

IN THE HIGH COURT FOR ZAMBIA

2014/HP/0793

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF:

**AN APPLICATION FOR JUDICIAL
REVIEW PURSUANT TO ORDER 53
OF THE RULES OF THE SUPREME
COURT 1999 EDITION**

IN THE MATTER OF:

**ACCOUNT NUMBER 1401221472001
NATIONAL SAVINGS AND CREDIT
BANK LUSAKA NORTHEAST BRANCH**

BETWEEN:

PATIENCE CHALWE

1ST APPLICANT

FREEMAN MWELWA

2ND APPLICANT

AND

ATTORNEY GENERAL

RESPONDENT

**Before the Hon. Mrs. Justice J.Z. Mulongoti in Chambers on
the 4th day of July, 2014**

For the 1st and 2nd Applicants:

**Mr. P.K. Chibundi –
Chibundi & Company**

For the Respondent:

**Mr. M. Mulawo – Assistant
Senior State Advocate**

RULING

Cases Referred to:

1. *R v Darlington Borough Council ex parte Association of Darlington Taxi Owners (1994) COD 424*

2. *Nigel Kalonde Mutuna and Another v Attorney General (2012) ZR Vol. 3 565 (HC)*
3. *Frederick Jacob Titus Chiluba v Attorney General (2003) ZR 153*
4. *R v Registrar of Friendly Societies, ex parte New Cross Building Society (1984) 2 ALL ER 65*
5. *Inland Revenue Commissioners and National Federation of Self Employed and Small Businesses Limited (1982) AC 617*

Legislation Referred to:

1. *Order 53/14/62 of the Rules of the Supreme Court, 1999 Edition (White book)*

Works referred to:

1. *Halsbury's Laws of England 4th Edition, Vol. 37, Para 570*
2. *"Judicial Review: Emergence of concern": A paper by Hon. Justice P. Musonda presented to the Judges at a Seminar held on 30th June, 2011*

This is an Application by the Respondent for an order to discharge the *ex parte* order for leave for judicial review granted on 6th June, 2014. The Application was made pursuant to Order 53 Rule 14 Sub rule 62 of the Rules of the Supreme Court 1999 Edition. The Application was made by summons and a supporting affidavit dated 1st July, 2014, deposed to by counsel for the Respondent, Mr. Mwaba Mulawo. He deposed *inter alia* that:

- (i) The Applicants commenced Judicial Review proceedings against the Respondent on 6th June, 2014 by way of Originating Notice of Motion. That on the same day, this

court granted an *exparte* order for leave for judicial review.

- (ii) That I have perused the Affidavit in Support of the summons and *Exparte* Notice of Application for Leave to Apply for Judicial Review filed by the Applicants into this honourable court.
- (iii) That the Applicants have not exhibited the actual decision being challenged in this matter. They have neither exhibited the official written communication from the National Savings and Credit Bank nor an official response from the Commissioner of the Drug Enforcement Commission to warrant Judicial Review proceedings.
- (iv) That I verily believe that the Applicants ought to have exhibited the decision they are challenging. This is notwithstanding that the Commissioner did not communicate with the Applicants directly; they ought to have at least exhibited the official communication from

the bank informing them that their account had been seized by the Commission.

- (v) That premised on the above, I verily believe that the Applicants' application for Judicial Review will not succeed and thus crave the indulgence of this honourable court to discharge the *exparte* order for leave to commence judicial review proceedings.

At the hearing of this Application, the Respondent was represented by Mr. Mulawo, an Assistant Senior State Advocate in the Respondent. Mr. Philip Chibundi appeared for the Applicants and indicated to the court that he had just seen the Application before court for an order to discharge the *exparte* order for leave for judicial review and that he was ready to proceed nonetheless.

Mr. Mulawo argued the Application relying on the Affidavit aforesaid. He submitted that Order 53, Rule 14 Sub rule 62 of the Rules of the Supreme Court 1999 Edition, entitles the Respondent to apply to this court to discharge the *exparte* order for leave. The Applicants had not exhibited any official

communication to show that the account in question has been seized.

It was Mr. Mulawo's submission that upon perusal of the Affidavit in Support of the Applicant's *Exparte* Notice of Application for leave for Judicial Review, they are aware that the Commission has not responded and thus the Applicants have no exhibits. That notwithstanding, the Applicants ought to have at least exhibited official communication from the Bank to state that their account has been seized. He contended that without any official communication, this court has not been given the opportunity to have sight of any decision it is being called upon to decide. He prayed that the *exparte* order for leave be discharged.

Mr. Chibundi argued *viva voce*, that the power to discharge an *exparte* order is a discretionary power that must be exercised sparingly and with proof of material irregularity such as if the question before court did not fall within the ambit of matter to be determined by judicial review. He submitted that the Applicants had, under paragraph 9 of the Affidavit in Support, deposed that failure by the commission to avail them of the restriction notice on the account is in bad faith and unreasonable.

He also argued that the Commission is obliged by the Anti Money Laundering Act to avail the subject of the restriction notice. Therefore, the Respondent is unable to determine any valid grounds for the restriction notice. According to him, the only available inference from the refusal to do so is that it does not contain valid reasons. Mr. Chibundi then referred this court to Exhibit marked 'CMF1' in the Affidavit in Support of the *Exparte* Notice for Judicial Review which is a letter from the Applicants' Advocates on record advising the Commissioner of the information from the Bank and requesting them to avail the Applicants a copy of the restriction notice.

It was further submitted that paragraph 4 of the Affidavit in Support confirms that on 10th February, 2014, the 2nd Applicant was informed verbally by the bank of the restriction notice.

Mr. Chibundi submitted that the most pragmatic response is to state that they have not restricted the account if indeed they have not done so through the process of judicial review. He argued that the attempt to discharge the *exparte* order for leave on the basis that the decision which is sought to be challenged has not been produced is ingenuous. He added that there is no law to the effect that verbal communication from a bank to customer is

invalid in the same way there is, any law, which states that all decisions must be in writing. He prayed that the application be refused for lack of merit.

In reply, counsel for the Respondent indicated that counsel for the Applicants had conceded that it is just an inference that the failure to provide a restriction notice infers that there are no valid reasons. In serious cases such as this one, where a bank has refused to release money to a client, the bank cannot just confirm verbally. He contended that the Applicants ought to have at least requested the bank to communicate in writing and in the absence of that, the court has not been availed with an opportunity to look at the actual decision by the Respondent. If the court were to make a decision, it would amount to deciding without sight of any decision being challenged. He maintained his prayer that the Application be sustained.

I have carefully considered the Application before me and the submissions by Counsel. The circumstances in which leave can be set aside are almost similar to those of denial for leave. These are:

- (1) Where there is serious material non disclosure;

(2) Failure to demonstrate an arguable case though it has been stressed in a number of decisions that this has to be exercised in the most exceptional cases;

(3) Absence of jurisdiction to apply for judicial review as in **R v Darlington Borough Council ex parte Association of Darlington Taxi Owners (1)**, where leave was set aside where the applicants were unincorporated associations and the proceedings were not properly constituted;

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

(5) Where the applicant delayed unduly; and

(6) Failure to make out a necessary precondition in relation to entitlement to seek review i.e. writing to the decision maker seeking clarification.

See **“Judicial Review: Emerging Areas of Concern”**: A Paper presented by Hon. Mr. Justice P. Musonda and also Nigel

Kalonde Mutuna and Another v Attorney General (2), a High Court decision for persuasive value.

I am inclined to dismiss the application. I am of the considered view that the Respondent has not shown any of the above to warrant an order to discharge the *ex parte* order for leave.

It is trite law that the procedure under Order 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if the leave is granted, the hearing of the application itself.

In the case of **Frederick Jacob Titus Chiluba v Attorney General (3)**, the Supreme Court stated that *“the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.”* In addition, it was stated in **R v Registrar of Friendly Societies, ex parte New Cross Building Society (4)** that *“it is not for the court to consider whether the decisions of the chief registrar were right or wrong or to entertain an appeal from them or to substitute the court’s discretion for this. The role of the court is to consider whether the chief registrar has exceeded his powers”*.

On the material before me, the Applicants are alleging that their account has been seized without a restriction notice and have

made efforts to communicate to the Drug Enforcement Commission for their response on the decision but to no avail. The Respondent on the other hand contends that the issue is moot as the Applicants have not exhibited the decision sought to be challenged in writing and have not disclosed whether or not the decision was made despite there been no evidence in writing. That to me raises issues for determination at the substantive hearing; the second stage of judicial review as exhibited in the cases cited above.

In **Frederick Jacob Titus Chiluba v Attorney General**, *supra*, the Supreme Court also stated, as it has, in so many other cases, that *“the purpose 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 part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question...”*

Furthermore, in the case of **Inland Revenue Commissioners and National Federation of Self Employed and Small Businesses Limited (5)**, Lord Diplock at Page 642 stated that *“the court must direct its mind to it and form a prima facie view about it upon the material that is available at the first stage. The*

prima facie view so formed, if favourable to the applicant, may alter on further consideration in light of further evidence that may be before the court at the second stage, the hearing for judicial review itself.”

The mechanism for the process of judicial review is sufficient to canvass the issues raised by counsel for the Respondent. At this stage, the Applicant only has to make out a *prima facie* arguable case so that if it turns out that the decision being challenged is in fact nonexistent at the second stage, then the position stands to be altered. According to the learned authors of **Halsbury’s Laws of England volume 37, 4th Edition para 570**, “*an applicant need only show, that he has a prima facie or arguable case or reasonable grounds for believing that there has been a breach, or threat or failure to perform a public duty.*”

I must state that in considering the *ex parte* application for an order for leave for judicial review, I directed my mind to the threshold test to be applied and formed a *prima facie* view in favour of the Applicants.

In light of the foregoing, I find that the Respondent has failed to show that the application for judicial review in this case is fundamentally flawed and bound to fail. The test required to be

applied by the court when considering an application for an order for leave for judicial review remains satisfied. Therefore, the application for an order to discharge the *ex parte* order for leave for judicial review is denied with costs in the cause. Leave to appeal is granted.

Delivered the^{31st}.....day of^{July}.....2014



J.Z. MULONGOTI

HIGH COURT JUDGE