

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)**

2013/HP/0534

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
IN THE MATTER OF: A DECISION BY THE PRESIDENT TO WITHHOLD
BENEFITS AND ENTITLEMENTS TO HONOURABLE
MR JUSTICE DENNIS K. CHIRWA (RETIRED JUDGE OF
THE SUPREME COURT)**

BETWEEN:

HONOURABLE JUSTICE

DENNIS K. CHIRWA (RETIRED)

APPLICANT

AND

ATTORNEY GENERAL

RESPONDENT

Before Hon. Mrs. Justice M.S. Mulenga on the 28th day of May, 2013

For the Applicant : Mr V. Malambo SC, Mr. C.M. Sianondo
Messrs Malambo and Company

For the Respondent : Ms. B. Chilufya, State Advocate, Attorney
General's Chambers

R U L I N G

Cases cited:

- 1. Dr. Katele Kalumba v Drug Enforcement Commission and Others
2009/HP/1121 (unreported)**
- 2. R V Secretary of State for the Home Department Exparte Ruddock
and Others (1987) 2 ALL ER 518**
- 3. ZAWA and Others Vs Muteta Community Resources Board (2009) ZR
156 (SC)**

- 4. New Plast Industries vs. Commissioner of Lands and Attorney
General SC Judgment No. 8 of 2001**
- 5. Bibiyana Bulaya Kearns v Attorney General 2011/HP/91 (unreported)**
- 6. Mercury Ltd v Telecommunications Director [1996]1 WLR 48**
- 7. R v Secretary of State for the Home Department Exparte Ruddock
and Others.**
- 8. R v Stratford -on- Avon District Council, Ex parte Jackson [1985] 3 All
ER 769**

This is the Applicant's application for extension of time and for leave to apply for judicial review. This application is made pursuant to *Order 53 Rule 4 (1)* as read together with *Order 53 Rule 14 (53) (RSC)*. The same is supported by an affidavit and a statement of facts. The brief facts outlined in the Applicant's affidavit verifying facts are that the Applicant, Honourable Justice Dennis K. Chirwa (retired), retired after working for the government for 42 years of which 33 years was on the bench. On 14th May 2012, the Applicant had given notice to the President of the Republic of Zambia that he was due to retire on 11th November, 2012. This was accepted. Later there were meetings between the Applicant and the President over the Applicant proceeding on leave pending retirement. The President wrote to the Applicant on 14th June 2012 giving him special dispensation to immediately proceed on leave and be granted additional benefits.

It later came to the Applicant's attention that the Secretary to the Treasury, on directions from the President, had ordered the stoppage of the payment of his emoluments, that is salary, monthly pension and fuel allowances from August, 2012. His

servants were also removed from the payroll. That efforts to resolve the matter with the relevant authorities had not been successful.

At the hearing, Mr. Sianondo submitted that the issue of combining an application for leave and extension of time in which to lodge the application for judicial review fell to be considered in the case of **Dr. Katele Kalumba v Drug Enforcement Commission and Others 2009/HP/1121 (unreported)**. In that case Judge Lengalenga endorsed the proposition that an application for extension of time should be made together with that of leave.

The Applicant in the case of **R V Secretary of State for the Home Department Exparte Ruddock and Others (1987) 2 ALL ER 518** delayed in filing for leave and reasons advanced for that failure was that she was involved in re-training as a gardener and was cautious in drafting her affidavit and the Court allowed for time to be extended.

It was further stated that the only challenge which the Respondent could raise against extension of time was that the same was detrimental to good administration and for such a defence to be sustained, evidence needed to be adduced. That in the present case, the Respondent had not shown that if leave was granted the same would be detrimental to good administration.

Counsel further argued that under *Order 53 rule 4 RSC* the guiding word is that there must be good reason. The Affidavit in Support shows that the Applicant engaged the state so as to try to resolve the matter outside court, and that was what led to delay in filing the application. That this was a good reason for the delay.

Further, that the Applicant has met the conditions for grant of leave as outlined in **ZAWA and Others Vs Muteta Community Resources Board (2009) ZR 156 (SC)**, namely, that there is an arguable case fit for further investigation once leave is granted and that the Applicant is directly affected by the decision complained of.

In response to the Respondent's skeleton arguments whose upshot was that relations of employment concerning the Applicant was found in private law and not public law, the Applicant submitted that the remuneration which is the subject of these proceedings emanates from an Act of Parliament namely, the Judges (Conditions of Service) Act Cap 277. That the same being in the statute is subject to public law and thus falls under judicial review. It was further argued that the authority relied upon by the Respondent concerned the employment of a Magistrate whose conditions were totally different from that of Judges.

It was prayed that in granting leave, the Court should order that the same acts as a stay and direct that forthwith all the outstanding arrears of both salary and monthly pension due to the Applicant under the Judges (Conditions of Service) Act Cap 277 should be paid pending hearing of the main matter.

The Respondents' counsel relied on the skeleton arguments filed on 9th May, 2013 and argued that the fact that an employee's conditions of service emanate from statute does not mean that the matter ought to be determined by judicial review. *Order 53 rule 14* provides that even where the conditions of service are governed by statute, the matter is private and not under public law. That the same has constantly been upheld and urged the court to find that this matter lies in private and not public law and hence is not amenable to judicial review.

Respondent's counsel further stated that apart from considering the issues raised by the Applicant's counsel on the grant of leave, the first step is to consider whether or not the dispute lies within the scope of judicial review. That *Order 53 RSC* directs that matters of private law are not within the scope judicial review. She contended that this goes down to the mode of commencement and that in **New Plast Industries vs. Commissioner of Lands and Attorney General SC Judgment No. 8 of 2001** it was held that the matter having been brought by way of judicial review when it should have been commenced

by way of appeal, the court had no jurisdiction to grant the reliefs sought. It was argued that the Applicant in commencing the action by way of judicial review instead of by Writ of Summons, this Court has no jurisdiction to award the Applicant any of the reliefs sought. That the Applicant's leave to commence judicial review proceedings be dismissed with costs.

The Applicant's counsel replied that the purpose of judicial review is to investigate and determine whether the exercise of the power which purports to have been exercised was done within the confines of the law. That there is no dispute that the President who is the head of the Executive and so a public officer has made a decision to the detriment of the Applicant. It is that decision that the Court has to investigate whether the same was made within the confines of the law. It is therefore apparent that what is in issue falls under the realm of public law. It was reiterated that the conditions of service for Judges emanate from an Act of Parliament and as such the court is called to determine whether or not the said decision by the President flies in the teeth of the Act which regulates the conditions of service of Judges. That Judicial Review is the appropriate method to determine the questions which shall be raised in the application.

The Applicant's counsel also distinguished the **New Plast Industries** case, in that the spirit under which the Supreme Court held that judicial review was not the appropriate proceedings was

pursuant to Section 87 of Lands and Deeds Registry Act Cap 185 which prescribed a specific mode of commencement while there is no such provision under the Judges (Conditions of Service) Act. That this authority, is therefore, inapplicable in the current circumstances.

I have considered the application and the submissions by both parties. The main contention by the Respondent is that judicial review is not the appropriate action by the Applicant as the matter concerns issues of employment which fall under private law.

The text book **Judicial Review: Law Procedure and Practice by Peter Kaluma** was cited as stating that judicial review is only concerned about rights which are recognised in and protected by public law. The High Court case of **Bibiyana Bulaya Kearns v Attorney General 2011/HP/91 (unreported)** was also cited in which Judge Hamaundu stated that:

“...Judicial review makes a distinction between public and private law. Judicial review will not lie where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law and not private law. Order 53/14/33 of the Rules of the Supreme Court provides;

“...A claim in connection with the dismissal of an employee from an employment with a public authority where the conditions of employment are governed by a statutory instrument is nevertheless a matter of private law, not public law.”

Quite clearly, the applicant's grievance arises from a contract of employment. The decision complained of was made by the applicant's employer. Even though a statute might play a part in the party's disciplinary procedure, the dispute, nevertheless remains one that should be addressed by private law and not public law."

The Respondent thus argued that I should find that this matter falls under private law and is not amenable to judicial review.

The Applicant's response was that this instant case was distinguishable from the **Bibiyana Bulaya Kearns** case in that the conditions of service for the Applicant are provided in the statute, namely, the Judges (Conditions of Service) Act Cap 277.

I have perused the Judgment in the **Bibiyana Bulaya Kearns** case and find that it can be distinguished from the instant case. The said case involved a magistrate who was employed by the Judicial Service Commission under the Service Commissions Act Cap 259 and whose conditions of service were provided in a statutory instrument or guidelines. The case in *casu*, involves the constitutional office of Judge of the Supreme Court which is established under Part 6 of the Constitution of Zambia dealing with the Judicature. Further, as rightly submitted by the Applicant's counsel, the conditions of service for judges are provided for under a statute, namely, the Judges (Conditions of Service) Act Cap 277.

I have further considered the paragraph under *Order 53* RSC cited in the **Bibiyana Bulaya Kearns** case and relied upon by the

Respondent. Paragraph **53/14/33** discusses the distinction between public and private law. It also cites the case of **Mercury Ltd v Telecommunications Director [1996]1 WLR 48** in which the House of Lords stated that;

“It was important to retain some flexibility, that the precise limits of what is called “private law” and “public law” are by no means worked out, and that private law proceedings should be struck out only if they constitute an abuse of the process of the court.”

I also note that the portion which was quoted in the **Bibiyana Bulaya Kearns** case goes on to state that in **“R v Civil Service Board ex parte Bruce [1989]2 All ER 907 the Court of Appeal left open the question whether a decision upholding the dismissal of a civil servant was susceptible to judicial review.”** Judicial review is the appropriate action where one seeks to challenge a decision of a person or body which infringes on the rights that are entitled to protection under public law.

Discussing this matter in detail might lead to straying into the substantive application. Suffice to state that on the particular facts of this instant case, I am satisfied that the Applicant’s application is within public law and not private law as argued by the Respondent.

Having found that this is a proper case for judicial review, I now turn to the application for extension of time and for leave to apply for judicial review. The Applicant’s counsel extensively submitted on this aspect as outlined above and I will not repeat the same for

the sake of brevity. The Respondent did not oppose this application apart from the challenge on private law aspect. The Respondent also did not raise the issue that the delayed application was detrimental to good administration.

I have had sight of the unreported rulings of this court in the case of **Dr Katele Kalumba v Drug Enforcement Commission and Others** which extensively considered these issues as well as the English case of **R v Secretary of State for the Home Department Ex parte Ruddock and Others**. In those cases, *Order 53 rule 4* on the extension of time for leave to apply for judicial review was extensively discussed. *Order 53 rule 4 (1)* provides;

“An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made.”

Paragraph **53/14/58** RSC in discussing the holding in the case of **R v Stratford -on- Avon District Council, Ex parte Jackson [1985] 3 All ER 769** states that when deciding whether to grant an extension of time for applying for leave to commence judicial review proceedings, the question is whether, on the facts, there is a reasonable excuse for the delay and there are good reasons for extending time.

The Applicant's counsel stated that the delay in instituting the proceedings in the present case was due to the fact that the Applicant had engaged the government to resolve the matter *ex curia* but this was not successful. I find that this is good reason to warrant extension of the period within which to commence judicial review proceedings.

I also note that the Applicant has satisfied the requirements for grant of leave to apply for judicial review as provided under *Order 53 rule 3* RSC.

I hereby grant the application for extension of time and for leave to commence judicial review proceedings.

The Applicant's further request is that the leave should act as a stay pursuant to *Order 53 rule 3 (10a)* RSC. I am of the view that the nature of the stay as outlined on the draft order in effect amounts to the determination of the substantive matter. I thus decline to grant a stay in the manner sought but direct that this matter be prosecuted and heard expeditiously.

I award costs to the Applicant to be taxed in default of agreement.

Datedday of2013.

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M. S. MULENGA
HIGH COURT JUDGE