IN THE HIGH FOR ZAMBIA **2014/HP/0069**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDITION)

BETWEEN:

MUSUNKA SILUNGWE **APPLICANT**

AND

ZAMBIA INSTITUTE OF ARCHITECTS **RESPONDENT**

Before the Hon. Mrs. Justice J. Z. Mulongoti, in Chambers on the 1st day of August 2014

For the PLAINTIFF : **Ms. M. Mutale, of KBF & Partners**

For the DEFENDANT : **Ms. L. Shula, of Isaac & Partners**

R U L I N G

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1. RV. City Panel on Takeovers and Mergers exparte Date Fin Ltd C.J (1987) QB 815
2. RV. Insurance Ombudsman Bureau exparte Aegon Life Insurance Ltd (1994) Times Jan 7th
3. Chiluba V. Attorney General (2003) ZR 153
4. Andrew Topeka Mbewe V. Attorney General Appeal No. 139 of 2010

The Ruling relates to an application on behalf of the Applicant for leave to issue Judicial Review Proceedings against the Defendant. The application was by summons pursuant to order 53 Rule 3 of the Rules of the Supreme Court supported by an affidavit sworn by the Applicant, dated 17th January 2014, in which he deposed inter alia that at the last Annual General Meeting of the Respondent held on 29th November 2013, he was nominated to stand as President. That it was announced by the returning officer, that if any proxy votes were to be allowed, they had to be in writing. However, when it was voting time he presented his written proxy votes which were rejected by the council stating that only the members present would be allowed to vote.

That he opposed this, although there was no formal motion or debate to determine this and only a select council members made the decision alone. That that was after being advised by the Attorney General's responsibility to hold elections in accordance with the law.

He further deposed that it has been a long standing tradition that any members who are not present are allowed to vote by proxy per exhibit 'MS1'.

The Respondent filed an affidavit in opposition sworn by one Mwangala Lethbridge its Vice President. She deposed inter alia that the application for leave for Judicial Review was irregular as it is not in compliance with the form of commencement of proceedings provided under order 53.

Further, that the decision to which the Applicant seeks Judicial Review relates to a decision made by members of a private association and thus not in the realm of public law as envisaged in Judicial Review proceedings.

Accordingly it was wrong and irregular and leave should not be granted. The Applicant filed an affidavit in Reply and contended that his application was in compliance with order 53 of the Rules of the Supreme Court White Book 1999 Edition. And that Respondent was established pursuant to an Act of Parliament and is a body exercising public functions.

At the hearing of the application Mrs. Mutale for the Applicant relied on the affidavit in support filed on 17the January 2014 and further affidavit of 20th February 2014.

She submitted that there was procedural impropriety on the part of the council to refuse proxy votes contrary to the long standing tradition per exhibit 'MS1'.

That the decision was irrational and unreasonable as it was made in the middle of the election. That the Applicant has shown sufficient interest and the grounds for Judicial Review have been fulfilled as the decision was irrational, unreasonable and procedurally improper.

It was also argued that the Respondent was established pursuant to an Act of Parliament that is the preamble to Zambia Institute of Architects Act, Chapter 442 of the Laws of Zambia. And that section 27(1) of the Act provides that
"*appeals from the council decision on disciplinary matters go to the Minister.*" Section 21(2) and section 31 were also cited in

RV. City Panel on Takeovers and Mergers exparte Date Fin Ltd [1] the court declined to grant the application on grounds that there were no grounds for Judicial Review but nonetheless rejected the claim by the City Panel that the Court had jurisdiction to consider the application.

That the city Panel was subject to Judicial Review despite the lack of statutory power because it can exercise public functions parallel to those which could have been in the absence of the Panel, exercised by a government department.

Ms. Mutale argued that if a body is set up under a statute or delegated legislation then the source of power brings the body within the scope of Judicial Review. That the Respondent exercises public functions parallel to those which could have been performed by a government department in their absence. And that it carried out business at the Ministry of Works and Supply in the Buildings Department.

The learned counsel for the Respondent, Ms. Shula relied on the affidavit in opposition. She argued that the application was

irregular as it did not conform with formal commencement proceedings provided under order 53 Rule 3 sub rule 2. Further that the decision of the council is not in the realm of public law as envisaged by order 53.

That according to the practice Note 53/14/33 of the RSC, the Applicant must demonstrate that the decision in question infringes rights which are entitled to protection under public law. The case of **RV. Insurance Ombudsman Bweau exparte Aegon Life Insurance Ltd, (2)** was cited under the practice note, and it gave a none exhaustive list of what bodies will be considered as public. According to counsel if the body does not fall within the list then they said decision of such members or body will be of private law and arbitrative in nature.

Further, that in the case of **Andrew Topeka Mbewe V. Attorney General (3)**, the Supreme Court refused the Appellant leave to commence Judicial Review and directed that the suit be instituted by writ of summons and statement of claim. In that case the decision was of the Judicial Service Commission, which is created by the constitution. It was contended that by mere

fact that a body is established by an Act of Parliament or constitution does not make it a public body neither does it mean rights affected are of a public nature to be safe guarded by Judicial Review.

That the procedure referred to by the Application was a long standing one and does not derive its power to carry out elections from statute.

In response, Ms. Mutale argued that the irregularity was not fatal as stated in Order 2 Rule of the White Book that "*procedural irregularity does not nullify proceedings*". Further, that even if the court so ordered, it had jurisdiction to order that the proceedings were began by writ.

I am grateful to counsel for the spirited arguments.

It is trite that the remedy of Judicial Review is to ensure that an individual is given fair treatment by the authority to which he has been subjected and that it is not the purpose of Judicial Review to substitute the opinion of the judiciary to that of the

authority constituted by law to decide the matter or matters in question."

See **Fredrick Chiluba V. Attorney General (3)**.

It is also trite that Judicial Review is a two stage process. First, the application for leave. It has been observed that the purpose of leave is to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless and to ensure that an application is only allowed to proceed to substantive hearing which is the second stage, if the Judge is satisfied that there is a case fit for further consideration. And that leave should be granted, if on the material then available, the court thinks without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant.

Lord Scarman in IRCV **National Federation of self Employed Small Business Ltd (4)**, stated: "Leave enables the Court to prevent abuse by busybodies, by cranks and other mischief makers. I do not see any purpose served by the leave requirements. It is expected that at leave stage unmeritorious application will be weeded out."

Circumstances when leave may be denied are similar to when it may be set aside as follows:

(i) where there had been material non disclosure

(ii) failure to demonstrate an 'arguable case', though it was stressed in a number of decisions this was a jurisdiction to be exercised only in the most exceptional cases. Lord Donaldson Mr. in RV Secretary of State for the Home Department, ex parte Begum supra, spoke of the need to establish some "knock out blow" such as the fact the original grant of leave was made per incurium, or the existence of a quasi-jurisdiction bar to relief;

(iii) Absence of jurisdiction to apply for Judicial review i.e. in RV Darlington Borough Council, ex parte Association of Darling Taxi owners (leave was set aside where the applicants were unincorporated associations and the proceedings were therefore not properly constituted);

(iv) where the applicant should have used an alternative remedy i.e. (failure to proceed by way of statutory right of appeal)

(v) where the applicant delayed unduly;

(vi) failure to make out a necessary precondition in relation to entitlement to seek review i.e. writing to the decision-maker seeking clarification equivalent to a "letter of demand" in ordinary civil litigation.

I perused the Act and section 34 clearly provides for any person aggrieved by the decision of the council to appeal to the Minister within 30 days.

I am of the considered view therefore, that it is not proper to grant leave in casu.

I noted the arguments by both counsel on whether the decision of the Respondent was of public law or by a public body. I must state that Ms. Mutale for the Applicant is on firm ground.

Accordingly, leave is denied as the Applicant should have used an alternative remedy of appealing as aforementioned, with costs to the Respondent.

Leave to appeal is granted.

Delivered this 1ST day of AUG..... 2014.

J. Z. Mulongoti

J. Z. MULONGOTI
HIGH COURT JUDGE