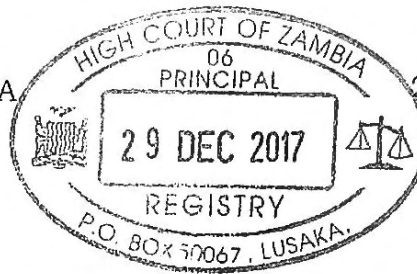


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA



2016/HP/0424

(Civil Jurisdiction)

IN THE MATTER OF: The Constitution of Zambia, The Constitutional Act, Chapter 1 of the Laws of Zambia

AND IN THE MATTER OF: Order 53 of the Rules of the Supreme Court (White Book), 1999 Edition, Volume 1 and 2

AND IN THE MATTER OF: Articles 11(a) and (d), 15, 17 and 18 of the Constitution of Zambia, The Constitution of Zambia Act, Chapter 1 of the Laws of Zambia

AND IN THE MATTER OF: Section 12 of the State Proceedings Act, Chapter 71, Volume 6 of the Laws of Zambia

AND IN THE MATTER OF: An Application for Judicial Review

AND IN THE MATTER OF: A purported decision of the Respondent via the Zambia Police Service and the Drug Enforcement Commission to possess and occupy the Applicants property, being Plot No. 186 Luanshya Road, Villa Elizabetha, Lusaka from 27th February 2016 to date and to further issue a search warrant dated 1st March 2016 to search for offensive weapons and suspected drugs against the Applicants' property which has been under the Respondent's custody, control, care, possession, watch and guard since Saturday, 27th February 2016 to date

BETWEEN:

GEOFFREY BWALYA MWAMBA

1st Applicant

GBM TRUCKING LIMITED

2nd Applicant

AND

THE ATTORNEY GENERAL

Respondent

Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on 29th December 2017

For the 1st and 2nd Applicants: Ms. M. Mushipe of Messrs Mushipe & Associates & Mr. L. M. Chikuta of Messrs Mumba Malila & Partners

For the Respondent: Mr. F. Imasiku, Principal State Advocate

JUDGMENT

Authorities referred to:

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *The Zambia Police Act, Chapter 107 of the Laws of Zambia*
3. *Penal Code, Chapter 87 of the laws of Zambia*
4. *Supreme Court Practice (White Book), 1999 Edition*

Cases Cited

5. *North-Western Energy Co Ltd Vs Energy Regulation Board (2011) ZR 513*
6. *House of Joy Church International & Ministries Registered Trustees Vs the Chief Registrar of Societies and the Attorney General 2012/HP/1465*
7. *Council of Civil Service Unions v Minister of State for Civil Service [1981] A.C. 363*

This is an application for Judicial Review made by ex-parte summons on the 3rd March 2016. Leave to apply for Judicial Review was only granted on the 17th August 2017. The Originating Notice of Motion was subsequently filed on 13th September, 2017. The reasons for the rather unusual delay in disposing of these proceedings will become apparent in the account of events given hereunder.

By this application, the Applicants seek the Court's review of the decision of the Respondent's agents to search the 2nd Applicant's property on the 27th February 2016 without a search warrant; to take possession, custody and guard of the Applicant's premises without a duly issued Court Order and to attempt a second search of the Applicants premises for offensive weapons and suspected drugs under a search warrant dated 1st March 2016 when the Respondent's agents had already searched the premises.

The Applicants seek the following reliefs:

- a) An Order of Certiorari to move into the High Court for purposes of quashing the decision by the Respondent acting through its agents the Zambia Police Service and the Drug Enforcement Commission (DEC) to search the 2nd Applicant's premises situated Plot No. 186 Luanshya Road, Villa Elizabetha without a duly issued Court Order and to quash the same decision.
- b) An Order and Declaration that the decision to conduct a subsequent search of the 2nd Applicants premises situated at plot No 186 Luanshya Road, Villa Elizabetha by the Respondent's agents under a search warrant dated 1st March 2016 for offensive weapons and suspected drugs when the said premises were already in the possession and custody of the Respondent's agents and a prior search already conducted without a duly issued search warrant is illegal and unconstitutional as it contravenes the provisions of the Constitution of Zambia and to that effect wholly null and void.
- c) An Order of Mandamus compelling the Respondent's agents to vacate and leave the Applicant's aforesaid premises.
- d) An Order of Prohibition proscribing the Respondent and his agents from continuing to unlawfully besiege, possess, guard, the Applicants property for offensive weapons and suspected drugs.
- e) The Applicant hereby requests the hearing of this application before the Judge of the High Court pursuant to Rule 3(3) of Order 53 of the Rules of the Supreme Court.
- f) If leave to apply is granted, a direction that such grant should operate as a Stay of the said decision and further proceedings on the same pursuant to Rule 3(10)(a) of Order 53 of the Rules of the Supreme Court.
- g) If leave to apply is granted, a direction that the hearing of the application for judicial review be expedited.
- h) An Order for Costs.
- i) And that all necessary and consequential directions be given.

The Applicants advanced four grounds in support of the application namely that the decision of the Respondent's agents to search their premises was illegal, in excess of their jurisdiction, irrational, procedurally improper and in breach of legitimate expectation. The detailed particulars of these grounds as advanced by the Applicants will be highlighted in the course of the judgment.

The background to the hearing of this matter is long but necessary to place on record to account for the extraordinary length of time it has taken to dispose of this application for judicial review.

The application was brought by way of *ex-parte* summons on 3rd March 2016. The Court directed that the matter be heard *inter-parte* on the 4th March 2016. At the inter-parte hearing, the Respondent's Advocates requested an adjournment to obtain their client's instructions. The matter was adjourned to the 11th March 2016.

While the matter stood adjourned for hearing, the Applicant filed an amended Notice containing statement and an affidavit in support of the application for leave to apply for Judicial Review on the said 4th March 2016.

The Respondent filed an application to strike off the amended Notice and the amended affidavit on 7th March 2016. The application to strike out came up for hearing on 15th March 2016. Counsel for the Applicants, Mr. Chikuta sought an adjournment to enable the Applicants file a further affidavit and supplementary arguments. The matter was rescheduled to the 12th May 2016. On that date, Counsel for the Respondent, Mr. Hamanyati was present but the Applicants were absent.

No explanation was given for the absence of the Applicants, the Court struck out the action with liberty to apply to restore within 21 days failing which the action would stand dismissed. There having been no application to restore within the stipulated time frame, the matter was dismissed on the 3rd June 2016.

An ex-parte summons for review of the order dismissing the matter was brought on the 9th June 2016. It was supported by affidavit. Having heard the application, the Court reviewed its earlier order and set aside the said Order dismissing the action. It further directed that the application to restore matter to active cause list be heard on the 31st August 2016. On that day, Counsel for the Applicant was not present, but requested for an adjournment through Mr. Phiri of Messrs Mushipe and Associates. The matter was initially scheduled for hearing on 4th October 2016 but was rescheduled to the 30th November 2016 on account of election petitions. On the said date, Counsel for the Applicant, Ms. Mushipe was present and the application to restore was heard and matter restored to the active cause list. The case was rescheduled for hearing on 7th December 2016. On the said date, the Respondent's application to strike out was adjourned at the instance of Counsel for the Applicant, Ms. Mushipe who had not had an opportunity to review the application. The matter was adjourned to 30th January 2017. On that date, the parties notified the Court that they were exploring ex-curia settlement. The Court matter was adjourned to the 20th March 2017.

The parties filed a Consent Order on the 1st February 2017. By that Consent Order, the parties agreed that the Respondent's application to strike out the Notice be withdrawn and the amended notice containing the statement and affidavit in support of 4th March 2016 be allowed.

Following the said Consent Order, the Applicants filed an affidavit in reply to the Respondent's affidavit in opposition to Originating Notice of Motion for Judicial Review and the matter was then scheduled for hearing of the application for leave for Judicial Review on 20th March 2017. On the said date, Counsel for the Respondents was absent. The Applicant sought an adjournment to enable the parties file submissions. The Court allowed the application and directed the parties to file their submissions within 14 days from the date thereof the application. The Court also lamented about the numerous adjournments sought by the parties. The matter was scheduled for hearing on the 22nd May 2017. On the said date, Counsel for the Applicants pointed out that they had not complied with the earlier order of Court and requested for more time to file submissions. The matter was accordingly adjourned.

Thereafter, on the 26th May 2017, the Applicants filed an application to amend their statement in support of the application for leave to apply for Judicial Review. The application was scheduled to be heard on the 15th August 2017. The Respondents sought another adjournment to review the application and explore an ex-curia settlement of the matter. The case was adjourned to the 17th August 2017. The Applicants filed skeleton arguments in support of notice of intention for leave to amend statement in support of application for leave for Judicial Review.

The matter was heard on the 17th August 2017, the Court proceeded to hear both applications for leave to amend and for Judicial Review. The Respondent did not object to the applications. Being satisfied that the Applicants had made out an arguable case fit for further determination at a full hearing, the Court granted the applications sought by the Applicants.

The Applicants filed an amended notice containing statement in support of the application for leave to apply for Judicial Review and a further affidavit. The Court further directed that the matter be heard on the 11th September 2017 upon filing of all necessary documents by the parties.

On the said date, the matter could not be heard as the Applicants had not filed the Notice of Motion. The Applicants were directed to comply with the Court Order. Following this direction, the Applicants filed the Originating Notice of Motion for Judicial review on 13th September 2017.

The matter was heard on the 6th October 2017. In support of their case, both parties relied on the affidavit evidence on record and the skeleton arguments and submission filed by the respective counsel. I am indebted to counsel for their submissions. They have all been given due consideration in arriving at this judgment.

I have carefully reviewed the affidavit, evidence and the arguments of the respective parties. The Applicants have advanced four grounds on which they seek Judicial Review, namely illegality, excess of jurisdiction, irrationality, procedural impropriety and breach of legitimate expectation. All the grounds advanced by the Applicants were opposed by the Respondent.

In support of the claim, the Applicants filed an affidavit in support of the summons for leave for Judicial Review on the 3rd March 2016. This affidavit was later amended through an affidavit filed on 4th March 2016. They also filed a further affidavit on 17th August 2017.

All the Affidavits were sworn by Geoffrey Bwalya Mwamba, the 1st Applicant herein. The gist of his evidence as contained in the said affidavits was that he was the 1st Applicant, Director and shareholder in the 2nd Applicant company and that between 07:00 and 08:00 hours on Saturday 27th February 2016, a combined team of officers from the Zambia Police Service and the Drug Enforcement Commission (DEC) took occupancy and possession of the 2nd Applicant's property known as Plot 186 Luanshya Road Villa Elizabetha Lusaka without a Court Order and proceeded to search the said premises, without a search warrant and in the absence of the Applicants. That the Zambia Police Service and DEC officers then apprehended and arrested 21 employees of the 2nd Applicant who were on the said property and charged them with Unlawful Drilling and being in possession of suspected drugs. He contended that the employees were not conducting any illegal activities on the said premises and that when the search was taking place he was away on the Copperbelt on political campaigns.

He stated further that he was requested to report to Woodlands Police Station for questioning and that he attended on the 2nd March 2016, whereupon he was charged and arrested for the offence of Unlawful Drilling contrary to **Section 66(1)(a)** as read with **Sections 21(c) and (d) and 22 of the Penal Code, Chapter 87 of the Laws of Zambia**. Following his arrest, he said he was detained in custody and subsequently issued with a search warrant to search Plot number 186 Luanshya Road Villa Elizabetha Lusaka for offensive weapons and suspected drugs. The search was to be carried out on the 3rd March 2016 at 14:30 hours but has not been effected. He stated further however, that the Respondent's agents and servants have continued to keep guard, custody and possession of the Respondent's premises from 27th March 2016 to date.

He also recounted that he tried but in vain to reason with the Respondents agents or servants of the Zambia Police Service and DEC that the search warrant dated 1st March 2016 authorising them to search the property and its premises aforesaid was illegal, unreasonable and procedurally improper as the Police Service and the DEC had already searched and taken possession, custody and control of the said property.

He was also apprehensive and suspicious that the Respondent's servants or agents aforesaid might have tampered with the said property by planting the said offensive weapons and/or suspected drugs in order to incriminate and incarcerate him. He contended further that there were constitutional illegalities, irregularities, abuse, excess of jurisdiction and unreasonableness in the conduct of the Respondent's security agents as the 2nd Applicant's premises were in possession and custody of the Respondent's agents. He therefore sought Judicial Review to determine the legality of the actions and conduct of the Respondent's agents.

The Respondents filed an affidavit in opposition to the summons for leave for Judicial Review on the 20th January 2017. The affidavit was sworn by Mubita Moya Detective Chief Inspector of the Zambia Police Service. His evidence was that on 23rd February 2016, the flying squad received information that the 1st Applicant had persons on his premises said to have concealed offensive weapons and drugs. That acting on this information, they proceeded to conduct a search at the premises to prevent an armed insurrection tending to cause disruption and public disorder.

The Respondent's deponent stated further that search warrants were prepared and on Saturday 27th February 2016 a team of officers was constituted and detailed to conduct a search on that date. He further stated that Detective Inspector Mwiya Mutakala executed the search warrants on the aforesaid premises which were received by a Mr Jacob Mtonga who introduced himself as District vice Youth Chairman in charge of politics for the UPND.

His further evidence was that during the said operation by the Respondent's agents, 21 persons who were found on the premises were charged with the offense of Unlawful Drilling contrary to **Section 66 of the Penal Code Chapter 87 of the Laws of Zambia**. He also stated that the said Mr. Jacob Mtonga was handed over to DEC by the police after the vehicle he was being driven in was found to have suspected cannabis. He was subsequently charged for trafficking in psychotropic substances. He stated that other items said to have been found during the said search were machetes, 8 rounds of ammunition and other offensive weapons. He stated further that the 1st Applicant was also subsequently arrested for aiding and abetting persons suspected to be training in the use of arms or practice of military exercise involvements or evolutions contrary to **Section 66(1) of the Penal Code as read with Section 21(1)(c) of the Penal Code** and that the 1st Applicant and the other persons arrested on the 27th February 2016 appeared before the Magistrates Court on 1st March 2016.

In concluding, he contended that contrary to the Applicants assertion that the search was illegal and improper the Police had acted within their powers based on reasonable suspicion. He also stated that with regard to the second search the same did not materialize and that the Applicant's property was never searched on 3rd March 2016.

I have carefully considered the affidavit evidence of the parties. I have also considered submissions made by Counsel for the Applicants and for the Respondent.

The undisputed facts leading up to this application are that on the 27th February 2016, the Respondent's agents entered the Applicants property and carried out a search and took occupation and possession of the said property known as Plot 186, Luanshya Road, Villa Elizabetha, Lusaka and continued to do so to date. This prompted the Applicants to bring this application for Judicial Review.

In seeking Judicial Review and the reliefs hereunder, the Applicants have argued that the decision and conduct of the Respondent's agents or servants was illegal and in excess of jurisdiction, irrational, procedurally improper and amount to a breach of the Applicants legitimate expectation.

The underlying objective of the remedy of Judicial Review is the power of the Courts to ensure that the exercise of administrative authority by public officers is done within the confines of the law.

It is important to understand the scope of Judicial Review. **Order 53/14/19 of the Supreme Court Practice, 1999 edition**, sub-heading entitled **nature and scope of judicial review** at page 902 provides 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. It is important to remember in every case that the

purpose of [the remedy 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 individual judges for that of the authority constituted by law to decide the matters in question.' (Chief Constable of North Wales Police -v- Evans [1982] 1 W.L.R. 1155 at 1160; [1982] 3 ALL E.R. 141 at 143, per Lord Hailsham L.C.). Thus, a decision of an inferior court or a public authority may be quashed (by an order of certiorari made on an application for judicial review) where that court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury sense (see para. 53/14/27). The court will not, however, on a 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 Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty itself of usurping power (Chief Constable of North Wales Police -v- Evans [1982] 1 W.L.R. 1155 at 1173; [1982] 3 ALL E.R. 141 at 154, per Lord Brightman).'

The Applicants have canvassed four grounds under which they seek the reliefs sought against the Respondents. Being fully alive to the extent of responsibility of this Court in Judicial Review applications as guided above, I will address the evidence, submissions and the law regarding the said grounds here below beginning with the second ground of procedurally impropriety.

1. PROCEDURAL IMPROPRIETY

The Applicants have advanced two arguments under this head of procedural impropriety.

These are that:

- i. The decision by the Respondents agents the Zambia Police Service and the Drug Enforcement Commission (DEC) to take possession, occupation, guard and custody of the premises of the 2nd Applicant from 27th February 2016 to date without a duly issued Court Order is procedurally improper in that it violates the procedural requirements of the law; and
- ii. That the decision by the Respondents agents the Zambia Police Service and the Drug Enforcement Commission (DEC) to issue a search warrant to search the 2nd Applicants property and premises despite being in occupation of the same and having already conducted a search of the premises without a search warrant is procedurally improper in that it violates the standard notions of fair procedure and the said decision has caused injustice.

In responding to the Applicant's contention that it has acted procedurally improper, the Respondents argue that the said search of the 2nd Applicant's premises was conducted in conformity to the provisions of **Section 15 of the Zambia Police Act** and that a reading of **Subsections (1) and (5) of Section 15** empowers the Police to conduct a search without undue delay.

They contend further that the said section obliges an investigating officer who conducts such search to record his reason for the search and its findings and present them before the nearest Magistrate. Such a record is available on application, to such party who is owner of the property so searched. The Respondent concludes by contending that its agents or servants did not breach procedure when conducting the search on the 2nd Applicant's premises on 27th February 2016.

The Applicants argued that the law places a mandatory obligation upon the agents of the Respondent to ensure that search warrants are properly issued. They contend that the provisions of **Section 15 of the Police Act** prescribe procedures to be followed prior to conducting a search.

When considering what constitutes procedural impropriety, the words of **Lord Diplock** in the leading case of **Council of Civil Service Unions** are that:

'I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an

administrative tribunal to observe procedural rules that are expressly laid down in the legislative instruments by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.'

In addressing this issue, I am also guided by the words of Lord Hailsham, L.C. in the case of Chief Constable of North Wales Police v Evans, where he stated that:

'It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no 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.'

The foregoing authorities expound that procedural impropriety refers to the failure by a public authority to observe procedural rules that are expressly laid down in the legislative instruments by which its jurisdiction is conferred.

Therefore, the question before me is whether, in exercising their powers, the agents of the Respondent observed the expressly laid down procedures prior to and following the search being conducted on the Applicants premises.

The Respondent has contended that it invoked its authority under **Section 15 of the Zambia Police Act.**

For the sake of clarity, the said **Section 15 of the Act** is reproduced here below:

'15.(1) Whenever a police officer, of or above the rank of Inspector, has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, that police officer may, after recording in writing the grounds of his belief and specifying therein so far as possible, the thing for which search is to be made, search or cause search to be made for such thing in any place within the limits of such station.

(2) A police officer proceeding under subsection (1) shall, if practicable, conduct the search in person.

(3) If a police officer proceeding under subsection (1) is unable to conduct the search in person and there is no other person competent to make the search present at that time, he may, after recording in writing his reasons for so doing, require any police officer subordinate to him to make the search, and he shall deliver to that police officer an order in writing specifying the place to be searched and so far as possible the thing for which search is to be made, and that police officer may thereupon search for the thing in the place so specified in the order.

(4) The provisions of the Criminal Procedure Code relating to search warrants shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under subsection (1) or (3) shall forthwith be sent to the nearest magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the magistrate.

(6) The occupant of the place or some other person on his behalf shall in every instance be permitted to attend during the search.

(7) Any police officer conducting a search of any private premises under the provisions of this section shall produce his police identity card to any person in or about the premises who may wish to confirm the authority of the police officer, and any officer required to make a search of private premises under the provisions of subsection (3) shall in addition carry with him upon such search the order in writing mentioned in the said subsection.

Subsection (1), (2) and (5) of Section 15 of the said Act requires that for a search to be conducted without undue delay, a police officer must prior to conducting such search, record in writing the thing for which the search is to be made and the grounds of his belief that the thing to be searched may be obtained in a place within the limits of the police station of which he is in charge or attached and that it cannot otherwise be obtained without undue delay. The Police Officer may conduct the

search in person after proceeding as above. Further, a copy of any record made under subsection (1) or (3) shall be sent to the nearest Magistrate.

In the present case, although the Respondent's evidence in the affidavit in opposition of 20th January 2017 clearly states that they obtained a search warrant before conducting a search on 27th February 2016, the warrant was not produced before this Court and Counsel for the Respondent argued to the contrary that it was empowered to conduct a search under the above section without delay.

A further review of the Respondent's affidavit in opposition does not reveal that the agents of the Respondent's carried out any of the procedures prescribe in the provisions of **Section 15 of the Police Act**. There is no evidence of any report or record having been compiled by the investigating officer who conducted a search on the 2nd Applicant's premises on 27th February 2016, neither have they testified that such a report was prepared and filed before a Magistrate. Furthermore, it is clear that the Respondent's evidence on record contradicts the arguments advanced by Counsel representing the Respondent. I find that this argument of the Counsel appears to be an afterthought intended to cure the impropriety on the part of its agents or servants. For the foregoing reasons, I therefore find that the Respondent's agents breached laid down procedure. This ground of procedural impropriety therefore succeeds. In any event, **Subsection 4 of the said Section 15 of the said Act** also provides that the provisions of the Criminal Procedure Code relating to search warrants shall apply to a search made under this section. The provisions of the Criminal Procedure Code relating to search warrants shall be addressed under the next ground of illegality.

2. ILLEGALITY AND EXCESS OF JURISDICTION

The Applicants contention in the amended Notice of 17th August 2017 under this ground of illegality is based on the following two allegations against the Respondents that:

- i) The decision to conduct a search on the 27th February 2016 without a duly issued Court Order by the Respondent's agents the Police Service and the Drug Enforcement Commission (DEC) is an abuse of their discretion to exercise their power in that the same was used unlawfully hence illegal; and
- ii) The decision to take possession, occupation, guard and custody of the Applicant's property from the 27th February 2016 to date without a duly issued Court Order to that effect contravenes the Applicants inviolable right to private property without reasonable justification. The actions of the Respondent's agents are illegal, in bad faith and in violation of its constitutional rights.

For purposes of context, the law pertaining to the ground of illegality was ably canvassed by my learned brother Matibini, J as he then was in the case of **North-Western Energy Company Limited Vs Energy Regulation Board**. He stated that:

'Under the ground of "illegality" the Court seeks to establish whether a decision-maker has acted within the purview of the law that regulates his decision-making power and has consequently given proper effect to it. Thus an administrative decision or action is flawed and illegal, if it falls outside the parameters of the law that regulates the exercise of the

power. According to Harry Woolf, Jeffrey Jowell and Andrew Le Seur, De Smith's Judicial Review, sixth edition, (London, Sweet and Maxwell, 2007), in paragraph 5-002, at page 225, a decision is illegal if it:

- a) contravenes, or exceeds the terms of the power which authorises the making of the decision;*
- b) pursues an objective other than for which the power to make the decision was conferred;*
- c) is not authorised by any power; and*
- d) contravenes or fails to implement a public duty.*

The learned authors of *De Smith's Judicial Review, (supra)* further state in paragraph 5-003, at page 226, as follows: *that the task of the Court in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute, or statutory instrument. The Courts when exercising this power of construction enforce the rule of law by requiring administrative bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of parliament's enactments. The learned authors of De Smith's Judicial Review, (supra) go on to state in paragraph 5-004, at page 226, that: this task is made easier where the purpose is clearly defined, or where the considerations which the body must take into account in arriving at its decision are clearly spelled out. In such cases, the Courts require the decision-maker to take into account the specified considerations, and ignore the irrelevant...'*

The foregoing authority refers to illegality where a decision or act by a public authority falls outside the law that regulates the exercise of that power. It also refers to a decision of a public authority which contravenes or exceeds its jurisdiction.

The Applicants contend that the purported decision by the Respondent's agents to search the 2nd Applicant's property on the 27th February 2016 without a search warrant, to take possession, custody and guard thereafter without a duly issued Court Order and to issue a search warrant on 1st March 2016 to search for offensive weapons and suspected drugs when the Respondent's agents had already searched the said premises was illegal.

The question that arises is whether the Police or Drug Enforcement Officers are empowered to search premises without a search warrant and to take possession or control of such premises thereof without order of the Court.

The Respondents contend in their affidavit in opposition filed into Court on the 20th January 2017 that prior to conducting the search, search warrants were prepared on 27th February 2016 and a team of officers were constituted and detailed to conduct a search on that date. The Respondent's agents further contend that Detective Inspector Mwiya Mutakala proceeded to execute the search warrants on the Applicants premises.

It is not in contention that the Respondent's acting through their agents, did carry out a search on the 2nd Applicant's premises on the 27th February 2016 and that from that date, the Respondent's agents have continued in possession and occupation of the said premises.

Although the evidence of the Respondent indicates that a warrant was prepared, the Respondent has not exhibited a copy of the said search warrant that was purportedly executed upon the Applicants premises. They have also not produced any subsequent report of the said officer to prove this. Further, Counsel for the Respondent has contended to the contrary in his submissions that the search was carried out without undue delay pursuant to the provisions of **Section 15 of the Police Act**.

It is therefore apparent that this search was carried out by the Respondent's agents on the 2nd Applicants property without a search warrant. The Applicants contend further that after the search was carried out, the Respondent's agents retained possession, control and guard of their premises from 27th February 2016 to date. The Respondent did not deny this allegation that it has retained control and possession of the 2nd Applicant's property known as Plot 186, Luanshya Road, Villa Elizabetha, Lusaka.

The Respondent contends in their arguments of 21st September 2017, that they are empowered by **subsection (1) of Section 15 of the Zambia Police Act** to conduct a search without undue delay. The question that arises under the ground of illegality is whether the Respondent's agents that is, the Police or Drug Enforcement Officers are empowered by that provision or any other to conduct a search of a property without a search warrant and to retain possession or control of such property without order of Court.

Article 17 (1) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia provides as follows:

'Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises....'

It is trite law that an exception to this constitutional rule is where a search warrant has been properly issued. On the power to issue search warrants, **Section 118 of the Criminal Procedure Code, Chapter 87 of the Laws of Zambia** provides as follows:

'Where it is proved on oath to a magistrate that, in fact or according to reasonable suspicion, anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, vessel, carriage, box, receptacle or place, the magistrate may, by warrant (called a search warrant), authorise a police officer or other person therein named to search the building, vessel, carriage, box, receptacle or place (which shall be named or described in the warrant) for any such thing, and, if anything searched for be found, to seize it and carry it before the court of the magistrate issuing the warrant or some other court, to be dealt with according to law.'

The above authorities make it mandatory before any entry, search and seizure is effected, a police officer must first obtain a search warrant as stipulated by **Section 118 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia**.

As aforementioned, there is no evidence of a search warrant having been obtained by the Police Officers enabling and empowering them to conduct a search the 2nd Applicants premises on the 27th February 2016. Further, there is no court order or notice authorizing the seizure, possession and/or control of the Applicants property know as Plot 186, Luanshya Road, Villa Elizabeth, Lusaka from 27th February 2016 to date.

Article 16 of the Constitution of Zambia provides protection from deprivation of property. It states thus:

'Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.'

Under the above provision, property cannot be acquired or taken possession of, unless under some authority of an Act of Parliament which provides for such. Counsel for the Respondent has suggested that the property has been seized as it forms part of the evidence in criminal proceedings in the lower court. However, this was not the evidence of the Respondent and a notice of seizure was not produced before the Court.

The Respondent has not demonstrated that they are lawfully entitled to retain possession and/or control of the 2nd Applicants property known as Plot 186, Luanshya Road, Villa Elizabetha, Lusaka.

In conclusion, I am of the considered view that the decision to conduct a search on the 2nd Applicants property on the 27th February 2016 without a search warrant and the continued possession and control of the 2nd Applicant's property is illegal.

3. IRRATIONALITY

The Applicants have canvassed two main arguments under the ground of irrationality namely that:

- i) The decision by the Respondent's agents the Zambia Police Service and the Drug Enforcement Commission to have issued a search warrant on the 1st March, 2016 to search the 2nd Applicants property and premises for offensive weapons and suspected drugs on the 3rd March 2016 when they had already taken possession, occupation, guard and custody of the same property without a Court Order from 27th of February 2016 and already conducted a search without a Court issued search warrant is irrational and the perversity of the decision is extreme in that no reasonable body would have made such a decision; and
- ii) The decision by the Respondent's agents the Zambia Police Service and the Drug Enforcement Commission (DEC) is irrational in that it violates the basic judicial values in that the Respondent's agents are using administrative powers for purposes of punishment.

The Court takes judicial notice of its previous decision in the case of the **House of Joy Church International & Ministries Registered Trustees Vs the Chief Registrar of Societies and the Attorney General** in which it quoted from **Lord Diplock** in the leading case of

Council of Civil Service Unions who summarized the basis for Judicial review pertaining to the ground of irrationality in the following words:

'By 'Irrationality' I mean what can by now be succinctly referred to as 'Wednsedbury unreasonableness' (see Associated Provincial Picture Houses Limited Vs Wednesbury Corp (1947) 2 All ER 680). It applies to a decision, which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within the category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.'

Under this ground, I wish to repeat that I have already found that the actions of the Respondent's agents of searching the 2nd Applicant's premises without a search warrant and taking possession, custody and guard thereof after conducting the search was illegal.

The Applicants argue under this head that the Respondent's decision to issue a search warrant on 1st March 2016 for the purpose of conducting a second search of the 2nd Applicant's premises when they had already searched the Applicant's premises and retained custody, possession and occupation thereof is irrational. They also argue that this decision violates basic judicial values.

The evidence of the Applicants shows that a search warrant was indeed issued by a Magistrate of the 1st class of the Subordinate Court on the 1st March 2016, based on information made on oath by one Detective Chief Inspector Moya to the effect that, offensive weapons and

suspected drugs are concealed in the premises of the 1st Applicant. This warrant was issued after the Respondent's agents had already conducted a search of the premises on the 27th February 2016.

The question for my consideration is whether the decision to issue this warrant to search the property for the second time, is so outrageous in its defiance of logical or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it. The Respondent has not specified the basis for securing a search warrant on the 1st March 2016. Counsel for the Respondent has simply argued that the second search never materialized and therefore this ground has no merit.

In reviewing this ground, it is clear that the search warrant of 1st March 2016 was not executed and that the Applicants were not affected by the issuance of this warrant. I therefore agree with the Respondent's counsel on this ground that the second search did not materialize and that this argument is without merit. This ground therefore fails and I dismiss it accordingly.

4. BREACH OF LEGITIMATE EXPECTATION

Under this ground, the Applicants have argued that the decision by the Respondent's agents the Zambia Police Service and the Drug Enforcement Commission (DEC) to take possession and occupancy of the 2nd Applicants property without a Court Order and also conducting a search of the same property without a search warrant is unfair and in breach of what the Applicants reasonably expected.

The term legitimate expectation was expounded by the learned author of De Smith's Judicial Review, 6th Edition at page 610, paragraph 12-003 as follows:

'The term "legitimate expectation" first made an appearance in the context of procedural fairness in Schmidt v Secretary of State of Home Affairs (14). A foreign student sought review of the Home Secretary's decision to refuse an extension of his temporary permit to stay in the United Kingdom. In rejecting the student's contention that he ought to have been afforded a hearing, Lord Denning, M.R., said obiter that the question of a hearing "all depends on whether he has some right, or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.'

The learned authors of *De Smiths Judicial Review* observe in paragraph 12-001, at page 609:

'That since the early 1970's one of the principles justifying the imposition of both procedural and substantive protection has been "legitimate expectation". Such an expectation arises where a decision-maker has led someone affected by the decision to believe that he will receive, or retain a benefit, or advantage - including that a hearing will be held before a decision is taken. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public.'

The learned authors of *De Smith's Judicial Review* also go on to state in paragraph 12-004, at page 610:

'that the doctrine of legitimate expectation derives its justification from the principle of allowing the individual to rely on assurances given, and to promote certainty, and consistent administration.'

And further at page 611 paragraph 12-006 that:

'The first attempt at a comprehensive definition of the principle of legitimate expectation was provided by the House of Lords in Council of Civil Service Union v Minister for the Civil Service (supra). A bare majority of their lordships rested their conclusion on the fact that, but for national security, there would have been a duty on the minister to consult within the union on the ground that the civil servants had a legitimate expectation that they would be consulted before their trade union rights were taken away. Lord Diplock stated that for a legitimate expectation to arise, the decision:

'Must affect [the] other person... by depriving him of some benefit, or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy, and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received an assurance from the decision-maker that it will not be withdrawn

without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.'

The Respondents have argued under this ground that the ground of legitimate expectation as canvassed in the ***North-Western Energy Company Limited*** case must be understood in context. They fortified this argument by stating further that this ground cannot be sustained where a greater public interest as opposed to an individual interest is at stake.

In considering this ground of legitimate expectation under judicial review, the Court is required to scrutinize a decision as to whether it has disappointed a legitimate expectation and whether such disappointment is unlawful. In the present case, the Applicants have simply argued that the Respondents agents have acted unfairly and in breach of their legitimate expectations. The Applicants have not expounded their expectations or how these have been breached by the Respondent's agents. The Court is therefore unable to determine whether there has indeed been a breach of legitimate expectation. This ground therefore fails.

I now turn to specifically address the reliefs claimed by the Applicants.

1. The Applicants first claim is for an Order of Certiorari to move into the High Court for purposes of quashing the decision by the Respondent acting through its agents the Zambia Police Service and the Drug Enforcement Commission (DEC) to search the 2nd Applicant's premises situated at Plot No. 186 Luanshya Road, Villa Elizabetha without a duly issued Court Order and to quash the decision. I have already found that the search conducted by the Respondent's agents on the 2nd Applicants property on the 27th

February 2016 without a search warrant was illegal. This act having already been carried out, there is therefore no decision in force to quash. This claim is therefore misconceived and fails accordingly.

2. The Applicants second claim is for an Order and Declaration that the decision to conduct a subsequent search of the 2nd Applicants premises situated at Plot No 186 Luanshya Road, Villa Elizabetha by the Respondent's agents under a search warrant dated 1st March 2016 when the said premises are already in the possession and custody of the Respondent's agents and a search had already been conducted without a search warrant is illegal and unconstitutional as it contravenes the provisions of the Constitution of Zambia. I have already made a finding that the search warrant of 1st March 2016 was not executed as a second search was not conducted. I have also stated that the Applicants were not affected by the issuance of this warrant which did not materialize. This claim therefore also fails.
3. Turning to the Applicants third claim for an Order of Mandamus compelling the Respondent's agents to vacate and leave the Applicant's aforesaid premises.

The learned authors of the **Rules of the Supreme Court, White Book (1999 Edition)** describe Mandamus in **Order 53, rule 14 sub rule 42** as: *'an Order requiring an inferior Court or tribunal or a person or body of persons charged with a public duty to carry out its judicial or other public duty. An order of mandamus cannot be made against the Crown but it will lie against an officer of the Crown who is obliged by Statute to do some ministerial or administrative act which affects the rights or interests of the Applicant.'*

It is clear that an order of mandamus is an order requiring a public officer to carry out some public duty that he is compelled by law to carry out. In the present case, there is no public duty that the Applicants are requesting the Respondent to carry out. To the contrary they seek an order compelling the Respondent's agents to vacate their premises. An application for mandamus is therefore not the appropriate remedy in the circumstances of this case. This claim fails accordingly.

4. The Applicants fourth claim is for an Order of Prohibition proscribing the Respondent and his agents from continuing to unlawfully besiege, possess, guard the Applicants property.

The learned authors of the **Rules of the Supreme Court, White Book (1999 Edition)** describe Prohibition under **Order 53, rule 14 sub rule 40** as, 'an Order restraining an inferior court, or tribunal or a public authority from acting outside its jurisdiction.

In the present case, I have already found that the actions of the Respondent's agents to take possession, custody and guard of the said premises without a duly issued Court Order as being illegal and in excess of jurisdiction. There is therefore no legal basis for the Officers of the Zambia Police Service and/or the Drug Enforcement Agency to continue guarding, controlling or possessing the 2nd Applicants property. The foregoing authority empowers the Court to grant an order restraining a public authority from acting outside its jurisdiction.

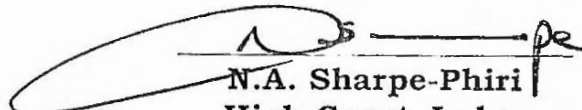
I therefore grant an Order of Prohibition sought by the Applicants proscribing the Respondent's agents from possessing, occupying and /or controlling the 2nd Applicant's property.

I order that the Respondent through its agents shall forthwith vacant the said property and give immediate possession and control of Plot 186, Luanshya Road, Villa Elizabetha, Lusaka to the 2nd Applicant.

The Applicants claims at 5, 6 and 7 have been overtaken by events.

The Applicants final claim is for an Order for costs. The Applicants having partially succeeded with their claims, I order that the Respondent shall bear the Applicants costs of this suit, to be taxed in default of agreement.

Delivered at Lusaka this 29th day of December 2017


N.A. Sharpe-Phiri
High Court Judge