of dealing with the Applicants case.

The third ground need not be considered in view of the way I have ruled.

The fourth issue which relates to the question of whether the presence of Mr Otuana was necessary is relevant in my view in that he is one of the partners in the set up of the Project, and accordingly, it would have been material that he be given an opportunity to be heard. I accept that at the time of the hearing on the 22nd of October 1993, he had been undergoing medical treatment overseas. Had an adjournment been given to Mr Murphy to allow his solicitor to appear, then I would not have thought that the presence of Mr Otuana was that material. Each case would have to be considered on its own merits. Where no solicitor was present then it seems proper that both partners should be present. I do note that perhaps at that time, it was not known when Mr Otuana would be available.

The orders of the Court accordingly are:

(1) The decision of the 3rd Respondent dated the 9th of August 1993 is hereby set aside.

(2) The decision of the 3rd Respondent dated the 22nd of October 1993 is also set aside.

(3) The Chairman, Hon. J. Tuhanuku be disqualified from sitting as Chairman when the 3rd Respondent convenes to consider the Applicant's case.

(4) Costs of the Applicants are to be borne by the 2nd and 3rd Respondent.

(A.R. Palmer)
JUDGE