

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2018/HP/0407

IN THE MATTER OF:

**ORDER 53, RULE 3 OF THE RULES OF
THE SUPREME COURT OF ENGLAND**

IN THE MATTER OF:

**THE INDUSTRIAL AND LABOUR
RELATIONS ACT CHAPTER 269 OF THE
LAWS OF ZAMBIA**

IN THE MATTER OF:

**AN APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW**

B E T W E E N :

KANGWA MUSENGA (suing in his capacity
as General Secretary of the Professional Teachers
Union of Zambia (PROTUZ)

APPLICANT

AND

THE ATTORNEY GENERAL
LABOUR COMMISSIONER

1ST RESPONDENT

2ND RESPONDENT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 21st day of
March, 2018**

For the Applicant : *Mr. K. Kanswata, Kanswata & Company*

R U L I N G

Cases Referred To:

1. *Chief Constable of North Wales Police v Evans (1982) 1 WLR 1152*
2. *R v Hillingdon London B.C ex p Puhlhofer (1986) A.C 484*

Legislation Referred To:

1. *Rules of the Supreme Court 1999 Edition*

On 28th February, 2018, the Applicant filed an ex parte application for leave to apply for judicial review pursuant to Order 53 Rule 3 of the Rules of the Supreme Court. It is supported by an Affidavit and Statement.

The Applicant, **Kangwa Musenga** swore an Affidavit where he states that he is the General Secretary of the Professional Teachers Union of Zambia (PROTUZ). He also states that he was dismissed by the Teaching Service Commission (TSC) on 31st October, 2017. That, on 21st January, 2018 the PROTUZ National Executive Council resolved to support him in instituting legal process against the TSC as shown in the exhibits marked "**KM1**" and "**KM2**."

The deponent avers that Mr. Chanda Kaziya, the Labour Commissioner at the Ministry of Labour directed PROTUZ to remove him as General Secretary after he was dismissed by the TSC. That the deponent defied the direction because he is challenging his dismissal by the TSC in the Industrial and Labour Relations Divisions.

The deponent avows that on 15th January, 2018, the Labour Commissioner issued a notice to cancel the Certificate of Registration of PROTUZ because the Applicant was employed by Twinkle School. That the School does not have an approved Recognition Agreement with the Ministry of Labour and Social Security and the membership of PROTUZ cannot be drawn from it. Upon realizing that fact, the deponent terminated his contract with the School and informed the Labour Commissioner before he issued the notice.

The deponent avers that his former Vice President Mr. Chrispin Lupiya connived with the Labour Commissioner to remove him as General Secretary and the President of PROTUZ, Mr. Vincent Kambimba Mwitumwa, but their efforts failed. That the Labour Commissioner then directed the Branch Manager, Zambia National Commercial Bank, Woodlands Lusaka, where PROTUZ holds an account to block it. Thereafter, the Labour Commissioner forced the Deputy General Secretary, Administration and Finance, Mr. Stephen Mwendaluta and Mrs. Tregain Rhoda Nguni to remove the deponent on the list of signatories according to exhibit "**KM5**." The

deponent also avows that the Labour Commissioner failed to show the legal basis of his actions and overstepped his authority by interfering in the operations of PROTUZ.

At the hearing, Learned Counsel for the Applicant placed reliance On the Affidavit and Statement filed in Support. He reiterated that the labour Commissioner's actions were beyond his authority as stated in the Industrial Labour and Relations Act. He prayed to Court to grant the Applicant leave to commence judicial review proceedings and for the leave to operate as a stay until the decisions challenged were fully determined.

I have anxiously considered this application, the Affidavit and Statement filed herein. The application raises the question whether in the circumstances of this case, I can invoke my discretionary power to grant the Applicant leave to commence judicial review proceedings. It is a well settled principle of law under Order 53 Rule 3 of the Supreme Court Rules that:

“54 (3) An application for leave to apply for judicial review should 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 a good reason for extending the period within which the application shall be made."

In the case of **Chief Constable of North Wales Police v Evans**¹, the Court stated that:

"The remedy of judicial review is concerned with reviewing and not the merits of the decision in respect of which the application for judicial review is made but the decision making process itself. In all cases of judicial review, the purpose is to ensure that an individual is given fair treatment by the authority to which he has been subjected. That authority must not be substituted by the opinion of the Court."

It was further stated in that case that:

"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."

In the case of **R v Hillingdon London B.C ex p Puhlhofer**², Lord Brightman stated thus:

"(It) is not, in any opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground on which the Courts will review the exercise of an administrative discretion is abuse of power, e.g. bad faith, a mistake in constructing the limits of the power, a

procedural irregularity or unreasonableness in the Wednesbury sense...i.e. unreasonableness verging on an absurdity:... Where the existence or non-existence of a fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.”

It follows, therefore, that the remedy of judicial review is only concerned with reviewing the decision making process of a public body or authority and not the merits of the decision. The existence or non-existence of facts are a matter of a public body's judgment or discretion. The Court can only intervene in cases where a public body or authority has consciously or unconsciously acted perversely.

Order 53 Rule 14 Sub Rule 55 of the Rules of the Supreme Court is instructive. It provides that the requirement of granting leave to commence judicial review is meant among other things, to enable an aggrieved party an opportunity to be heard on a decision complained of. A Court should only be satisfied with the fact that there is a case fit for further investigation at a full *inter partes*

hearing of a substantive application for judicial review. It must not concern itself with the merits of the decision.

After carefully examining the evidence on record, my firm view is that this matter is not fit for further investigation at a full *inter partes* hearing. In my view, the first decision assails rights that can be pursued by the Applicant in private law. The Applicant would have to prove his allegation of impropriety against the Bank, whose decisions do not turn on a public function. Instead the relationship arises from a client/service provider arrangement.

I also take the view that the Applicant's claim against the Labour Commissioner's interference manifests in private law. As General Secretary of PROTUZ, the Applicant is not employed in great public. The fact that the Labour Commissioner has taken a position against him does not remove his case into public law. There is an active Court case between the Applicant and the TSC regarding his dismissal and I find no need to further entertain the claim.

I therefore, refuse to grant the Applicant leave to commence judicial review proceedings. I make no order as to costs.

Leave to appeal is granted.

Dated this 21st day of March, 2018.

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE