IN THE HIGH COURT FOR ZAMBIA **2019/HP/2025**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	**AN APPLICATION FOR JUDICIAL REVIEW**
IN THE MATTER OF:	**ORDER 53 OF THE RULE OF THE RULES OF THE SUPREME COURT, (WHITE BOOK) 1999 EDITION**
IN THE MATTER OF:	**ARTICLE 266 OF THE CONSTITUTION OF ZAMBIA.**
IN THE MATTER OF:	**SECTION 10 OF THE CHIEFS ACT CHAPTER 287 OF THE LAWS OF ZAMBIA.**
AND	
IN THE MATTER OF:	**THE DECISION OF THE CHIRUNDU DISTRICT COUNCIL SECRETARY FOR CHIRUNDU DISTRICT BARRING PETER CHOONGA AS DEPUTY CHIEF SIKOONGO FROM ATTENDING COUNCIL MEETINGS.**

HIGH COURT OF ZAMBIA PRINCIPAL 26 JUN 2020 REGISTRY BOX 50067, LUSAKA

BETWEEN:

PETER CHOONGA **APPLICANT**
(Suing in his capacity as Deputy Chief Sikoonga)

AND

CHIRUNDU DISTRICT COUNCIL **RESPONDENT**

BEFORE HON. JUSTICE G. MILIMO- SALASINI IN CHAMBERS ON THE 26TH DAY OF JUNE, 2020.

For the Applicant : Mr. M. Mutemwa – Messrs. Mutemwa Chambers.
For the Respondent: N/A

RULING

Cases referred to:

1. ***R vs Inland Revenue Commissioners Ex Parte National Federation of self employed small Business Limited (1982) AC 617.***

2. ***R vs Secretary of State for the Home Department Ex Parte Rukshanda Bequm, (1990) COD 107.***

3. ***Chitala vs the Attorney General (1995-1997) ZR, 91***

4. ***Collum Coal Mining Industry Limited vs Attorney General (2013) Vol 2 ZR 348.***

5. ***R vs Eppingand Harlow General Commissioners Ex Parte Gold straw (1983) 3 ALLER 257, 262.***

6. ***North Wales Police vs Evans (1982) 3 ALLER 141.***

7. ***Council for Civil Service Union and Others vs Minister for Civil Service. (1984) H.L. 9.***

8. ***Associated Provincial Houses Limited vs Wednesbury Corporation (1948) 1 K.B. 223.***

9. ***Chiluba vs Attorney General.***

10. ***Fedrick Jacob Titus Chiluba vs the Attorney General (2003) ZR 153.***

Legislation referred to:

1. **Halsbury's Laws of England, 4th edition, volume 1(1) 2001 at paragraph 61.**
2. **De Smith Judicial Review (Supra) State in Paragragh 11-003 at page 544**

This is an application for Judicial Review Pursuant to ***Order 53, rule 3*** of the ***Rules of Supreme Court (RSC) 1999 Edition***, in

which the Applicant was challenging the decision of the Chirundu District Council Secretary for Chirundu District, in the Southern Province of Zambia barring the applicant as Deputy Chief Sikoongo from attending Council meetings. For this reason, the Applicant now seeks leave for Judicial Review of the said Council Secretary's decision for the following reliefs:

1. An order of Certiorari to move into the High Court for purpose of quashing the decision of the Chirundu Council Secretary for barring the applicant as Deputy Chief Sikoongo from attending Council meetings at Chirundu District on behalf of the Sikoongo Chiefdom.
2. A declaration that the decision of the Council Secretary barring the Deputy Chief Sikoongo from attending Council meetings in Chirundu Council is suppression of effective representation and interest of Chief Sikoongo and infringement on his statutory functions.
3. If leave is granted a direction that the grant of such leave should operate as a stay of the decision of the Council Secretary to bar the applicant, as deputy Chief Sikoongo from attending Council meetings.
4. If leave is granted that the hearing of the application for Judicial Review be expedited.
5. And that all necessary and consequential directions be given.

The ground for seeking these reliefs are that:

1. The decision of the Council Secretary for Chirundu barring; the applicant from attending Council meetings is not only unreasonable but an infringement on his statutory functions and suppression of Chief Sikoongo and his subjects

especially with regard to matters affecting their interest in the Council meetings.

2. That the applicant being Deputy Chief Sikoongo duly put in the said position in accordance with the customs and tradition of Bana Mainga Traditional Authority of Sikongo Chiefdom is entitled to attend meetings of the Chirundu District Council as a Statutory Function confessed upon him by the Chiefs Act.

The application is supported by an affidavit sworn by the applicant, one Peter Choonga, in his capacity as Deputy Chief Sikoongo. The deponent contends, that on the 4th April, 2019, the Bana Mainga Traditional Authority of Sikoogo Chiefdom in line with their culture and tradition and acting together with Chief Sikoongo of Sikoongo Chiefdom in Chirundu District appointed him deputy Chief Sikoongo on account that the incumbent Chief Sikoongo was unwell and unable to carry out some of statutory functions.

By a letter dated 16th May, 2019, the Council Secretary for Chirundu District sought guidance from his parent Ministry, the Ministry of Local Government, on whether the applicant could attend Council meetings on behalf of the Chiefdom which Ministry duly responded in the affirmative.

It is the contention of the applicant that a letter was sent to him on the 25th November, 2019 from the Chirundu District Council Secretary directing that he stops attending Council meetings without affording any reasons.

The applicant asserts that his ascending to the position of Deputy Chief Sikoongo was in line with the customs and traditions of Bana

Mainga Traditional Authority of Sikoongo Chiefdom and is in compliance to the Chief Acts and that is entitled in line with the provisions of the Chief Act to carry out statutory functions as Deputy Chief, one such function which is attending Council meetings.

The applicant claims that the decision of the District Council Secretary to bar him from attending Council meetings is unreasonable and an infringement to his statutory function.

I have considered the affidavit evidence of the applicant. It is common cause from the application and affidavit evidence that the applicant's basis for challenging the Council Secretary's decision is on the grounds of unreasonableness and infringement of statutory functions. This is premised on grounds that in Section 10(3) of the Chief's Act, Chapter 287 of the laws of Zambia, a Deputy Chief shall discharge such functions of the office of the Chief to whom he is a Deputy as have been transferred to him under the Act.

The Principal question that falls to be considered and determined in the application is whether the Council Secretary's decision to refrain the Deputy Chief from attending Council meetings is subject to judicial review.

It is trite law that the requirement to obtain leave to apply for judicial review serves a twofold purpose namely:

1. *To eliminate frivolous, vexatious a hopeless application for Judicial review without the need for a substantive inter Parte Judicial review hearing; and*

2. *To ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full Inter Parte hearing.*

The requirement that leave must be obtained is designed to prevent the time of the Court being wasted by bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived. (***R v Inland Revenue Commissioners Ex Parte National Federation of self-employed small Business Limited.***[1]

In the case of ***R Vs. Secretary of State for the Home Department Ex Parte Rukshanda Bequm***[2]**,** the Court held that the test to be applied in deciding whether to grant leave for Judicial review is whether the Judge is satisfied that there is a case fit for further investigation at a full Inter Parte hearing of a substantive application for Judicial review.

Order 53 of the Rules of the Supreme Court, ***1999*** deals with Judicial review. Rule 3 provides as follows.

1. *No application for Judicial review shall be made unless the leave of the court has been obtained in accordance with this rule.*
2. *An application for leave must be made Ex Parte to a Judge by filing*

   (a) a notice containing a statement of

   (i) the name and description of the applicant;

   (ii) the relief sought the grounds upon which it is sought

(iii) the name and address of the applicant's advocates (if any)

(iv) the applicant's address for service and

(b) an affidavit verifying the facts relied on.

Order 53/14/21 provides that:

no application for Judicial review can be made unless leave to apply for Judicial review has been obtained. Applications for leave are normally dealt with ex parte by a single judge in the first instances without hearing.

The purpose of the requirement of leave is:

(a) To eliminate frivolous vexatious or hopeless applications for Judicial review without the need for a substantive Inter Parte Judicial review hearing and

(b) To ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full inter parties hearing.

Order 53/14/25 provides that:

Judicial review will not lie against a person or body carrying out private law and not public law functions.

Order 53/14/54 provides that:

The applicants for leave must:

a. have a sufficient interest

b. have a case sufficiently arguable to merit investigation at a substantive hearing and

c. apply for leave promptly

From the above, it is clear that an applicant for leave to commence Judicial review proceedings needs to show that he or she has an arguable case with a likelihood of succeeding in the substantive matter.

In the case before me, the application for leave arose out of the decision of the Council Secretary for Chirundu District barring the Applicant acting as Deputy Chief Sikoongo from attending Council meetings.

In considering the purpose of the requirement for leave, Ngulube CJ, in the case of ***Chitala vs the Attorney General***[3] held that the purpose of the requirement of leave is three fold, namely:-

a) to eliminate at an early stage any applications which are either frivolous or vexatious or hopeless.

b) to ensure that an applicant is only allowed to proceed if the court is satisfied that there is a case fit for further consideration and

c) to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints of administrative error.

An application for Judicial review should be made promptly and only in the absence of an alternative remedy. In the case of ***Collin Coal Mining Industry Limited Vs. Attorney General***[4] the Court held that an application for leave to move for Judicial review must be made promptly which in this context means as soon as practicable or as soon as the circumstances of the case will allow, and in any event such application must be made within three months from the date when grounds for the application first arose.

In the case of MR in ***R Vs Epping and Horlow General Commissioners Ex Parte Goldshow***[5] the Court held that:

> *"It is a cardinal principle that save in the most exceptional circumstances, the Jurisdiction to grant Judicial review will not be exercised where other remedies are available and have not been used."*

From the above, it is clear that, in Judicial review proceedings, the primary issue to be addressed or considered is whether the applicant has demonstrated that the institution or body, whose decision has been called into question, is one that deals with Public law or performs public functions. If the Court is of the view that the institution or body in question is one that deals with public law, it must proceed to consider whether the specific decision of such body, which has been called into question infringes such rights of the applicant as are entitled to protection under Public law.

In discussing this point, Order 53/14/33 of the Supreme Court Rule 1999 Edition States that:

> *Where a person seeks to establish that a decision of a person or body infringes right which are entitled to protection under Public law he must, as a general rule, proceed by way of Judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise.*

This principle is also discussed by the learned authors of Halsbury's Laws of England, 4th edition, Volume 1 (1) 2001 at Paragraph 61 where they state in part that:

"however, not every act of such a body is of a type which is suitable for Judicial review. It is also necessary to consider the nature of the decision of which the complaint is made. The crucial consideration will be whether there is a sufficient Public law element to a particular decision."

In the case of **Chief Constable of *North Wales Police Vs***

Evans[6], the could held 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 individual is given a fair treatment by the authority to which he has been subjected.

It is trite that, following the celebrated statement of ***Lord Diplock in Council for Civil Service Union and others Vs. Minister for Civil Service***[7] Judicial review has developed to a stage today where administrative actions are conveniently reviewed under three heads or grounds. namely, illegality, procedural, impropriety, unreasonableness or irrationality. I will briefly consider unreasonableness based on the applicant's grounds for the reliefs sought in this application.

Under the rubric unreasonableness or irrationality is meant, and conveniently so, what is succinctly referred to as Wednesbury unreasonableness; following the famous dictum in ***Associated Provincial Pictures Houses Limited Vs. Wednesbury Corporation***[8]. That is, it refers to a decision which is so outrageous in its defiance of logic, or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it.

It is instructive to note that the learned authors of De Smiths Judicial Review (Supra) in Paragraph 11 – D02 at Page 543, now refer to this ground as *"Substantive review and jurisdiction"* for a number of reasons, as stated in Paragraph 11-002 at page 544. First, argue that both the terms unreasonableness and irrationality are notoriously imprecise.

Be that as it may, the learned authors of De Smiths Judicial Review (Supra) further state in Paragraph 11 – 003 at page 544 that under this ground of review, the issue is not whether the decision maker stayed outside the terms, or authorised statute the test of legality, but rather, it is whether the power under which the decision maker acts, a powerful normally conferring a board discretion has been improperly exercised or is insufficiently Justified. Thus, the Courts engage in the review of the substance of the decision, or its jurisdiction. In our case however, the purpose of Judicial review is epitomised by the case of ***Chiluba Vs. Attorney general***[9] In the **Chiluba** case (Supra), it was held that Judicial review is not concerned with reviewing the merits of the decision, but rather the decision making process itself. Thus the object of Judicial review is to ensure that an individual is given a fair treatment by the authority to which he has been subjected.

Where parliament has given to a minister or other person or body a discretion, the Courts Jurisdiction is limited, in the absence of an exercise of that discretionary power so as to ensure that it has been exercised lawfully.

A perusal of the relevant documents brings me to consider whether the decision of the Council Secretary to ban the applicant attend the meeting was unreasonable.

The Chiefs Act particularly ***Section 10 (1)*** and ***(3)*** does lay down procedural routes to be observed as regard the powers and duties of the Deputy Chief.

What I must decide before I grant such an order is to answer the question whether or not the decision to which relief is sought is subject to Judicial review. If it is, then leave must be granted. If not, the application must fail in terms of ***Order 53/14/55 of the Rules of the Supreme Court***.

In the case of ***Fredrick Jacob Titus Chiluba Vs. the Attorney Geneneral[10], (2003) ZR 153***, the Supreme Court of Zambia held that,

> *"The emphasis is that the purpose of Judicial review is not to provide an appeal procedure against decisions of Public bodies as their merit, but to control the Jurisdiction of Public bodies by ensuring that they comply with their duties or by keeping them within the limits of their powers. For instance, when the High Court is reviewing a decision of a Public body it will not admit evidence which is relevant to whether the decision is a reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made."*

It was submitted by the applicant that he seeks to prove before this court that the decision made by the Chirundu District Council Secretary to ban him from attending Council meetings was illegal or unlawful therefore such decision should be reviewed. It was

further submitted that this was a Prima facie case to be heard by the Court.

In my considered view although the Respondent is a Public body and the Applicant is a Public officer, these facts do not in themselves make Judicial Review open to the applicant. This is so because the applicants Claims relates to an infringement on statutory function as provided under ***Section 10 of the Chief Act*** by the Respondent who on the face of the case was not the right person to be sued.

Furthermore, as provided in ***R Vs. Epping and Harlow General Commissioner, Ex Parte Gold straw***[5] where the Court held that "save in the most exceptional circumstances, that Jurisdiction (to grant Judicial review would not be exercised where other remedies were available and had not been used."

The Applicant did not exhaust other remedies but came straight to Court when he should have exhausted all the other remedies.

In this regard, the application for leave for Judicial Review is dismissed.

Leave to appeal is granted.

Delivered at Lusaka this 26th Day of June,2020.

HON. JUSTICE G. MILIMO- SALASINI
HIGH COURT JUDGE