

IN THE HIGH COURT FOR ZAMBIA

2010/HK/690

AT THE KITWE DISTRICT REGISTRY

(CIVIL JURISDICTION)

**IN THE MATTER OF : ORDER 53, RULE 3 OF THE RULES OF THE
SUPREME COURT 1999**

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY
FOR**

JUDICIAL REVIEW

BETWEEN:

FINSBURY INVESTMENTS LIMITED

AND

OTHERS

Before the Hon. Mr. Justice I. Kamwendo in Chambers on the 7th day of
February 2011

For the Applicant: Mr. S. Malama State Counsel - Jaques
and Partners

For the Respondents: Mr. S. Lungu - Shamwana and Company
Mr. L. Zulu - Malambo and Company and
Mrs. B.L Mupeso - Bank of Zambia.

For the Intervener - Mr. A. Shonga, State Counsel - Attorney
General

RULING

Cases referred to;

1. Chitala v. The Attorney General (1995 – 1997) ZR 91
2. Development Bank of Zambia vs. Sunvest Limited (1995-1997) Z.R. 187
3. New Plast v. Commissioner of Lands and Attorney General (2001) ZR 51
4. Chiluba v. Attorney General Appeal No. 125 of 2002

5. Access Financial Services Limited, Access Leasing v. Bank of Zambia Supreme Court of Zambia Judgment No. 7 of 2005
6. Bank of Zambia v. Aaron Chungu, Access Leasing Limited and Access Financial Services Limited. (2008) 1 ZR 159

Legislation referred to:

1. Sections 81 (2) a, 81 (4), 84 C, 84 E and 84 A (g) 81 (4) of the Banking and Financial Services Act, Cap 387 of the Laws of Zambia

Works referred to;

1. Order 53 rule 3 of the Supreme Court Practice (White Book).

This is an application by the Applicants for an Order for leave to apply for Judicial Review pursuant to Order 53 rule 3 of the Rules of the Supreme Court 1999.

The decisions in respect of which relief is sought are, what the applicants say contained in the brief to the Minister of Finance contained in a Post Newspaper article dated 12th November, 2010. This brief was made pursuant to Section 81(4) of the Banking and Financial Services Act Section 81(4) and marked MCPC 6. The second is/are the decision/s contained in the Enforcement Order marked MCP

7. This Enforcement Order was issued in terms of Section 84 (A) (g) of the Banking and Financial Services Act Cap 387 of the Laws of Zambia.

In the Notice of Application, the first decision in which relief is sought is the Brief to the Minister, Pursuant to Section 81(4) of the Banking and Financial Services Act and the enforcement Decision Order dated 22nd December, 2010.

There has been filed an affidavit verifying facts by Dr. Rajan Mahtani in which he states that the story published in the Post News Paper of 12th December, 2010 was to his knowledge a reproduction of the brief prepared by the Respondent to the Minister of Finance.

An affidavit in opposition was filed by the Respondent on 5th January, 2011 in which the deponent Lameck Zimba stated that the Respondent had conducted three inspections of Finance Bank Zambia Limited in accordance with the statutory powers vested in the Respondent under the Banking and Financial Services Act and that the high numbers of inspections were attributable to the growing supervisory concerns about the increasing level of unsafe and unsound banking practices at Finance Bank Zambia Limited and the fitness and propriety of its shareholders, Board and executive management. He said that they were serious breaches of statutory provisions. As a result of those breaches the Respondent took over Finance Bank Zambia Limited. He said that the Respondent had in possessing Finance Bank Zambia Limited complied with the statutory requirements and exercised its statutory powers and junctions in good faith. He also stated that there were currently 3 actions instituted by the Applicants in the High Court of Zambia.

For the Applicant, Mr. Sangwa, has argued that the Applicants' case requires a fuller determination at hearing for Judicial review. He has also argued that the Applicants have complied with the requirements of Order 53 that the Applicants have sufficient interest in the matter and that they have locus standi in the matter.

He submitted that the Applicants were also seeking for an Order of prohibition to stop the Respondent from reorganizing a restructuring Finance Bank other than in line with Section 84E of Banking and Financial Services Act. Further, he submitted that they were seeking for an order of certiorari to quash the decisions of 22nd December, 2010 and also were praying for a declaration that the said decisions were ultra vires Section 84A (g) of the Banking and Financial Services Act.

Mr. Lungu, for the Respondent submitted that they opposed the application on 2 issues. He stated that this application was an abuse of court process because they were similar arguments now under the umbrella of judicial review before 2 other courts in Ndola and in Lusaka. He submitted that this was an abuse of court process and a multiplicity of court actions. He referred the court to the case of Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals (1995-1997) Z.R. 187, in which the Supreme Court discouraged multiplicity of actions. He also referred the court to the case of Muiy Muiy v. Chanda. He submitted that if applied to the present case, it would clearly suggest that the Applicants were forum shopping. His second aspect of his submission he submitted was that under the Banking and Financial Services Act, only Section 84(c) allows a party to go to Court. He said that in the case of Access Financial Services v. Bank of Zambia, Supreme Court of Zambia No. 7 of 2005, the Supreme Court held that Judicial Review was

not a proper mode of commencing proceedings. The Court held that writ of summons was the correct mode. He also submitted that these may be argument that these proceedings were not brought under the provisions of Section 84(c) and Review may be the correct way of commencing proceedings. He submitted that the answer is provided in the case of *New Plast v. Commissioner of Lands and Attorney General* (2001) ZR which stated that where a statute provides the mode of commencement it had to be followed. He submitted that the Supreme Court has laid down the principles to follow when commencing an action under the Banking and Financial Services Act. He submitted that the matter should fail with costs.

Mr. Mupeso, for the Respondents submitted that in terms of Order 5 subrule 14 paragraph 55, there is a requirement that the court should be satisfied that there is an arguable case before granting the relief claimed. She submitted that the applicant failed to demonstrate impropriety either procedural or legal. She submitted that the brief referred to by the Applicants was not a decision making document but a document which merely, if it exists, provides foundation for notification of the decision about to be made. With respect of the Enforcement Order she submitted that Section 81(2) of the Banking and Financial Services Act gives the respondent power to take possession of any Financial Services Provider whom in its opinion is conducting its business in an unsafe and unsound manner.

For the intervener, the Attorney General, Mr. Shonga submitted stated that he did not support the application and submitted that he had joined the proceedings to protect the public policy considerations. He stated that he was aware that there were two other matters where the Applicants were challenging possession of Finance Bank Zambia

Limited. He submitted that granting leave would encourage multiplicity of actions and that this is contrary to public policy.

In reply Mr. Sangwa submitted that in terms of Section 84 C, only the possession can be challenged. He said that what they were challenging was a decision made under section 84 A(g). He submitted further that the arguments by Mrs. Mupeso illustrated the need to grant leave for judicial review. He submitted further that they have three different applications before other courts and these were disclosed to the court. One matter related to an injunction against taking possession of Finance Bank Zambia Limited and the other related to the constitutionality of the take over and the one before me related to the challenge of decision to terminate the shareholding interest of the Applicants in Finance Bank Zambia Limited. He submitted that Judicial review in this matter is available.

I have considered the arguments by Counsel appearing for both parties. Serious questions of law have been raised.

Before I proceed to consider the law in this application, I wish to take issue with the first set of decisions which the applicants rely on for their application. This is contained in a newspaper article which appeared in the Post Newspaper. During the course of proceedings, Mr. Lungu raised an objection, which I overruled. In my ruling I stated that, it would not be in the interests of justice to throw out from the proceedings that which the Applicants consider to be a decision and that I had to hear the case and thereafter making a determination of the matter. There is firstly, as rightly observed Mr. Lungu and Mrs. Mupeso no brief this Court. This Court cannot rely on a newspaper article as a brief and proceed to determine the matter based on newspaper articles. There is no brief before this Court and as Mrs.

Mupeso rightly observes, the brief, if at all exists, is not a decision making document. Section 81 (4) is clear, it provides as follows;

“The Bank of Zambia shall, in writing, inform the Minister, regarding the state of affairs of a financial service provider in respect of which it intends to take action under this Section.”

Clearly, the state of affairs of a Financial Service Provider cannot, going by the provisions of this Section, subject to Judicial review because they are not decisions.

That being the case, only the decisions contained in enforcement Order marked PCM 7 in the Applicant’s affidavit remains, and will be the basis of whether or not, leave for Judicial Review will be granted.

This application for leave to apply for Judicial Review is made pursuant to Order 53 rule 3 of the RSC or White Book.

The purpose of the requirement for leave is:

- a. to eliminate at an early stage which are either frivolous, vexations or hopeless, and
- b. to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration.

The requirement that leave must be obtained is designed to “prevent the time of the court being washed by busybodies with misguided or trivial complaints of administrative error, and to remove the

uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.” Order 53/14/55 of Rule of the Supreme Court.

This is the position that the Supreme Court took in the Chitala v. The Attorney General (1995-1997) ZR 91.

From the foregoing, what the court must decide before it grants such an order is to answer the question whether or not the decision to which relief is sought is subject to judicial review. If it is, then leave must be granted. If not, the application must fail in terms of the rule above.

The Banking and Financial Services Act confers upon the Central Bank the power to terminate shareholding in an Financial Service Provider. This is in terms of section 81(2) (a) which provides as follows:

**“The Supervisory action the Bank of Zambia may take includes;
a). taking possession of the financial service provider.”**

After taking possession section 84 A (g) provides as follows:

**“The Bank of Zambia upon taking possession of a financial service provider under paragraph (a) of subsection 81 shall be vested full and exclusive powers of management and control of the financial service provider, including the power:
“to terminate the interest of the shareholders at a value**

**to
be determined by the court.”**

The decisions in the enforcement order are pursuant to the sections above. The Bank of Zambia did not act ultra vires to these provisions. They acted according to the powers conferred upon them by statute. The Applicants have not shown how the bank of Zambia acted ultra vires. The Applicants have also not shown all motive in their affidavit. The supreme Court in *Chiluba v. Attorney General Appeal Number 125 of 2002*, held, *inter alia*, that:

**“The court will not on Judicial Review application act as a
“court of
appeal” from the body concerned, nor will the court interfere
with the exercise of any power or discretion which has been
conferred upon that body, unless it has been exercised in a
way
is not within the body’s jurisdiction or the decision is
Wednesbury unreasonable”.**

The Applicants have not demonstrated that the decision taken by the Bank of Zambia is out of its jurisdiction or is unreasonable. Other than saying that they are challenging the termination of the shareholding interest in Finance bank Zambia Limited, their affidavits say nothing else. The view, I take is that, if the Applicants are seeking for an order for leave to issue judicial review proceedings, they must in their affidavits show that there was ill motive and show it. The affidavit filed by the Applicants fails for short of this requirement.

Secondly, from the affidavits filed of record by the parties and from the submissions, I note that there is presently five matters relating to the Financial Services Provider, Finance Bank Zambia Limited. There is one before my brother Judge Musonda at the Principal Registry, then there is one

before my brother Judge Lisimba at the Ndola District Registry. There is also another one in which, Judge R. Kaoma at Kitwe declined to grant leave for judicial review.

Together with the application before me, it brings the total number of cases, in relation to the possession of Finance Bank Zambia Limited to five. Even though Mr. Sangwa, for the applicants has vigorously argued that, there is no multiplicity of actions in this matter, I take a different view. Clearly, all the application in this matter all relate to an action of the take over by the Bank of Zambia of Finance Bank Zambia Limited. That is one issue, and all the matters in the different courts can be dealt with by one court. This is the position that was followed when the Supreme Court held in Development Bank of Zambia v. Sunvest (1995-1997) ZR. 187 that “The court disapproves of the commencement of a multiplicity of actions over the same matter, as well as the pursuit of other steps during the action”. Ngulube CJ, at P 188 stated as follows;

“we also disapprove of the multiplicity of actions between the same parties involving various issues proposed to be raised in the new action which, as we said, we disapprove of”

All the matters raised in the different courts involve the same parties and the same issues. Thus granting leave for an order to issue judicial review proceedings which would constitute perpetuating multiplicity of actions which our courts frown upon.

Thirdly, as the documents on record show, this application before me relates to the possession of Finance Bank Zambia Limited by the Bank of Zambia. The Banking and Financial Services Act is very clear. The

termination of the shareholder interest of the Applicant from the Financial Service Provider is pursuant to possession. In terms of Section 84 A upon the bank taking possession, one of the powers vested in it includes termination of shareholding. In other words there can be no termination of the shareholding interest of any party without possession of the Financial Service Provider. That being the case, a challenge to the termination of the shareholding interest of any aggrieved party

must be a challenge possession. That being the case, the Banking Financial Service Act provides in Section 84 C that:

“within a period of twenty-one days after the date on which the Bank of Zambia takes possession of a Financial Service Provider the Financial Service Provider or any interested person acting on its behalf may institute proceedings in the court to require the Bank to show cause why the possession should be terminated”.

I find therefore, that the eloquent argument by Learned Counsel, Mr. Sangwa to the effect that, the decision made under Section 84 A (g) is a stand alone decision is without merit. As I said above, the decision to terminate shareholding arises out of possession of the Financial Services Provider. The correct procedure to follow is as provided by the statute. That being the case, the Applicants should have brought their

application pursuant to the provisions of Section 84 C, not by way of Judicial review.

I am satisfied in my decision by the holding of the Supreme Court in Access Financial Services; Access Leasing v. Bank of Zambia that was referred to in Bank of Zambia v. Aaron Chungu, Access Leasing Limited and Access Financial Services Limited (2008) 1 ZR 159 that:

“The correct position is that the mode of commencement of any action is generally provided for by statute.”

In this matter, the correct mode of commencement of this action was by Writ of Summon.

For the reasons above, I find that the application has no merit and it must fail with costs.

Leave to appeal is granted.

Delivered in Chambers this 7th day of February, 2011

I. Kamwendo
JUDGE