

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)



2014/HP/1604

In the matter of: **The application for Judicial Review pursuant to Order 53 Rule 3 of the Supreme Court Rules of England**

AND

In the matter of: An application for leave to apply for Judicial Review

AND

In the matter of: **The Decision of the Permanent Secretary, Ministry of Foreign Affairs/Public Service Commission to dismiss the Applicant and recall him from foreign service.**

BETWEEN:

YOSI MITI

APPLICANT

AND

ATTORNEY GENERAL

RESPONDENT

BEFORE : HON. G.C. CHAWATAMA

For the Applicant : Mr. Zulu – Messrs Tembo Ngulube & Associates
For the Respondent : S.G. Mr. Mwansa – Attorney General Chambers
Mrs. C. Mulenga – Attorney General Chambers

RULING

CASES REFERRED TO:

1. *Nyampala Safaris Zambia Limited V Zawa (2004) ZLR at Page 49*
2. *Fredrick Jacob Titus Chiluba V Attorney General (2003) ZR 153*

On the 8th October, 2014 the Applicant filed an Ex-parte summons for leave to apply for Judicial Review pursuant to Order 53 of the Rules of the Supreme Court (1999) Edition. Filed also was an affidavit verifying facts and a statement in support of application for Judicial Review. Filed with the above were the Applicant's submissions in support.

On the 23rd October, 2014, an affidavit of service was filed in which the deponent Paul Chalwe stated that he personally served the order granting leave and inter parte summons for leave returnable on the 2nd December, 2014 at 09:30 hours.

However, before that date the Respondent filed summons to discharge the Ex-parte order for leave for Judicial Review pursuant to *Order 53 Rule 14 sub Rules 4 and 62 of the Rules of the Supreme Court (1999) Edition* and an affidavit in support of the same.

In paragraph 3 of the affidavit the deponent Mr. Mwaba Muhawo states as follows:-

"That I have perused the order granting the Applicant's leave to commence judicial review and to stay execution granted by this honourable court as well as the affidavit in support of the Application for Judicial Review."

In paragraph 4 of the affidavit the deponent states as follows:-

“That I verily believe that the matter in question does not fall under the ambit of Judicial Review as it falls under private instead of public law.”

The Respondent relied on Order 53 Rule 14 sub Rule 4 which provides:

“It is open to a Respondent (where leave to move for judicial review has been granted ex-parte) to apply for the grant of leave to be set aside; but such applications are discouraged and should only be made where the Respondent can show that the substantive application will clearly fail.”

In support of the fact that the Applicant’s application has got no chance of succeeding due to the fact that Judicial Review is strictly concerned with public and not private law, the Respondent relied on Order 53/14/33 which provides in part that:

“Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise... if a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process. It would ... as a general

rule, and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.”

The Learned Solicitor General in supplementing the skeleton arguments referred the court to the case of ***Nyampala Safaris Zambia Limited V Zawa (2004) ZLR at Page 49.*** The Supreme Court held in part:

1. ***“That the remedy of judicial review is concerned not with the merits of the decision, but the decision making process itself.***
2. ***The purpose of judicial review is to ensure that the individual is given fair treatment by the authority, to which he has been subject and that it is not part of that purpose to substitute the opinion of the Judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question.”***

The court was further referred to the case of ***Fredrick Jacob Titus Chiluba V Attorney General (2003) ZR 153.*** The Supreme Court held in part:

1. ***“The hearing of an application for Judicial Review does not start from the day set for the motion. The application starts with notice of application for leave to apply for Judicial Review.***

2. *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.*
3. *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 that purpose to substitute the opinion of the judiciary or of the individual Judges for that of the authority constituted by law to decide the matters in question.*
4. *The court will not on Judicial Review application act as a "court of appeal," from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision is Wednesday unreasonable.*
5. *When the High court is reviewing a decision of a public body it will not admit evidence which is relevant whether the decision is reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it.*
6. *In all applications for Judicial Review, the principal source of evidence is from affidavits and the only witnesses that may give viva voce evidence on applications for Judicial Review, are the deponents of the affidavits on record."*

The Learned Solicitor General stated that the Permanent Secretary of Foreign Affairs followed the correct procedure when re-calling the Applicant and the court cannot substitute its decision for that of the Permanent Secretary.

Mr. Zulu for the Applicant referred the court to the skeleton Arguments in opposition to summons to discharge the order for leave for Judicial Review. Mr. Zulu in supplementing the skeleton arguments stated that the Respondent had not adduced any evidence to show that the application for Judicial Review is bound to fail at substantive stage.

The court was urged to consider that in the application for leave, the Applicant demonstrated that the decision to dismiss him from public service and re-call him was made in disregard of procedural steps required under the applicable terms and conditions he was serving under. The court was referred to clause 60 of the Terms and conditions of service for The Public Service. Counsel brought to the attention of the court the Service Commission Disciplinary Code and Procedures for handling offences in the Public Service. Counsel stated that there was no warning letter of any action to be taken. The Applicant also relied on the absence of a charge as well as a potential penalty. Counsel pointed out that there are no minutes of the disciplinary hearing. All this according to Counsel points to procedural lapses on the part of the Respondent.

Regarding the proposition that this is a private law matter and not a public law matter, Counsel pointed out that the decision is that of a Public Service Commission and not a Private Service Commission. Counsel further stated that the Permanent Secretary at the Ministry of Foreign Affairs is a Public Officer

discharging public functions. According to Counsel whether it is a private or public law issue depends largely on whether the person discharging the power is discharging a private or public function.

Mr. Zulu submitted that there are numerous authorities that show that this matter is a proper case for Judicial Review for the court to inquire into the impropriety of the exercise of disciplinary powers. The court was asked to consider the relationship of the Applicant and his employer and to distinguish that from the master and servant relationship.

In response the Learned Solicitor General stated that any application for Judicial Review ought to adhere to the Rules of procedure as established in order 53. The court was referred to the case of *Martin Mbangu and Two Others V Attorney General* a Ruling of my sister Justice Mulenga in which she cited the case of *Dean Mung'omba V Peter Muchingwa and Others 2003 ZLR at Page 20*.

The Learned Solicitor General in clarifying the position taken by the Applicant stated that the Applicant is confusing two issues. These issues being firstly the decision to dismiss him from the civil service and secondly the decision to recall him from Foreign Service. The Learned Solicitor General stated that what is being challenged is the decision to recall the Applicant from Foreign Service which is a matter of a contract between the Applicant and his employer.

I am grateful to both the Learned Solicitor General and Mr. Zulu for their submissions. The distinction between public and private law is provided for by Order 53/14/33 which states in part that:

“Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule proceed by way of judicial review and not by way of an ordinary action whether for a declaration or as injunction or otherwise. As to whether the issues before me fall under private instead of public law to warrant the same to be heard by way of Judicial Review;”

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 not public law; (*R V East Berkshire Health Authority Exp. Walsh (1985) QB 152, (1984) 3 ALL ER 425 CA.*)

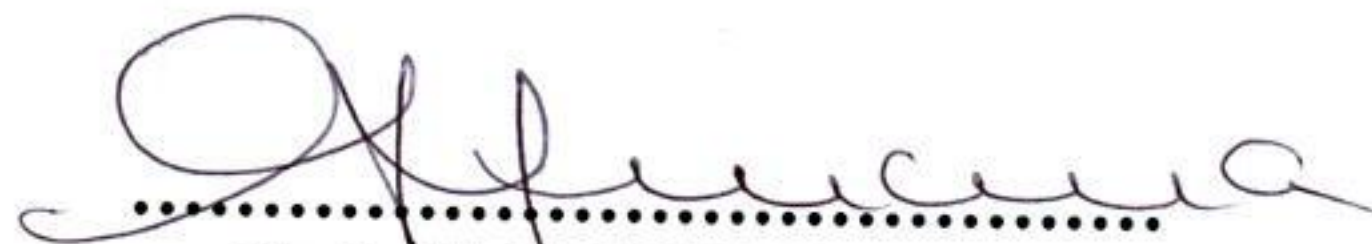
In the matter before me the employment of the Applicant is subject of Public Service Commission regulations which derives its authority from the Service Commission Act Chapter 259 of the Laws of Zambia. The remedy being sought by the Applicant is an ordinary common law action in contract concerning his private rights and not rights protected under public law.

For the above reasons the Order granting the Applicant's leave to commence Judicial Review and to stay execution is hereby

discharged. Having decided that the remedy sought is an ordinary common law action in contract concerning the Applicant's private rights and not rights protected under public law means that the substantive application if heard would have failed.

Counsel for the Respondent brought to the court's attention his desire to file an application for contempt of court but was informed by the court that the court had adjourned to hear the application for the discharge of the order granting the Application for leave to commence Judicial Review and to stay execution. Since this application would have a bearing on whether or not the application for committal for contempt of court would be entertained, the court went ahead and heard the application to discharge. Having made the decision to discharge the Order granting the Applicants leave to commence Judicial Review and to stay execution, the application for contempt of court cannot be entertained.

DELIVERED AT LUSAKA THIS 17th DAY OF JUNE 2015



**G.C.M CHAWATAMA
JUDGE**