

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

2015/HP/1406

**IN THE MATTER OF ORDER 53, RULE 3 OF THE RULES OF THE
SUPREME COURT OF ENGLAND, 1999 EDITION**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW BY FINSBURY INVESTMENTS LIMITED AND ZAMBEZI
PORTLAND CEMENT LIMITED**

BETWEEN:

THE PEOPLE

AND

**THE PATENTS AND COMPANIES REGISTRATION
AGENCY EXPARTES FINSBURY INVESTMENTS
AND ZAMBEZI PORTLANT**

APPLICANT

RESPONDENT



BEFORE HONOURABLE MRS. JUSTICE P. C. M. NGULUBE IN CHAMBERS

**FOR THE APPLICANT : MR JP SANGWA, SC
MESSRS SIMEZA SANGWA AND ASSOCIATES**

**FOR THE RESPONDENT : MR B MPALO
ASSISTANT REGISTRAR, PACRA**

**INTERESTED PARTIES : MR MWIYA
MESSRS CENTRAL CHAMBERS**

R U L I N G

Cases referred to:

1. Mutuna and Kajimanga vs Attorney General 2012/HP/2012,
2. Bellamano v Ligure Lombarda Limited (1976) Z.R 267
3. Dean Namulya Mung'omba Bwalya Kanyanta Nga'andu, Anti Corruption Commission Vs Peter Machungwa, Golden Mandandi and The Attorney General (2003)ZR 17
4. R. v. Secretary of State for the Home Department, ex p. Rukshanda Begum [1990] C.O.D. 107, C.A.

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act, number 2 of 2016
2. The High Court Act, Chapter 27 of the Laws of Zambia
3. The Rules of the Supreme Court of England, (1999) Edition

This is a Ruling on the Applicants' Motion to set aside the Respondent's Application to discharge the Order granting leave to apply for Judicial Review on the basis of irregularity. The motion was made pursuant to Order 53 Rule 8 and Order 2, Rule 2 of the Rules of the Supreme Court of England. The grounds for the motion were set out as thus;

1. The Summons did not disclose the grounds on which the Order granting leave to move the Court by way of Judicial Review ought to be discharged;

2. The Affidavit in Support of the Application to discharge the Order granting leave to apply for Judicial Review did not comply with the provisions of Order 5 of the High Court Rules;

3. The Application to discharge the Order granting leave to apply for Judicial Review did not comply with the provisions of Order 53 Rule 8 of the Rules of the Supreme Court of England.

When the Motion came up for hearing, Learned State Counsel for the Applicant made oral submissions which were buttressed by written Skeleton Arguments in which it was contended that to entertain the Respondent's application to discharge the Order granting leave would be inconsistent with the provisions of the Constitution of Zambia (Amendment) Act number 2 of 2016 which required the Applicants' application to be heard and decided on its merits as opposed to being prematurely determined on the grounds advanced by the Respondent.

It was the Applicant's submission that the combined effect of Articles 1 and 118 of the Constitution of Zambia (Amendment) Act, number 2 of 2016 was that there was no need for leave of Court in order to commence Judicial Review Proceedings which were to be commenced and prosecuted as a matter of right. That as this Court did not have jurisdiction on constitutional issues, it was mandated to refer the matter to the Constitutional Court which has jurisdiction to interpret the constitution.

In terms of the Respondent's summons, the Applicant contended that it was irregular as Order 53 Rule 3 does not give the Court power to discharge leave granted to commence Judicial Review Proceedings. That the commentaries in

order 53/14/4 did not equally confer such authority. It was advanced that all interlocutory applications in the Judicial Review proceedings are to be made pursuant to Order 53 rule 8 which the Respondent had not done and therefore its application was irregular.

The Applicant argued that the Respondent's Affidavit contained legal arguments as well as conclusions and thus flouted Order 5 of the High Court Rules.

Further that the Respondent's application amounted to an abuse of process as the Respondent was attempting to derail the hearing and determination of the substantive Judicial Review proceedings. That the Respondent was supposed to raise the arguments in opposition to the substantive Judicial Review Proceedings and not by way of an application to discharge the leave granted.

In response, the Respondents submitted that their summons for an order to discharge leave granted was in line with the High Court Rules and that the Applicants were not prejudiced as the grounds were disclosed in the Respondent's Skeleton Arguments.

The Respondent contended that under Order 5 Rule 13 and 14 of the High Court Rules, the Court may allow amendments to a defective Affidavit. It was the Respondent's position that the Affidavit in support of their application was devoid of any prayer or legal arguments as alleged by the Applicants.

Relying on **Mutuna and Kajimanga vs Attorney General**¹, the Respondent submitted that Orders 53/14/4 and 53/14/62 were the correct provisions under which an application to discharge leave was to be brought. It was stated that in the event that the Court was of a different view, following the decision of **Bellamano v Ligure Lombarda Limited**², the Court must take Judicial Notice of the correct rule and proceed to determine the application on the merits as envisaged in Article 118(2) of the Constitution of Zambia (Amendment) Act number 2 of 2016.

Further that Order 53 allows a party to move the Court to set aside leave where it is demonstrated that the application will fail. The Respondent thus maintained that its application was not an abuse of Court Process.

In reply to the Respondent's arguments, the Applicant relied on **Dean Namulya Mung'omba Bwalya Kanyanta Nga'andu, Anti Corruption Commission Vs Peter Machungwa, Golden Mandandi and The Attorney General**³. It was advanced that the Respondent's reliance on Order 30 of the High Court Rules was irregular as the High Court Rules were not applicable in Judicial Review Proceedings. Further that the Respondent purported to make the application pursuant to Order 53 rule 3 of the Rules of the Supreme Court which did not prescribe the manner in which such an application was to be made.

The Applicant submitted the High Court decision cited by the Respondent was not binding on this Court and that in the particular decision objections to the

reliance on the said provisions were not raised. That the Court concerned itself with substantive issues and not procedural as is the case at hand.

It was thus maintained that the Respondent's application be dismissed.

I have carefully considered the submissions made by the respective parties and hasten to point out that submissions on constitutional related matters were made at length by the Applicant in support of this motion. However, as rightly submitted, I have no jurisdiction on constitutional related matters as is clear from **Article 128. (1) of the Constitution of Zambia (Amendment) Act number 2 of 2016** which stipulates that-

"Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

(a) a matter relating to the interpretation of this Constitution..."

Notwithstanding, I am of the considered view that the crux of this application is anchored on the procedure stipulated under Order 53 of the Rules of the Supreme Court of England which falls squarely within this Court's Jurisdiction. The main issue as I see it is whether the Respondent's application for an Order to discharge leave granted to commence Judicial Review Proceedings is proper or not? The Applicant impugns the step taken by the Respondent on the grounds of an irregular summons, defective affidavit and non compliance with Order 53 of the Rules of the Supreme Court of England. I shall deal first with the issue of non compliance with the dictates of Order 53.

A thorough perusal of Order 53 reveals that no particular rule provides for discharge of leave to commence Judicial Review, however, in the commentaries of the Learned Authors of the Rules of the Supreme Court, in particular paragraph 53/1-14/2 titled **Stages in the progress of an application for judicial review**, discharge of leave is alluded to. The Learned Authors observe as follows;

"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 (see para. 53/1-14/34, below); but such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail."

There being no rule under Order 53 which provides for discharge of leave to commence Judicial Review proceedings does not mean that this Court is not vested with authority to set aside leave earlier granted on an application of a party. This is a point which the Applicant has not disputed and rightly so. It is only logical that a Court which has power to grant an Order must have the powers to set aside such an order on particular grounds. I will not endeavour to state the particular grounds as I am not dealing with the application to discharge. Suffice to add that the commentaries by the Learned Authors of the Rules of the Supreme Court are based on practice and are usually drawn from decided cases and the Power of the Court to discharge leave granted ex parte is

an accepted practice as is apparent from **R. v. Secretary of State for the Home Department, ex p. Rukshanda Begum**⁴. The Court of Appeal dealt with two cases where leave to move for judicial review had initially been granted by the High Court Judge ex parte, and then, on the application of the Respondent and after an inter partes leave hearing, the grant of leave to move for judicial review was set aside

That settled, the only issue outstanding relates to the appropriate rule pursuant to which such an application ought to be made.

Order 53 Rule 8(1) provides that-

"Unless the Court otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to any judge or a master of the Queen's Bench Division, notwithstanding that the application for judicial review has been made by motion and is to be heard by a Divisional Court."

The Respondent's application is undeniably an interlocutory application in nature and therefore as rightly submitted by Learned State Counsel, I am of the considered view that Rule 8 is the appropriate rule under which one can bring such an application.

The Respondent made its application to discharge Leave to commence Judicial Review Proceedings pursuant to Rule 3 which rule relates to the grant of leave. Upon being challenged by way of this application, the Respondent placed

reliance on paragraphs 53/14/4 and 53/14/62. I hasten to note here that this is usually the practice in this Jurisdiction as is clear from cases relied upon by the Respondent. However, I am inclined to agree with the Learned State Counsel that such reliance is erroneous and as I have stated above, the appropriate Rule is 8 as it provides for all interlocutory applications that parties are to make in the matter.

As to the effect of relying on the said paragraphs instead of the appropriate rule, I should state emphatically that the reliance on the wrong provision of the law nor the lack thereof, is not a basis on which an application can be dismissed as long as the Court has the power to deal with such an application. As stated above, Rule 8 grants this Court the power to deal with interlocutory applications. Therefore, despite the Respondent's erroneous reliance on the commentary paragraphs instead of Order 53, rule 8, it is not fatal. As submitted by the Respondent, I shall pick a leaf from the Supreme Court decision of **Bellamano v Ligure Lombarda Limited**.²

Addressing the argument of an irregular summons, the Applicant contends that the summons failed to disclose the grounds upon which the application was being made. I have perused the summons and it points the reader to the Affidavit in support of the application as stating the grounds. As to whether the Affidavit so stated the grounds, I am led to consider the third point of contention, that is, defective Affidavit. The Applicant contended that the Affidavit in support of the application flouted Order 5 Rule 15 of the High Court

Rules in that paragraphs 5, 6,7,10,11,12,13,14,15,16 contained legal arguments while paragraph 8 and 9 contained both legal arguments and conclusions drawn by the Respondent. I have carefully perused through the Affidavit in question and I am of the considered view that it states the grounds upon which the Respondent brought the Summons to discharge leave and since the Applicant was served with the Affidavit in Support of the Summons, they were fully aware of the grounds upon which the application was being brought. Further, I am satisfied that the contents of the Affidavit fall squarely within Order 5 as they reveal a factual position upon which the Respondent is relying on in bringing its application to discharge leave to commence Judicial Review proceedings. Granted, the facts are interwoven with legal aspects and without which, they would lack clarity. I thus see nothing untoward in the paragraphs impugned.

Based on the foregoing, I dismiss the Applicants' application in its entirety. As the application raised a novel issue, I direct that each party bears their own costs.

Dated this 3rd June, 2016


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P.C.M NGULUBE
HIGH COURT JUDGE