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IN THE HIGH COURT FOR ZAMBIA **2016/HP/365**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: ORDER 53 OF THE RULES OF THE SUPREME COURT (WHITE BOOK) (1999 EDITION) VOLUME 1 AND 2

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF: THE DECISION OF THE MUTEMBO NCHITO SC TRIBUNAL MADE ON AND AROUND 23RD FEBRUARY, 2016.

IN THE MATTER OF: ARTICLE 143, 144 AND 182 (3) OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE LAW GOVERNING THE PROBING OF A SITTING DIRECTOR OF PUBLIC PROSECUTIONS.

BETWEEN:

MUTEMBO NCHITO SC APPLICANT

AND

THE ATTORNEY-GENERAL RESPONDENT

Before The Honourable Mrs. Justice P.C.M. Ngulube in Chambers.

For the Applicant: Mr. N. Nchito, SC, Mr. C. Hamweela, Messrs Nchito and Nchito.

For the Respondent: Mr. L. Kalaluka, SC, Attorney – General, Mr. A. Mwansa, SC, Solicitor- General.

RULING

Cases Referred to:

1. ***Derrick Chitala vs. Attorney General (1995-1997) ZR 91***
2. ***Nyampala Safaris Limited and others vs. Zambia Wildlife Authority and Others (2004) ZR, 49***
3. ***Attorney General vs. Mutembo Nchito, Selected Judgment Number 1 of 2016***
4. ***Kelvin Hangandu and Company vs. Webby Mulubisha (2008) Vol. 2 ZR 82***
5. ***Muyawa Liuwa vs. Judicial Complaints Authority and Attorney General, Selected Judgment Number 6 of 2011.***
6. ***Mukumbuta Mukumbuta and others vs Nkwilimba Chobana Lubunda and others Selected Judgment Number 8 of 2003***
7. ***Zimco Limited vs. Reuben Verra, Supreme Court Judgment Number 6 of 2001***
8. ***Secretary of State for the Home Department ex-parte Rukshanda Begum (1990) COD 107***
9. ***R vs Inland Revenue Commissioners, Ex-Parte National Federation of Self Employed and Small Business (1982) AC 617***
10. ***Epping and Hallow General Commissioners Ex-parte Gold Straw (1990) COD***
11. ***City of Toronto vs. The Dream Team 2012 ONSC 3904 3904 (CANLII II)***

12.Halifax Regional Municipality a body Corporate duly incorporated pursuant to the laws of Nova Scotia and Canadian Human Rights Commission and others, 2012 SCC, 10.

Legislation Referred to:

1. **Constitution of Zambia Act, Number 1 of 2016**
2. **Constitution of Zambia (Amendment) Act, Number 2 of 2016**
3. **Rules of the Supreme Court (White Book), 1999**

This is the Applicant's application for leave to apply for Judicial Review against a decision of the Tribunal that was set up to probe the Applicant on various terms of reference's decision to continue sitting. The Applicant states that a serious jurisdictional issue has arisen out of the 5th January, 2016 amendment of the Constitution and is pending determination before the Constitutional Court. The Applicant seeks an order of certiorari to remove into the High Court for purposes of quashing the decision of the Tribunal that was set up to investigate him to continue sitting when the Constitution no longer provides for its existence.

The Applicant further seeks a prohibition to restrain the Tribunal from otherwise operating when the Constitution pursuant to which it was set up no longer provides for its existence. The Applicant also seeks damages against the Respondent for misfeasance in public office. The Applicant seeks a direction that leave to commence Judicial Review proceedings be granted and that such leave should operate as a stay of the decisions which the application relates pursuant to *Rule 3(10)(a) of Order 53 of the*

Rules of the Supreme Court. The Applicant further seeks an order for Costs. The Applicant requested for a hearing of the application pursuant to Order 53 Rule 3(3) of the Rules of the Supreme Court and the request was granted.

The grounds upon Judicial Review is sought, if leave is granted are as follows –

1. It is the Applicant's contention that it is illegal for the ***"defunct"*** Tribunal to insist on continuing to sit when a serious jurisdictional issue has arisen with the 5th of January, 2016 amendment of the Constitution and is pending determination before the Constitutional Court.
2. In the alternative, it is the Applicant's contention that the decision of the said ***"defunct"*** Tribunal set up to investigate the Applicant to continue sitting is illegal as the Constitution no longer provides for its existence.

3.The Applicant submits that the Constitution Amendment Act in section 4 repeals the former part 4 of the Constitution which is the part under which the **"defunct"** Tribunal was set up.

4.Article 182(3) as read with Articles 143 and 144 of the Constitution now places the onus of probing the Director of Public Prosecutions in anticipation of removal on the Judicial Complaints Commission.

5.The Applicant contends that in insisting on sitting, after it no longer exists, the ***"defunct"*** Tribunal is contravening the Constitution and that its actions are illegal.

6.The Constitution in Articles 1(5) and 128 provides that –

1 (5) A matter relating to the Constitution shall be heard by the Constitutional Court.

128 (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear -

(a) a matter relating to the interpretation of the Constitution;

(b) a matter relating to a violation or contravention of this Constitution.

7. The Applicant contends that the decision on whether the ***"defunct"*** Tribunal can continue sitting inspite of the law on which it stood being repealed can only be made by the Constitutional Court and the insistence by the said Tribunal in making this decision is illegal.

8.The Applicant stated that he would rely on the decision of the Supreme Court in the case of **Derrick Chitala vs. Attorney-General[1] (1995-1997) ZR 91** where the Supreme Court stated that by illegality is meant that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it and that if the decision maker fails to understand the law that regulates his decision-making process, then the decision is illegal.

9.The Applicant stated that he would refer to the Supreme Court decision in **Nyampala Safaris Limited and Others vs. Zambia Wildlife Authority and Others[2], (2004) ZR.49** where the Court held that the decision of a public authority

may be quashed for illegality where the authority either acted without or exceeded its jurisdiction.

10.On irrationality, the Applicant stated that in the Wednesbury sense, it is irrational for the **"defunct"** Tribunal to assume that it can make a determination of whether a matter can be heard by them in light of the provisions of Articles 1(2) ,1(5), 128, 143, 144 and 182 (3) of the Constitution.

The Applicant prayed that the continued hearings of the ***"defunct"*** Tribunal be stayed.

Mr. Nchito, SC and Mr. Hamweela, were heard on behalf of the Applicant. Mr. L. Kalaluka, SC, Attorney General and Mr. A. Mwansa, SC, Solicitor General, were heard on behalf of the Respondent.

Mr. Nchito, SC submitted that the Applicant's Advocates filed a Notice of the application for Judicial Review together with an affidavit verifying facts, a Notice to Produce as well as the Ruling of the Tribunal on the issue of its continuing to sit. He submitted that he would rely on all the documents filed for their effect and further submitted that this is a fit and proper case for this court to grant leave because it is illegal for the Tribunal to insist to continue sitting even when they are aware that serious jurisdictional issues have arisen and are pending determination before the Constitutional Court.

Mr. Nchito, SC, submitted that an attempt by the Tribunal, as seen in the Notice to Produce to interpret provisions of the Constitution as amended is an action which is expressly

forbidden by the Constitution as Article 128(1) reserves that power to the Constitutional Court. He submitted that justice demands that this court exercises discretion in favour of the Applicant and grants the Applicant leave as the matter is urgent. He further submitted that the issues raised by the Applicant are very good for investigation at a full hearing for Judicial Review and stated that the Applicant had demonstrated sufficient interest. He prayed that the court grants the order sought.

The Learned Attorney-General, Mr. Kalaluka, SC opposed the application for Judicial Review on the basis of law. Mr. Kalaluka, SC submitted that he would rely on the Supreme Court Judgment in the case of the ***Attorney-General vs. Mutembo Nchito,[3] Selected Judgment Number 1 of 2016.*** He submitted that the Supreme Court's guidance in the afore-mentioned matter was that interlocutory rulings of a Tribunal are not subject to judicial review. The Learned Attorney General quoted from page J30 of the said Judgment where the court stated that –

"in our view, it would not be in the interest of justice to open all interlocutory ruling of the Tribunal to checks for illegality, irrationality and procedural impropriety. Much as Constitutional office holders must be afforded avenues for ensuring that they are treated fairly by investigative tribunals, a balance should be struck to ensure that inquiries by administrative tribunals in the conduct of Constitutional office bearers are not made impossible or unduly fragmented through interlocutory proceedings."

The Learned Attorney-General submitted that at the first sitting of the Tribunal after the said guidance, it made an interlocutory ruling at the instance of the Applicant for which a stay of proceedings is sought.

The Learned Attorney-General submitted that the Court is bound by the decision of the Supreme Court and should give the Tribunal an opportunity to carry out its investigations without undue fragmentation. Mr. Kalaluka, SC submitted that the Applicant's application lacked merit as all the provisions relating to the operationalization of the Constitutional Court are not yet in effect. He submitted that Article 120(3) of the Constitutional talks about the processes and procedures of the Court being prescribed, which entails that the said prescription will come by an Act of Parliament. He further submitted that Section 21 of the Constitution Act guides that Articles relating to the Constitutional Court will come into effect upon the publication of the Act.

The Learned Attorney General referred to Section 16 of the Constitution Act which states –

"unless otherwise provided under the Constitution as amended, proceedings pending before court or tribunal shall continue to be heard by the same court or tribunal or may be transferred to a corresponding court or tribunal established under the Constitution as amended."

The Learned Attorney-General contended that by Section 16, the proceedings pending before the Tribunal shall continue or be

transferred to a corresponding court or Tribunal. He then referred to Section 16(2) which states that-

" unless otherwise provided under the Constitution as amended, a matter or proceeding that, immediately before the effective date is pending before a commission, office or authority shall continue before the same commission, office or authority or corresponding commission, office or authority established under the Constitution as amended."

The Learned Attorney-General submitted that proceedings pending immediately before the effective date shall continue before the same authority even after the enactment of the Constitution. He urged the court to render a ruling which will not create an absurd position.

The Learned Solicitor-General submitted to supplement the Learned Attorney General that Supreme Courts are defined under Article 266 of the Constitution to include the Constitutional Court, the Supreme Court, the Court of Appeal and the High Court. Mr. Mwansa, SC submitted that processes and procedures for the Constitutional Court and the Court of Appeal have yet to be prescribed. The Learned Solicitor General submitted that by commencing proceedings before this court as well as in the Constitutional Court, this amounts to forum shopping. The action in the Constitutional Court will pend until the processes and procedures of the Court are established. He submitted that the relief sought in this court as well as the one sought in the Constitutional Court are the same. Mr. Mwansa stated that the order which the Applicant seeks from this court

should have been sought from the Constitutional Court. He cited the case of **Kelvin Hangandu and Company vs. Webby Mulubisha[4] (2008) Vol 2 ZR 82** where the court stated that –

"Once a matter is before a court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved."

The Learned Solicitor-General submitted that courts disapprove of parties commencing multiple proceedings and actions over the same subject matter. He urged the court not to grant leave to the Applicant to commence judicial review proceedings. He further submitted that the Applicant referred to the Tribunal set up to inquire into allegations levelled against him as being defunct on account of the coming into effect of the Constitutional Amendment Act Number 2 of 2016. Mr. Mwansa, SC submitted that the Tribunal was established pursuant to Article 58 of the repealed Constitution. The Learned Solicitor-General submitted that the repeal of the Constitution does not affect the existence and jurisdiction of the Tribunal, neither does it affect the investigations as they survive the repeal of the Constitution. Mr. Mwansa, SC referred to the provisions of the Interpretation and *General Provisions Act Chapter 2 of the Laws of Zambia, particularly Section 14(1), 14(2) and 14(3)* which provisions refer to the amendment of written law and the effect of repealing written law.

The Learned Solicitor-General submitted that the law is very clear and that the Tribunal survives the repeal of the Constitution. He prayed that the Court declines to grant the

Applicant the relief sought. He further submitted that this is a proper case for the court to order the Applicant and his Advocates to pay costs. Mr. Mwansa cited the case of ***Muyawa Liuwa vs. Judicial Complaints Authority and the Attorney-General***[5], ***selected Judgment Number 6 of 2011*** where the Supreme Court stated that –

"The appellant has abused the court process relentlessly yet knowing that his case has already been adjudicated upon. We cannot encourage such conduct. We order that the Appellant bears the costs of the Appeal."

The Learned Solicitor - General referred the court to previous proceedings by the Applicant which ended up in the Supreme Court. He cited the case of **Mukumbuta Mukumbuta and others vs. Nkwilimba Chobana Lubunda and others**[6], **Selected Judgment Number 8 of 2003** where the Supreme Court held that in view of the fact that the Advocate deliberately and consciously went forum shopping, the Advocates for the Respondents needed to be punished and condemned in costs.

Mr. Mwansa , SC submitted that it was a deliberate move for the Applicant to commence this action when another is pending, awaiting the enactment of the Constitutional Court. The Learned Solicitor-General urged the Court to dismiss the application with costs.

In reply, Mr. Nchito, SC submitted that the Supreme Court in the case of **The Attorney – General vs. Mutembo Nchito** posed the question whether judicial review can lie to challenge an interlocutory ruling of a Tribunal. Mr. Nchito, SC, submitted that

the Supreme Court stated that interlocutory decisions of administrative tribunals can only be subjected to judicial review when it is clear that the Applicant will suffer fundamental failure of justice.

Mr. Nchito, SC submitted that although the Supreme Court stated that Judicial Review could not apply in the case of ***Attorney-General vs. Mutembo Nchito*** , it was not a universal prohibition. He submitted that the threshold for the grant of leave to commence judicial review proceedings had been reached and that this makes the question more final than interlocutory. The question is whether the Tribunal can continue sitting when it is not provided for in the Constitution. He submitted that the Applicant has petitioned in accordance with the provisions of the Constitution. There is therefore no need for further prescription.

Regarding *Section 16(1) of the Constitution of Zambia Act Number 1 of 2016,* Mr. Nchito, SC submitted that Article 58 of the Constitution has been repealed and that the provisions of the repealed Constitution cannot continue to have effect. Mr. Nchito, SC submitted that the Tribunal has no power to sit under the Constitution as amended. On the issue of procedure, Mr. Nchito submitted that *Article 128 of the Constitution provides for the jurisdiction of the Constitutional Court.* The question of procedure does not apply. On the issue of forum shopping, Mr, Nchito submitted that judicial review is still the preserve of the High Court and that the Constitutional Court has power and jurisdiction to interpret the Constitution.

This Court is being invited to accord the Applicant his procedural rights. The question of one court resolving all issues does not apply when the jurisdiction of the courts is different.

Mr. Nchito referred to the case of ***Mbazima and others Joint Liquidators of Zimco Limited vs. Reuben Verra Supreme Court[7] Judgment Number 6 of 2001*** and stated that the Tribunal is defunct because *Article 58 under which it was established no longer exists.* He submitted that the Constitution is the Supreme law of the land and a repealed Constitution cannot be applied. He further submitted that determining whether or not a law applies to you is interpretation of the law. Mr. Nchito submitted that the Applicant has raised serious questions of the law relating to his rights which this court has an obligation to determine. He urged the court to exercise its discretion and grant leave to commence judicial review proceedings, which leave should operate as a stay until the court has occasion to investigate.

Mr. Hamweela, on behalf of the Applicant urged the court to investigate further to ensure that the Applicant is accorded his right to procedural justice. He submitted that a question arose relating to the interpretation of the Constitution and that the Tribunal resolved to exercise jurisdiction which it did not have. Mr. Hamweela submitted that the question that this court must ascertain at this stage is whether there is a case fit for further investigation at a full inter parties hearing of a substantive application for Judicial Review. He urged the court to grant the applicant's application as prayed.

I have considered the Applicant's application with supporting affidavits, exhibits, submissions by Counsel and all the authorities cited. I have also considered the Learned Attorney-General and the Learned Solicitor-General's submissions and on whether this Court should grant the Applicant leave to commence judicial review proceedings. Access to judicial review is not a matter of right, it is subject to the discretion of the court. judicial review serves a two fold purpose, namely -

(1)To eliminate frivolous vexatious or hopeless applications for Judicial Review without the need for a substantive inter-partes judicial review hearing.

(2)To ensure that an applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter-partes hearing. The case in point is that of ***R vs. Secretary of State for the Home Department ex-parte Rukshanda Begum[8] (1990) COD 107.***

In the case before me, the application for leave arises out of the Applicant's contention that the Constitution *of Zambia (Amendment Act) Number 2 of 2016 repealed* among other things, Part 4 of the Constitution which contained Article 58 under which the Tribunal in issue was created.

The Applicant contends that the proceedings instituted by the President for the removal of the Applicant under the repealed provisions of the Constitution cannot continue under the current Constitution.

Particularly, the Applicant seeks to challenge the decision by the Tribunal to continue sitting and states that by doing so, the Tribunal has attempted to interpret the Constitution. In the case of ***City of Toronto vs. The Dream Team, 2012 ONSC 3904 (CANLII II)***[11], the Ontario Supreme Court had occasion to decide on principles regarding judicial review of interlocutory decisions of administrative tribunals. Swinton J, dismissed the application for judicial review on the basis that the decisions by the tribunal were reasonable and that the application for judicial review was premature. The Court stated that judicial review of interim decisions of administrative tribunals should only occur in exceptional circumstances.

The Learned Counsel for the Applicant, Mr. Nchito, SC submitted that the Constitutional Court is the only Court which has power to hear and determine issues that relate to the Constitution and that the Court has original and final jurisdiction to hear and determine matters relating to the interpretation of the Constitution.

However, Mr. Nchito SC went on to ask this court to grant the Applicant leave to commence judicial review proceedings as he stated that the Tribunal had insisted on continuing to sit when jurisdictional issues have arisen which relate to the amendment of the Constitution. I have difficulties in appreciating why the Applicant sought judicial review from this court on a matter which he clearly contends must determined by the Constitutional Court. I find that this indeed an act of forum shopping by the Applicant which courts frown upon as was held by the Supreme

Court in the case of ***Kelvin Hangandu and Company vs. Webby Mulubisha[4].*** In the case of ***Attorney-General vs. Mutembo Nchito[3],*** the Supreme Court stated that –

"courts should only intervene in judicial review of interlocutory decisions of tribunals when it is absolutely clear that the Applicant will suffer fundamental failure of justice."

The court went on to state that allowing judicial review of interlocutory decisions of administrative tribunals would hinder them from efficiently conducting their administrative inquiries. As was stated by the Supreme Court of Canada in the case of ***Halifax Regional Municipality, a body corporate duly incorporated pursuant to the laws of Nova Scotia (Appellant) and Canadian Human Rights Commission and others.[12]*** the Supreme Court of Canada stated that -

"early judicial intervention risks depriving the review court of a full record bearing on the issue and allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal might be entitled to deference and encourages an inefficient multiplicity of proceedings in tribunals and courts."

In the present case, the this court can only allow a challenge of the Tribunal's interlocutory Ruling where the said application is so exceptional that the Applicant will suffer a fundamental failure of justice.

On the issue of whether the Tribunal is defunct or not, without delving into the merits of the case, Section 16 of the Constitution of Zambia Act, Number 1 of 2016 provides that proceedings pending before a court or tribunal shall continue to be heard and determined by the same court or tribunal or may be transferred to a corresponding court or tribunal established under the Constitution as amended. By virtue of the provisions of Section 16, the Tribunal still has the mandate and power to continue sitting and determine issues before it. As such, it is erroneous and misconceived for the Applicant to refer to it as a **"defunct"** Tribunal.

I therefore find no merit in the Applicant's challenge of the Tribunal's interlocutory Ruling in this matter. I further find no exceptional circumstances to warrant the exercise of my discretion to grant the Applicant leave to commence judicial review proceedings. Without going into the merits of the matter, I do not find any case fit for further investigation.

This application fails for lack of merit and I accordingly dismiss it. I award costs to the Respondents which shall be taxed in default of agreement.

Leave to appeal is granted.

Delivered this 3rd day of March, 2016.

P.C.M. NGULUBE
HIGH COURT JUDGE