

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

2018/HP/0138

(Civil Jurisdiction)



IN THE MATTER OF:

**AN APPLICATION FOR LEAVE
FOR JUDICIAL REVIEW.**

IN THE MATTER OF:

**THE PUBLIC PRIVATE
PARTNERSHIP ACT NO. 14 OF
2009.**

IN THE MATTER OF:

**THE PUBLIC PROCUREMENT ACT
2008**

IN THE MATTER OF:

**THE CITIZENS ECONOMIC
EMPOWERMENT ACT 2006**

IN THE MATTER OF:

**A DECISION BY THE ROAD
TRAFFIC & SAFETY AGENCY &
THE PUBLIC PRIVATE
PARTNERSHIP UNIT TO AWARD A
CONTRACT ON TRAFFIC
ENFORCEMENT TO INTELLIGENT
MOBILITY SOLUTIONS LIMITED
UNDER THE PRIVATE PUBLIC
PARTNERSHIP FRAMEWORK
DISREGARDING A SIMILAR
PENDING UNSOLICITED
PROPOSAL.**

IN THE MATTER OF:

**A DECISION BY THE 1ST
RESPONDENT TO IMPLEMENT
DIGITAL TRAFFIC
ENFORCEMENT WITHOUT THE
APPROVAL OF THE APPLICANT.**

B E T W E E N :

TURNKEY SOLUTIONS (Z) LIMITED

APPLICANT

AND

ROAD TRAFFIC & SAFETY AGENCY
THE ATTORNEY GENERAL

**1ST RESPONDENT
2ND RESPONDENT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 6th day of February, 2018

For the Applicant : *Mr. M. D. Lisimba assisted by Ms. N. Sameta, Messrs Mambwe Siwila & Lisimba Advocates*

R U L I N G

Cases Referred To:

1. *William David Carlisle Wise v E. F. Hervey Limited (1985) ZR 17*

Legislation Referred To:

1. *Rules of the Supreme Court 1999 Edition*

On 24th January, 2018, the Applicant filed an *ex parte* application for extension of time and leave to apply for judicial review pursuant to Order 53 Rule 3 and 4 of the Rules of the Supreme Court. It is supported by an Affidavit and Statement.

The Affidavit is sworn by **Msaiwale Mlewa** who states that in 2010, he submitted an unsolicited proposal to the Zambia Development Agency for the introduction of an electronic traffic enforcement system on a Build, Operate and Transfer (BOT) basis under the Public Private Partnership framework. That the Zambia

Development Agency through its then Director advised the Applicant to direct its bid to the Public Private Partnership (PPP) Unit under the Ministry of Finance.

The deponent states that sometime in 2011, the Applicant submitted the bid to the PPP Unit as shown in the exhibit marked "**MM1**." That the Company was invited to demonstrate its proposal to relevant stakeholders. That the Applicant Company paid costs for an expert team of engineers and technicians from Sensys Sweden to present the proposal. Further, that the Government waived taxes on the equipment that was shipped in for the demonstration.

The deponent states that the experts presented their first proposal on 26th May, 2011, at Southern Sun, Lusaka. That another presentation was held on 28th May, 2011 at the 1st Respondent's Head Office, at which the Deputy Director Enforcement, Mr. Robert Mtonga and his departmental staff were present. This is shown in the exhibit marked "**MM2**." That on 8th June, 2011, the Applicant received a letter from the PPP Unit

stating that the Council of Ministers had approved its proposal. Further, the Applicant was informed that a public tender would be floated in accordance with statutory regulations.

The deponent states that the Applicant was requested to resubmit its proposal as shown in the exhibit marked "**MM3**". That the Applicant complied as shown in exhibit "**MM4**." Further, that on 24th August, 2011, the Director PPP Unit called the Applicant for negotiations of the concession as shown in the exhibit marked "**MM5**." The deponent states that at the meeting, the Deputy Director RTSA asked him to submit a value-add proposal as shown in exhibit "**MM6**." Later, that the deponent was availed a copy of a draft concession agreement shown as exhibit "**MM7**."

The deponent states that he never heard from the PPP Unit from August, 2011 and made a number of inquiries as shown in the exhibits marked "**MM8**" to "**MM10**." That he learnt in May 2015, through the media that the 1st Respondent had begun to implement the Applicant's project through the installation of cameras.

The deponent avers that he approached the 1st Respondent's Chief Executive Officer (CEO) in August, 2015, and in a letter dated 15th October, 2015, the CEO denied that the 1st Respondent had begun to implement the digital traffic enforcement system. This is contained in exhibit "**MM15.**"

The deponent also avers that on diverse dates in October 2017, the 1st Respondent through the media informed the public that it had awarded a contract on digital traffic enforcement to Kapsh International Austria and Lamise Trading. The deponent claims that the scope of the project was remarkably similar to that of the Applicant. That he approached the Respondents through his Advocates and on 12th December, 2017, the parties held a meeting. He adds that the 2nd Respondent asked for time to settle the matter but has failed to do so, thus, these proceedings. The deponent prays to Court to grant the Applicant leave to apply for judicial review out of time.

I have seriously considered the application, and Affidavit filed herein. The application raises the question whether in the

circumstances of the case, I can exercise my discretionary power to grant the Applicant leave to file proceedings for judicial review out of time.

Order 53 Rule 4 of the Rules of the Supreme Court reads:

“An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the ground for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.”

In terms of Order 53 Rule 4, the time frame for filing an application for judicial review is cast in mandatory terms. That is to say, an application for judicial review must be made promptly and within three months from the date when the grounds for the application first arose. A Court has power to enlarge time for filing judicial review process where there is good reason for doing so. However, Order 53 Rule 4 does not define “good reasons”, but I would be inclined to presume that the Court must only be exercise its discretion where exceptional and compelling grounds have been shown. Each case therefore, must be considered on its own merits and where the power is exercised, it must be done judiciously.

Learned Counsel invited me to consider the ruling of **Honourable Justice Dennis K. Chirwa v The Attorney General 2013/HP/0534**, where the Court enlarged the time for filing an application for judicial review. In that case, the Court considered that since the parties were involved in *ex curia* settlement negotiations, the Applicant had good reason for filing process outside the three months' time limit.

In the present case, the Applicant's grievances according to its Affidavit can be traced from May, 2015, when it learnt through the deponent its Managing Director; that the 1st Respondent had awarded a contract to another bidder. The Applicant claimed that the proposal was remarkably similar to its own and that gave it cause for concern. The deponent also averred that he wrote a letter of complaint to the CEO of the 1st Respondent in August, 2015. This was followed by a series of communication between the parties on diverse dates, between August, 2015 and December, 2017. The deponent further stated that he instructed the Applicant's Advocates to issue a letter of demand, "**MM16**", against the Respondents on 24th November, 2017.

In the case of **William David Carlisle Wise v E.F. Hervey**

Limited¹, the Supreme Court held that:

“(a) cause of action is disclosed only when a factual situation is alleged, which contained facts upon which a party can attach liability to the other upon which he can establish a right or entitlement to a judgment in his favour against another.”

After carefully examining the events of this dispute as disclosed in the supporting Affidavit, I find that the Applicant ran out of time to commence judicial review proceedings by mid-September, 2015. The Applicant’s cause of action arose in May, 2015, when it learnt through the media that the 1st Respondent had begun to implement “its project” through the installation of cameras. By his own admission, the deponent in paragraph 20 of his Affidavit, states that he raised concern with the 1st Respondent on 21st May, 2015. The deponent also states in paragraph 21 of his Affidavit, that the CEO of the 1st Respondent denied the allegation. Further, on 21st September, 2015, he wrote a letter of demand to the 1st Respondent but took no further steps, except to await the CEO’s response of 15th October, 2015.

I have considered the ruling of **Honourable Justice Chirwa**, and find that it is distinguishable from this case. Firstly, in that case, the cause of action arose sometime in August, 2012. Between that time and early 2013, the parties were pursuing an amicable settlement, which failed. The Applicant commenced judicial review proceedings almost immediately after the failed negotiations, unlike in the present case, where the Applicant waited almost two years and six months from the time that its cause of action arose.

Secondly, it was quite obvious that **Honourable Justice Chirwa's** case was firmly founded on public law unlike the present case whose facts heavily suggest that it leans towards private law. The fact that the 1st Respondent is a statutory body does not necessarily establish that the Applicant's case can be pursued under public law. In my view, it remains one that can be addressed by private law.

I therefore, decline to be moved by way of judicial review and dismiss this application. I make no order as to costs.

R10

Leave to appeal is granted.

Dated this 6th day of February, 2018.

MMapani

M. Mapani-Kawimbe
HIGH COURT JUDGE