

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
PRINCIPAL REGISTRY
(Civil Jurisdiction)

2015/HP/0942

BETWEEN:

THE PEOPLE

V

THE DIRECTOR OF PUBLIC PROSECUTIONS
ex-parte RAJAN MAHTANI (DR)



CORAM: SIAVWAPA J

For the People:

*Mr. L. Kalaluka (SC) Attorney
General with Mr. J. Simachela Ag.
Chief State Advocate*

For the Applicant:

*Mr. J. Sangwa (SC) of Messrs Simeza
Sangwa and Associates with
Patricia Simeza and Mr. D. M.
Chakoleka of Messrs Mulenga
Mwandashi Legal Practitioners*

RULING

Cases Referred To:

1. *C and S Investments Limited, Ace Car Hire Limited, Sunday Maluba
V The Attorney-General (2004) ZR 216.*

2. *R.V Secretary of State for the Home Department, ex-parte Rukshanda Begum (1990) C.O.D. 107*
3. *R V Inland Revenue Commissioners, ex-parte National Federation of Self-employed and Small Business LTD (1982) AC 617 at 642*

The Applicant, in this case, Dr. Rajan Mahtani, was on 2nd June, 2015, arrested and charged with two counts of forgery and bonded to 29th June, 2015 for plea. By Notice of Application for Leave to apply for Judicial Review pursuant to Order 53 (3) of the Rules of the Supreme Court 1999 Edition and an affidavit verifying facts filed on 19th June, 2015, the Applicant seeks leave to move the Court for Judicial Review.

The reliefs being sought, if leave is granted are as follows:-

- (a) A declaration that the institution and maintenance of the criminal prosecution of the Applicant, based on the alleged forgery of the share transfer forms of Zambezi Portland Cement is an abuse of the Court process;
- (b) An order of certiorari to remove into the High Court for the purpose of quashing the said decision;
- (c) An order of prohibition prohibiting the prosecution of the Applicant on the said counts of alleged forgery of the share transfer forms of Zambezi Portland Cement.

The Applicant has further prayed that should leave be granted, the same should operate as a stay of the decision to which the application relates.

The grounds upon which Judicial Review is being sought, if leave is granted are as follows:

(a) **Illegality/Constitutional Issues.**

- Under this head, the contention is that the decision to prosecute the Applicant on charges founded on the share transfer forms of Zambezi Portland Cement is ultra-vires the provisions of Article 56(7) of the Constitution of Zambia in that the Director of Public Prosecutions is bound by the direction given by the Attorney-General pursuant to the provisions of Article 56 (7) of the Constitution.
- That the decision by the Director of Public Prosecutions to prosecute the Applicant on charges founded on the share transfer forms of Zambezi Portland Cement is in breach of the agreement between the Applicant and the Attorney-General.
- That the decision to prosecute the Applicant on charges founded on the share transfer forms of Zambezi Portland Cement is an abuse of the powers of

the Director of Public Prosecutions hence ultra-vires the provisions of Article 56(3) of the Constitution for not being in the interest or furtherance of the administration of justice.

That the decision to prosecute the Applicant is ultra-vires the provisions of Article 56(3) of the Constitution in that the powers of the Director of Public Prosecutions have not been exercised in order to enforce law and order but in order to further other purposes and objectives.

(b) **Procedural Impropriety/Illegality**

- That there was a duty to consult the Applicant before the decision was made to prosecute him on charges founded on the share transfer forms of Zambezi Portland Cement under common law given the fact that the said decision would inevitably affect him.

- That in the alternative, if there was only a discretion or no duty on the part of the Respondent to consult the Applicant, that the Applicant, had a legitimate expectation that he would be consulted.

- That it would be unfair and contrary to public policy to prosecute the Applicant in the light of the agreement between him and the Attorney-General.

(c) **Irrationality**

- That if there was no duty to consult or any legitimate expectation on the facts, then the decision not to consult was irrational.

Upon request by the Applicant to be heard pursuant to Order 53 (3) of the Rules of the Supreme Court, an inter-partes hearing was instead ordered by the Court and on the return date, Counsel addressed the Court on whether or not, the notice of application for leave to apply for Judicial Review demonstrated that there was a case fit for further investigation at the inter-partes hearing of the substantive application for Judicial Review.

Mr. Sangwa (SC) argued, on behalf of the Applicant, that the Applicant had sufficiently demonstrated that the notice was filed timely, that he had the requisite locus standi and that there was a case fit for further investigation at a substantive Judicial Review hearing.

On the other hand, the learned Attorney-General, Mr. Likando Kalaluka, (SC) argued that leave should not be granted based on the Supreme Court decision in the case of **C and S Investments**

Limited, Ace Car Hire Limited, Sunday Maluba V The Attorney-General (2004) ZR 216.

In that case, the Supreme Court held, inter-alia, that:-

“Civil proceedings cannot be used to arrest criminal investigations”.

Besides this argument, the learned Attorney-General's submissions delved into issues fit for consideration at the hearing of the substantive application if leave is granted.

The only question I need to attend to at this stage is whether the test formulated in the case of ***R.V Secretary of State for the Home Department, ex-parte Rukshanda Begum (1990) C.O.D. 107*** has been satisfied. In that case, the Court of Appeal held that:-

“The test to be applied in deciding whether to grant leave to move for Judicial Review is whether the Judge is satisfied that there is a case fit for further investigation at a full inter-partes hearing of a substantive application for Judicial Review.”

In this case, the Applicant intends to show the Court that his prosecution on the charge laid against him is illegal and

unconstitutional among other things, at the hearing of the substantive application for Judicial Review if leave is granted.

It is my considered view that the material made available to the Court, without delving into details of the matter, present an arguable case meriting the granting of the leave. That is as per Lord Diplock in the case of **R V Inland Revenue Commissioners, ex-parte National Federation of Self-employed and Small Business LTD (1982) AC 617 at 642** when he put the matter thus:

“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”.

In this case, the Applicant has raised matters which, on face value, present impropriety on the part of the State and the veracity of the same ought to be further investigated at a hearing of the substantive application for Judicial Review.

It is however, noted that the objection raised by the State to the granting of leave for Judicial Review, based on the **case of C and S Investments and Others** seems to suggest that there is no Judicial Review permissible in criminal matters. To the contrary that case firmly establishes the law as being that it is unlawful to arrest criminal investigations through civil proceedings. It does not

state that Judicial Review or indeed leave to apply for Judicial Review cannot be granted in criminal investigations or proceedings. It would therefore, be within the province and scope of Judicial Review to interrogate any processes and decisions relating to criminal investigations without arresting the said investigations.

It is further noted that in fact, what the Supreme Court in that case prohibited is the arrest of criminal **investigations** (emphasis mine) and not criminal proceedings through civil proceedings. It is not in dispute that criminal matters are not shielded from the long arm of Judicial Review where decisions are made that fall within the ambit of Judicial Review except where an appeal is the prescribed mode of challenging a decision in a criminal matter.

As submitted by Mr. Sangwa, SC, the decision sought to be challenged by the Applicant is that to prosecute him and not to investigate him.

Clearly, the case sought to be relied upon by the State is somewhat misplaced and therefore inapplicable to the case at hand. What the case may be of relevance to is the further relief sought by the Applicant that should leave be granted, it should be ordered that the leave should act as a stay of the criminal proceedings the subject of the application.

The analogy however, remains the same that is, if the relief is granted, it would not be offensive or in contumelious disregard by this Court of the doctrine of stare decisis. The fact would still remain that the order would not have the effect of arresting a criminal investigation but a criminal trial or proceeding.

In effect, should the State still have some unfinished investigations to do, on the Applicant, in relation to the charge, the order of stay would have no effect on the intended or on going investigations except that the prosecution on the same would have to be on hold until the Judicial Review is disposed of.

It is in that regard, my firm view that the essential facts leading to the applicable holding in the case of **C and S Investments Ltd and others (Supra)** are clearly different and therefore, distinguishable from the relevant facts upon which the holding in the said holding is being canvassed as applicable to this case.

In the result, the application for leave to apply for Judicial Review must succeed and I grant it accordingly.

In consequence the leave shall also operate as a stay of the criminal prosecution against the Applicant on the charge laid against him so far and any that may be preferred against him in

R10

relation and incidental to the share forms in Zambezi Portland Cement.

Parties shall bear their own costs for this application.

Dated at Lusaka this 25th day of June 2015.



J. M. SIAVWAPA
JUDGE