IN THE HIGH COURT OF ZAMBIA **2020/HP/0246**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **ORDER 53 RULE 3 OF THE RULES OF THE SUPREME COURT OF ENGLAND, 1999 EDITION, VOLUME 1**

AND

IN THE MATTER OF: **SECTIONS 5 (1) (a), 64 (1) and 65A OF THE INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **AN APPLICATION FOR JUDICIAL REVIEW**

BETWEEN:

KELVIN MAMBWE **APPLICANT**
(Suing as General Secretary of the University of Zambia Lecturers and Researchers Union)

AND

THE ATTORNEY GENERAL **1st RESPONDENT**
THE UNIVERSITY OF ZAMBIA COUNCIL **2nd RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 17th DAY OF AUGUST, 2020

For the Applicant : *Mr E.K. Mwitwa, Mwenye and Mwitwa Advocates and Mr P.G. Katupisha, Milner & Paul Advocates*

For the 1st Respondent : *Mr F. Imasiku, Deputy Chief State Advocate and Ms D. Mwewa, Acting Principal State Advocate*

For the 2nd Respondent : *Ms T Nkhoma and Ms T. Daka, Legal Officers*

JUDGMENT

CASES REFERRED TO:

1. ***Associated Provincial Picture Houses Limited v Wednesbury Corporation 1948 1 KB 223, 1947 2 ALL ER 680***
2. ***Padfield & others v Minister of Agriculture, Fisheries and Food & others 1968 1 ALL ER 694***
3. ***Council of Civil Service Unions v Minister of State for Civil Service 1981 AC 363***
4. ***R v Mental Health Review Tribunal, ex parte Clatworthy 1985 3 ALL ER 699***
5. ***Civil Service Union v Minister for the Civil Service 1985 AC 374***
6. ***Shilling Bob Zinka v The Attorney-General 1990-1992 ZR 73***
7. ***R v Independent Television Commission, Ex Parte Tsw Broadcasting Limited 1992 The Times, 30th March, 1992 HI, England***
8. ***Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General 1995 ZR 91***
9. ***Roy Clarke v The Attorney General 2004/HP/003***
10. ***Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others 2005 ZR 38***
11. ***Almaz Lulsegen (female) v British Airways Limited 2008 Vol 1 ZR 186***
12. ***Nursing Council of Zambia v Inutu Milambo Mbangweta 2008 Vol 2 ZR 105***
13. ***Col Kasheke Chrispin Kayombo v The Committee on the Sale of Government Pool Houses, the Commander, Zambia Air Force and the Attorney General 2009/HP/668***
14. ***Nyampala Safaris (Z) Limited and four others v Zambia Wildlife Authority and six others 2004 ZR 66***
15. ***Andreas Panani v Attorney General 2010 Vol 1 ZR 73***
16. ***The Attorney General v Nigel Kalonde Mutuna and others Appeal No 088/2012***
17. ***James Banda v Neria's Investments Limited 2016***

LEGISLATION REFERRED TO:

1. ***The Rules of the Supreme Court of England, 1999 Edition***
2. ***The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia***

OTHER WORKS REFERRED TO:

1. ***De Smith Woolf and Jowell on Judicial Review of Administrative Action, Sweet and Maxwell, London, 199***
2. ***Judicial Remedies in Public Law, 2000, Sweet and Maxwell***

This is an application for judicial review that was filed on 25th February, 2020, following an order granting leave to commence judicial review proceedings on 24th February, 2020. The notice of the application was filed pursuant to Order 53 Rule 5 of the Rules of the Supreme Court of England, 1999 edition. It states that the reliefs sought are;

a) A **DECLARATION** that the decision of the Acting Labour Commissioner made on 4th February, 2020, in which she approved the 2nd respondent's application to terminate the Recognition Agreement dated 23rd March, 1993 entered into between the applicant and the 2nd respondent (The Recognition Agreement) does not amount to termination of the Recognition Agreement, and that the applicant and the 2nd respondent are still under an obligation to comply with the termination provisions of the Recognition Agreement;

b) **CERTIORARI** requiring the decision of the Acting Labour Commissioner to approve the termination of the Recognition Agreement to be moved into the High Court for purposes of determination and quashing;

c) **MANDAMUS** directing the University of Zambia Council, the 2nd respondent herein, to comply with the terms of the Recognition Agreement;

d) **AN ORDER** to the effect that if leave is granted to the applicant to file the application for judicial review, such application should operate as a stay of the decision of the Acting Labour Commissioner to approve the termination of the Recognition Agreement;

e) If leave to apply is granted, a direction that the hearing of the application for judicial review be expedited; and

f) An order that the costs of and occasioned by this application be borne by the respondents.

The grounds on which the reliefs are sought are stated as;

(a) ILLEGALITY

It is contended that the decision of the Acting Labour Commissioner contained in her letter dated 4th February, 2020, approving the termination of the Recognition Agreement was illegal, because the Acting Labour Commissioner did not understand or give effect to her duties under the provisions of Section 65A of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia when:

1. She decided the 2nd respondent's application in the full knowledge that she was incapable of being impartial, and could not be impartial in the application, because she had already written to the applicant on 7th January, 2020 to show cause why the applicant's certificate of registration should not be cancelled, and that she was thereby incapable of being impartial in determining the said application from the 2nd respondent;

2. She decided to hold a meeting with the 2nd respondent's Vice Chancellor, Professor Luke Mumba and the 2nd respondent's Registrar, Mr Sitali Wamundila, in the presence of the Minister of Labour and Social Security; Mr Chanda Kaziya, Permanent Secretary in the Ministry of Labour and Social Security on 3rd February, 2020, at which meeting the approval of the termination of the Recognition Agreement was discussed, and a decision to approve the termination was reached in concert with one of the parties to the total exclusion of the applicant.

In this regard, the applicant relies on the decision of the Supreme Court in the case of ***Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General*** [8], in which the Supreme Court decided 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.

The applicant also relies on the cases of ***Civil Service Union v Minister for the Civil Service*** [5] and ***Padfield & others v Minister of Agriculture, Fisheries and Food & others*** [2], which cases decided that illegality includes a situation where an authority misconstrues its duties, and that the exercise of discretionary powers for a purpose alien to that which it was granted, is unlawful, regardless of whether or not that alien purpose is in the public interest.

(b) IRRATIONALITY/UNREASONABLENESS

The decision of the Acting Labour Commissioner to approve the 2nd respondent's application for the termination of the Recognition Agreement on the ground that the applicant had violated Section 6 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, as well as breached Article 18 of the Recognition Agreement between the applicant and the 2nd respondent was irrational, unreasonable, and made in bad faith, because the 2nd respondent had not complied with the provisions of clause 18 of the Recognition Agreement, which clearly stipulates that the party intending to terminate the Agreement should give to the other, three (3) months' notice, stating reasons for such intention, which reasons, must be of a nature as sufficiently strong to justify such a move, and must relate to gross misunderstanding between the parties, in a manner that may be said that the relationship between the parties has broken down irretrievably.

In addition, the applicant contends that the 2nd respondent's application to the Acting Labour Commissioner to terminate the Recognition Agreement did not disclose sufficient reasons relating to gross misunderstanding between the applicant and the 2nd respondent, in a manner that could be said that the relationship between the two parties had broken down irretrievably. This is so because the said letter of termination did not indicate anywhere the alleged misunderstanding between the parties or the alleged unbridled insults on the 2nd respondent's

management, as they were not even disclosed to the Commissioner at the hearing that was held on 22nd January, 2020.

Further, it is contended that the decision of the Acting Labour Commissioner to approve the termination of the Recognition Agreement was disproportionate to the alleged violation of the Act or the Recognition Agreement, and was irrational or unreasonable, and was not a decision that could be made by any person properly exercising his mind to the continued existence of the Recognition Agreement between the applicant and the 2nd respondent. In this regard, the applicant relies on the case of ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** *(1)*.

The Applicant also relies on the case of ***Roy Clarke v The Attorney General*** *(9)*, citing the case of ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** *(1)* in which it was stated that ***by irrationality, is meant, what can be referred to as the Wednesbury Unreasonable***, following the decision in the case of ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** *(1)* in which it was held that it applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. The applicant further relies on the case of ***The Attorney General v Nigel Kalonde Mutuna and others*** *(16)* in that regard.

(c) PROCEDURAL IMPROPRIETY

1. The decision of the Acting Labour Commissioner to approve the termination of the Recognition Agreement without regard to the procedure for the cancellation of the agreement in clause 18 of the Recognition Agreement, which required the reference of the question of termination of the Recognition Agreement to the Bargaining Unit of the parties, and if negotiation failed, to trigger the provisions for the declaration of a dispute, was procedurally flawed and improper;

2. The decision of the Acting Labour Commissioner to approve the termination of the Recognition Agreement and to preside upon the 2nd respondent's application for termination of the Recognition Agreement, when she had prior to the hearing of the 2nd respondent's application, and of her own volition, served a notice to show cause why the applicant's certificate should not be cancelled, was in breach of the rules of natural justice, and thus procedurally flawed or improper; and

3. The decision of the Acting Labour Commissioner to approve the termination of the Recognition Agreement was in breach of the rules of natural justice and thereby procedurally flawed and improper because she decided to hold a meeting with the 2nd respondent's Vice Chancellor, Professor Luke Evuta Mumba and the 2nd respondent's Registrar, Mr Sitali Wamundila in the presence of Mr Chanda Kaziya, the Permanent Secretary in the Ministry of Labour and Social Security on 3rd February, 2020, at which meeting, the approval of the termination of the

Recognition Agreement was discussed, and a decision to approve the termination was reached in concert with one of the parties, to the total exclusion of the applicant.

As authority, the applicant relies on the case of ***Shilling Bob Zinka v The Attorney-General*** *(6)*, where it was held that the principles of natural justice are implicit in the concept of fair adjudication. The applicant further relies on the case of ***Andreas Panani v Attorney General*** *(15)* where it was decided that there is a presumption that fairness is required whenever the exercise of a power will adversely affect an applicant's rights as protected by common law or statute.

The affidavit in support of the application for judicial review, is deposed to by Kelvin Mambwe, the General Secretary of the University of Zambia Lecturers and Researchers Union (UNZALARU). He avers that the applicant is a duly registered trade Union, pursuant to Part VII of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. He further deposes that the principal objects of the Union include the representation and promotion of the interests of its members.

Further, that the Union regulates the relationship between its members, the employees of its members, and the management of the 2nd respondent. Exhibited as 'KM1' to the affidavit, is the certificate of registration of the Union. The deponent states that as at February, 2020, the applicant's records showed that it has four (4) full time employees at its registered office, and 769 members. It is also averred that the applicant runs a medical scheme, which is affiliated to at

least eleven (11) hospitals, and that 4, 319 members benefit directly from the medical scheme.

It is also deposed that the funds for the medical scheme are generated through deductions from the salaries of the members of the applicant, which are effected monthly by the 2nd respondent, and thereafter remitted to the applicant. Further, in the affidavit, the deponent deposes that the applicant also administers a Salary Advance Scheme (SAS) for its membership, which was established to assist the applicant's members who could not access bank loans, principally on the ground that their employer, the 2nd respondent herein, delays to pay salaries, hence affecting the bank's loan repayment plan.

The deponent also avers that in addition, the 2nd respondent deducts contributions and fees that are payable to the National Pension Scheme Authority (NAPSA), and to the applicant for the medical scheme and membership subscription from the salaries of the applicant's members. It is stated that thus far, the 2nd respondent has deducted from the employees, but has not remitted the following fees;

a) Over K300, 000, 000.00 NAPSA contributions deducted for a period running from January, 2011 to December, 2018;

b) Over K600, 000, 000.00 for their pension and gratuity as at December, 2018; and

c) At least K1, 000, 000.00 for their SAS, Medical Scheme and Membership Subscription fees for the month of January, 2020.

The deponent deposes that the applicant on 6th January, 2020 held a meeting at which he as General Secretary raised concern over the 2nd

respondent's delay to pay their December, 2019 salaries. That this came in the wake of the 2nd respondent's repeated delays in paying salaries in the previous months. He further avers that at the said meeting, a number of grievances affecting the welfare of the applicant's membership were discussed, all of which fell within the objects and mandate of the applicant.

It is the deponent's contention that he was exercising his freedom of expression, and in keeping with the duty to speak on behalf of the applicant's members, he lamented the government's failure to adequately fund the University of Zambia (UNZA). He expressed the view that *"if elections were held today (6th January, 2020), there were two categories of people that would vote for the PF, either those that were enjoying with them, or idiots, its as simple as that"*.

It is stated that arising from what was discussed in the meeting, the 2nd respondent wrote to the deponent in his capacity as General Secretary of the applicant on 7th January, 2020, alleging that the applicant was inciting industrial disharmony by urging the 2nd respondent not bring students on campus before the lecturers and researchers were paid, and that the applicant had breached Article 18 of the parties Recognition Agreement, which had been in existence since 23rd March, 1993.

The further averment is that the 2nd respondent also alleged that the applicant had breached Section 6 of the Industrial and Labour Relations Act, which according to it, has set the parameters of what the applicant can or cannot say or do as a Trade Union. The deponent also states that the 2nd respondent gave the applicant forty eight (48)

hours within which to show cause why it should not invoke the provisions of the Act, with a view to ask the Labour Commissioner to terminate the Recognition Agreement between the 2nd respondent and the applicant, as shown on the letter exhibited as 'KM2' to the affidavit.

It is deposed that in response to that letter, the deponent on 8th January 2020, via a letter which is exhibited as 'KM3', categorically stated that there were no reasons arising from the meeting of 6th January, 2020 that was held by the applicant, that justified the termination of the Recognition Agreement, on the ground that the relationship between the applicant and the 2nd respondent had broken down irretrievably.

Further, that he had clarified in that letter that the statement in the 2nd respondent's letter was officially made by himself, in his capacity as General Secretary of the applicant. He had also stated that other views were made by individual members, and did not represent the official position of the applicant.

He states that the 2nd respondent responded to his letter on 13th January, 2020, which letter is exhibited as 'KM4', stating that the applicant's response was not satisfactory, and the 2nd respondent would refer an application to the Commissioner to terminate the Recognition Agreement, by invoking the provisions of the Act. Further in his averments, the deponent states that prior to the 2nd respondent making an application to terminate the Recognition Agreement, and in connection with the meeting held by the applicant on 6th January, 2020, the Labour Commissioner wrote to the applicant on 7th

January, 2020, which letter is exhibited as 'KM5', notifying its membership of the Labour Commissioner's intention to cancel the certificate of registration of the applicant as a Trade Union.

The applicant was asked to show cause in writing as to why the certificate of registration should not be cancelled, pursuant to Section 12 (2) of the Act for violating the Act. It is averred that despite the Labour Commissioner clearly demonstrating that she was aggrieved by the sentiments made by the applicant at the meeting, by commencing the process of cancellation of the certificate of registration, the Labour Commissioner proceeded to sit, hear and ultimately determine the 2nd respondent's application to terminate the Recognition Agreement, at a hearing that was held on 22nd January, 2020.

The deponent contends that at the said hearing, he pointed out the fact the Labour Commissioner was a complainant in relation to the same subject matter, and she could not sit to hear the application for termination of the Recognition Agreement, as doing so would be in breach of one of the fundamental rules of natural justice, namely, that a person cannot be a judge in his own cause *(nemo judex causa sua).*

Further, that the deponent had pointed out that the procedure adopted by the Labour Commissioner to hear the 2nd respondent's application was irregular. This was on the basis that Clause 18 of the Recognition Agreement, spells out the procedure for termination, replacement, amendment or review of the Recognition Agreement, and therefore, the Labour Commissioner had no jurisdiction to entertain the application. Exhibited as 'KM6' to the affidavit, is the applicant's letter to the Labour Commissioner dated 20th January, 2020.

It is averred that Clause 18 of Recognition Agreement clearly stipulates that a party intending to terminate the Recognition Agreement should give the other party three (3) months' notice stating the reasons for such intention, which reasons must be of such a nature, as sufficiently strong to justify the move, and must relate to gross misunderstanding between the parties, in a manner that it may be said that the relationship between the parties has broken down irretrievably, as shown on the Recognition Agreement exhibited as 'KM7' to the affidavit.

Still in the affidavit, it is deposed that on 3rd February, 2020, in the absence of the applicant, a meeting was held at the Ministry of Labour and Social Security, and in attendance were the Minister of Labour and Social Security, the Permanent Secretary, Ministry of Labour and Social Security, Mr Chanda Kaziya, UNZA Registrar, Mr Sitali Wamundila, UNZA Vice Chancellor Professor Luke Evuta Mumba, and the Acting Labour Commissioner, Mrs Mukamasole M. Kasanda.

The averment is that the subject matter of the meeting was the substance of the meeting that was held on 22nd January, 2020, with regard to the application to terminate the Recognition Agreement, and to decide the fate of the application. The deponent contends that despite these glaring illegalities and procedural improprieties, the Labour Commissioner went ahead and approved the 2nd respondent's application to terminate of the Recognition Agreement between the applicant and the 2nd respondent. That this was through a letter dated 4th February, 2020, which is exhibited as 'KM8' to the affidavit.

It is averred that in addition to the Labour Commissioner acting in breach of Article 18 of the Recognition Agreement, the letter approving the 2nd respondent's application to terminate the Recognition Agreement, did not disclose sufficient reasons relating to gross misunderstanding between the applicant and the 2nd respondent, in a manner that it could be said that the relationship between the parties had broken down irretrievably.

The deponent states that this is because the said letter of termination does not disclose anywhere, the said unbridled insults to the 2nd respondent's management, as they were not even disclosed to the Labour Commissioner at the hearing that was held on 22nd January, 2020. Further in his averments, the deponent states that the Labour Commissioner's approval of the application to terminate the Recognition Agreement between the applicant and the 2nd respondent has led to a situation where the parties cannot formally engage each other on matters affecting the operations of UNZA or the applicant's members.

He goes on to depose that to this effect, on 7th February, 2020, the 2nd respondent wrote to the applicant advising that the parties could not engage each other formally on matters affecting the operations of the 2nd respondent or staff who are members of the applicant. The said letter is exhibited as 'KM9'.

The deponent contends that terminating the Recognition Agreement between the 2nd respondent and the applicant, which has been providing the machinery for consultation, discussion, negotiation and industrial interaction between the applicant's 769 members on the

ground that one of the members of the Union said something which the 2nd respondent finds unpalatable is excessive and disproportionate.

The deponent further contends that the decision by the Labour Commissioner to hear the 2nd respondent's application to terminate the Recognition Agreement when she had also shown that she was aggrieved by commencing the process of cancelling the applicant's registration certificate on the basis of the same allegations raised by the 2nd respondent, clearly goes against the rules of natural justice as the Labour Commissioner was a complainant against the applicant, and therefore, a judge in her own cause, or at the very least, incapable of being impartial.

It is also the deponent's contention that the decision by the Labour Commissioner to approve the termination of the Recognition Agreement was illegal, procedurally improper, unreasonable, irrational, disproportionate and was made in bad faith, and in blatant breach of the rules of natural justice. The deponent states that this decision has had the consequence of leaving the 769 members of the applicant, with no one to bargain for them, a situation that is likely to subject the voiceless members of the applicant to the whims and caprices of the 2nd respondent.

Still in the affidavit, the deponent deposes that he has been advised by his advocates that the Labour Commissioner is a public official, and therefore, her decision is amenable to judicial review, and in the same vein, so is the 2nd respondent.

No comment is also made with regard to the applicant's averment that the deponent of the affidavit in support of the application for judicial review, by a letter dated 8th January, 2020, responded to the 2nd respondent's letter dated 7th January, 2020, to the effect no reasons arising from the meeting that was held on 6th January, 2020, justified the termination of the recognition agreement on the ground that the relationship between the applicant and the 2nd respondent had broken down irretrievably.

The same goes with regard to the contention that the deponent, Kelvin Mambwe, made the statement in his capacity as General Secretary of the Union, and that the other views were individual member's opinions. The deponent also makes no comments with regard to the averment that the 2nd respondent on 13th January, 2020, responded to the applicant's letter dated 8th January, 2020, stating that it was inadequate and unsatisfactory, and that the 2nd respondent was referring the application to the Labour Commissioner to terminate the Recognition Agreement, by invoking provisions of the Act.

As regards the assertion that the Labour Commissioner on 7th January, 2020 wrote to the applicant notifying it of the intention to cancel the certificate of registration of the applicant as a Trade Union, and that the applicant should cause why the said certificate should not be cancelled, it is stated that the 1st respondent regulates the conduct and relationships between employers and employees through the registration of Trade Unions.

Therefore, it was within the 1st respondent's mandate to express concern, especially that the position taken by the applicant was

contrary to the spirit of a Trade Union. It is further deposed that contrary to the applicant's contention that the Labour Commissioner was clearly aggrieved by the sentiments that were made at the applicant's meeting, by commencing the process of cancellation of the applicant's certificate of registration, and then she proceeded to sit and determine the 2nd respondent's application to terminate the Recognition Agreement, and that this fact was pointed out to her, the 1st respondent is mandated to ensure that Trade Unions conduct themselves in accordance with the law, even when they are aggrieved.

Further, that the Labour Commissioner was mandated to comply with the provisions of the law, and notify the concerned parties of the decision to proceed to hear the application by either approving or rejecting the application to terminate the Recognition Agreement.

With regard to the allegation that the Labour Commissioner breached Article 18 of the Recognition Agreement, and that the letter approving the termination of the Recognition Agreement did not disclose sufficient reasons relating to gross misunderstanding between the applicant and the 2nd respondent, that it could be said that the relationship between them had broken down irretrievably, and that the said letter does not refer to the unbridled insults on the 2nd respondent's management, as they were not disclosed at the meeting held on 22nd January, 2020, the averment is that the letter exhibited as 'KM8' to the affidavit in support of the application for judicial review, does in fact give sufficient background and reasons.

The 1st respondent makes no comment on the assertions relating to the effect of the approval to terminate the Recognition Agreement, and

that the 2nd respondent on 7th February, 2020 wrote to the applicant advising that the parties could not engage each other formally, as well as the decision to terminate the Recognition Agreement on account of the 2nd respondent finding the views expressed by one member of the Union unpalatable, as being excessive and disproportionate.

The 1st respondent maintains that the Labour Commissioner was mandated to comply with the provisions of the law, and to notify the concerned parties of the decision to proceed to hear the application, as a response to the averments stating that the Labour Commissioner was aggrieved by commencing the process of cancellation of the applicant's certificate of registration, on the basis of the same allegations that were raised by the 2nd respondent, which went against the rules of natural justice.

The same is reiterated as regards the applicant's contention that it was illegal, procedurally improper, unreasonable, irrational, disproportionate, and that the decision to terminate the Recognition Agreement by the Labour Commissioner was made in bad faith. The 1st respondent makes no comment on the averments relating to the applicant's members being left with no one to bargain for them, and that the Labour Commissioner's decision, as well as that of the 2nd respondent, are subject to judicial review.

In the skeleton arguments, the 1st respondent refers to the cases of ***Nyampala Safaris (Z) Limited and four others v Zambia Wildlife Authority and six others*** [14] and ***Council of Civil Service Unions v Minister of State for Civil Service*** [5] on the purpose of judicial

review. The skeleton arguments respond to the grounds raised by the applicant for the grant of judicial review as follows;

a) ILLEGALITY

It is stated that the applicant alleges that the decision of the Acting Labour Commissioner in the letter dated 4th February, 2020, approving the termination of the Recognition Agreement was illegal, as she did not understand and give effect to her duties under Section 65A of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. The 1st respondent however states that their contention is that Section 65A of the said Industrial and Labour Relations Act, clothed the Acting Labour Commissioner with authority to approve or reject an application for the termination of the Recognition Agreement.

To this end, it is argued that the Acting Labour Commissioner had the mandate to regulate the conduct and relationship between employers and employees that are registered under a trade union. That part of that duty includes ensuring that members of a trade union conduct themselves within the provisions of the Industrial and Labour Relations Act, by not issuing statements that tend to injure or bring into disrepute, the good standing of the employers. That so acting, could not invoke the imputation of bias towards the applicant, as the acts fell within the mandate of the Acting Labour Commissioner.

b) IRRATIONALITY

On this ground, the 1st respondent states that the applicant's argument is that the decision of the Acting Labour Commissioner to

approve the termination of the Recognition Agreement on the ground that the applicant had violated Section 6 of the Industrial and Labour Relations Act, as well as breached Article 18 of the Recognition Agreement, was irrational, unreasonable and made in bad faith. The 1st respondent's argument is that the Acting Labour Commissioner was not mandated to consider whether the 2nd respondent had applied for the termination of the Recognition Agreement under Section 6 of the Industrial and Labour Relations Act, read together with Clause 18 of the Recognition Agreement.

Reference is made to Sections 65 and 65A of the Industrial and Labour Relations Act, and the 1st respondent argues that the 2nd respondent was not obliged to apply to terminate the recognition agreement, under Section 65 of the Industrial and Labour Relations Act. Further, that the introduction of Section 65A of the said Act provided an alternative method of terminating the recognition agreement. Thus, the two sections must not be considered conjunctively, as in the case where the statute uses the word *"and"* in its subsections.

It is the 1st respondent's argument that their contention is that the two sections stand alone, and that in each case, either party had the option to choose which provisions of the law to apply. The 2nd respondent in this case, chose Section 65A, and subjected the matter to an independent person to determine.

The argument is further that it is the 1st respondent's understanding that Article 18 of the Recognition Agreement subjected the dispute to the Bargaining Unit, which according to the article, does not mandate

the Bargaining Unit to reach a final determination of the dispute. That in fact, Article 18 allows the parties in a case where they fail to agree, to declare a dispute. The 1st respondent's submission is that the Acting Labour Commissioner applied her mind to the law and determined the matter with finality.

c) PROCEDURAL IMPROPRIETY

As regards this ground, the 1st respondent argues that they repeat the arguments under the head illegality, save to add that while the applicant states that the Acting Labour Commissioner held the meeting at which the termination of the Recognition Agreement was discussed, the applicant has not shown supportive evidence of the assertion. That this court must decide whether there was procedural impropriety, and reference is made to the case of ***R v Mental Health Review Tribunal, ex parte Clatworthy*** [4] where the court in considering the reasons given by a tribunal stated that;

> ***"Parliament having provided that reasons shall be given, in my view, that must clearly be read as meaning that proper, adequate reasons must be given, the reasons that are set out....must be reasons which will not only be intelligible, but can also reasonably be said to deal with the substantial points that have been raised".***

The argument is that the above case stated that regard must be had to what Parliament has provided, as a test for rejecting or approving an application to terminate a recognition agreement. That the procedure is simply that a party can apply, and the Labour Commissioner will

inform the parties of the date of hearing. Thereafter, the concerned parties are informed of the decision, whether it has been successful or not. The 1st respondent accordingly prays that the application be dismissed.

The 2nd respondent filed an affidavit in opposition on 24th March, 2020, which is deposed to by Sitali Wamundila, the Registrar of the 2nd defendant. He agrees that the applicant and the 2nd respondent entered into a Recognition Agreement on 23rd March, 1993, adding that it has not been amended to date.

It is deposed that the averments relating to the membership of the applicant, the medical scheme, and the Salary Advance Scheme (SAS) that it runs, as well as the assertion that the 2nd respondent has been deducting fees payable to NAPSA, the medical scheme and the SAS and has not remitted the said amounts to the applicant, is said to be within the applicant's peculiar knowledge.

The 2nd respondent agrees that the applicant held a meeting on 6th January, 2020, but states that the same should have been within its mandate and functions. The 2nd respondent denies the assertion by the applicant that at the said meeting, it discussed the grievances affecting the members, which fell within the objects and mandate of the applicant. This the deponent of the affidavit, states is on account of the address which was given by the General Secretary of the applicant, which was widely published in both the print and electronic media, some of which fell outside the mandate of the applicant.

The averment is further that some of the remarks made included a warning that no students should return to campus until the Union members were paid their salaries in full, in addition to a myriad of insults that were made to the UNZA management. The deponent contends that the words attributed to the General Secretary of the Union in paragraph 11 of the affidavit in support of the application for judicial review, fell outside the parameters of regulating the relationship between the applicant and the 2nd respondent.

It is admitted that pursuant to what was discussed in the meeting held by the applicant on 6th January, 2020, the 2nd respondent wrote to the applicant as alleged. The 2nd respondent reiterates that this was because the remarks made by the applicant fell outside the parameters of the objectives of the Union, and had the effect of inciting industrial disharmony. Further, the insults that were hurled were derogatory, disparaging, demeaning, spiteful and injurious to the UNZA management.

The 2nd respondent does not deny that it gave the applicant forty eight (48) hours, within which to show cause why the provisions of the Industrial and Labour Relations Act should not be invoked, with a view to terminating the Recognition Agreement between the applicant and the 2nd respondent.

It is also not denied that the applicant responded to the 2nd respondent, stating that no reasons arising from the meeting that it held on 6th January, 2020, justified the termination of the Recognition Agreement, on the ground that the relationship between the applicant and the 2nd respondent had broken down irretrievably. The 2nd

respondent's position is that the meeting of 6th January, 2020 was a Union meeting, that was organized by the Union and its members were present, and as such, all views, remarks and comments made at that meeting by all the members present represented the Union's views.

Further in the affidavit, it is deposed that the 2nd respondent does not deny that it responded to the applicant on 13th January, 2020, stating that the response that it had given was inadequate and unsatisfactory. The averment is that the 2nd respondent also agrees that it informed the applicant that it was referring the application to terminate the Recognition Agreement to the Labour Commissioner in line with the provisions of the Act. The 2nd respondent contends that the applicant did not give reasons why the Recognition Agreement should not be terminated, as it did not address the concerns that were raised.

It is deposed that on or about 13th January, 2020, the 2nd respondent wrote to the Acting Labour Commissioner asking her to terminate the Recognition Agreement by invoking the provisions of Section 65A of the Industrial and Labour Relations Act. The averment is also that Clause 18 of the Recognition Agreement is not couched in mandatory terms, and it therefore gives an option to terminate the said Recognition Agreement by way of that provision or Section 65A of the Act.

Still in the affidavit, it is stated that it was not the first time that the respondent had invoked the provisions of Section 65A of the Act. The averment is further that the applicant by responding to the application under Section 65A of the Act on 17th September, 2018, giving reasons

why the Recognition Agreement should not be terminated, waived their right to claim breach of Clause 18 of the Recognition Agreement.

The deponent deposes that on or about the 14th day of January, 2020, the Acting Labour Commissioner wrote to the applicant and the 2nd respondent, scheduling a meeting, as per Section 65A of the Industrial and Labour Relations Act, which was convened on or about the 22nd day of January, 2020. It is stated that in attendance at that meeting were representatives from the applicant, the 2nd respondent and the office of the Labour Commissioner.

The 2nd respondent also states that two issues were raised by it, being the threats as to the return of the students on campus, and the unbridled insults on management, as the reason why it had applied that the Recognition Agreement be terminated. This was on account of the fact that those issues incited industrial disharmony, and had caused the relationship between UNZA management and UNZALARU to break down irretrievably. Further, that the comments and unbridled insults fell outside the scope of the Union, as provided in Section 6 of the Industrial and Labour Relations Act.

The 2nd respondent states that the Labour Commissioner on or about 4th February, 2020 delivered a verdict to the effect that the relationship between the applicant and the 2nd respondent had broken down irretrievably, and approved the application to terminate the Recognition Agreement. It is contended that the procedure laid down in Section 65A of the Industrial and Labour Relations Act, and the criteria set out was followed, and therefore, the decision to terminate the Recognition Agreement was valid.

It is also the 2nd respondent's contention that while the applicant has relied on the ground of illegality, it has not shown that the decision of the Acting Labour Commissioner was illegal. The averment is that as the 2nd respondent has shown that the procedure laid down in Section 65A of the Industrial and Labour Relations Act was strictly followed, the ground for procedural impropriety cannot stand.

The 2nd respondent in the skeleton arguments like the 1st respondent, stresses that the remedy of judicial review is not concerned with the merits of the decision, but with the decision making process. Further, like the 1st respondent, the 2nd respondent relies on the cases of ***Nyampala Safaris (Z) Limited and four others v Zambia Wildlife Authority and six others*** (14) and ***Council of Civil Service Unions v Minister of State for Civil Service*** (5) as authority.

Reliance is also placed on the case of ***R v Independent Television Commission, Ex Parte Tsw Broadcasting Limited*** (7). As regards the grounds on which the judicial review is sought, the arguments are as follows;

a) ILLEGALITY

The case of ***Col Kasheke Chrispin Kayombo v The Committee on the Sale of Government Pool Houses, the Commander, Zambia Air Force and the Attorney General*** (13) is relied on. It is argued that it was stated in that matter that;

> ***"Briefly, illegality refers to a situation where an inferior court or Tribunal or public authority charged with a public duty acts without or in excess of its jurisdiction".***

The contention is that while the applicant has relied on the ground of illegality, it has not demonstrated the facts which establish that the decision of the Acting Labour Commissioner was illegal, in that it was made outside or in excess of her power. Reference is made to ***Judicial Remedies in Public Law, 2000, Sweet and Maxwell*** which states that;

> ***"Appeals deal with the merits of the case, whereas review deals with the legality of the power".***

The 2nd respondent argues that there is no nexus between the ground and the facts relied upon, as the Acting Labour Commissioner acted within the powers conferred by Section 65A of the Industrial and Labour Relations Act.

The 2nd respondent also argues in the alternative that should the applicant insist that there was illegality, then their argument is that Section 65A of the Industrial and Labour Relations Act gives the Labour Commissioner power to approve or reject an application made under that provision. Further, that the provision does not exclude the parties to a Recognition Agreement from making an application to the Labour Commissioner for termination of the Recognition Agreement.

That in order to prove illegality, two things have to be established namely;

1. That the inferior Court, Tribunal or public authority charged with a public duty acted without jurisdiction.
2. That the said inferior court, Tribunal or public authority acted in excess of its jurisdiction.

It is argued that the Acting Labour Commissioner had power under Section 65A of the Industrial and Labour Relations Act to approve or reject and application brought under that section, and therefore, there was no illegality in her decision.

b) IRRATIONALITY/UNREASONABLENESS

On the ground of irrationality/unreasonableness, the 2nd respondent contends that the applicant alleges that the Acting Labour Commissioner by approving the application to terminate the Recognition Agreement between the applicant and the 2nd respondent, violated Section 6 of the Industrial and Labour Relations Act, as well as breached Article 18 of the Recognition Agreement, by not giving three months' notice giving reasons for such intention, which reasons must be of such a nature, as sufficiently strong to justify such a move.

Further, that the said reasons must relate to gross misunderstanding between the parties in a manner that it can be said that the relationship between the parties has broken down irretrievably.

The 2nd respondent however argues that a decision may be deemed to be irrational, if it is so outrageous in its defiance of logic or of accepted moral standards that no person properly directing themselves on the relevant law, and acting reasonably, could have arrived at such, as was established in the Wednesbury case.

In this regard, the case of ***Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General*** [8] is relied on. That it was stated in that matter, that the Wednesbury unreasonableness principle applies to those exceptional cases where the

unreasonableness of a decision verges on an absurdity. The 2nd respondent's position is that there was no irrationality or unreasonableness on the part of the Acting Labour Commissioner, as the applicant acted outside its parameters as a Union, and it was only logical that the 2nd respondent could apply for the termination of the Recognition Agreement.

c) PROCEDURAL IMPROPRIETY

The 2nd respondent as regards this ground, refers to Section 65 of the Industrial and Labour Relations Act. It is argued that it is their understanding that the said provision makes it mandatory that every Union shall a Recognition Agreement. Further, that pursuant to that provision, a recognition agreement shall provide the methods, procedures and the rules relating to the procedures for settling of disputes or remedying grievances.

That in line with the said section, Clause 18 of the Recognition Agreement is titled "*Termination, Replacement, Amendment or Review of Agreement*". That the said Clause provides as follows;

> ***"This agreement may be terminated by three months prior notice given by either party to the other side, stating the reasons for such intention, which reasons must be of such a nature, as sufficiently strong to justify such a move, and must relate to gross misunderstanding, between the parties, in a manner that it may be said that the relationship between the parties has irretrievably broken down.***

Provided that where a party does not agree to the termination, it may refer the matter to the Bargaining Unit for negotiation. Where no agreement is reached by the Bargaining Unit, either party may declare a dispute in accordance with the relevant provisions of the Act".

The 2nd respondent states that in 2008, the Industrial and Labour Relations Act, was amended, ushering in Section 65A, which provides that a party to a recognition agreement may apply to the Commissioner for termination of a recognition agreement, giving reasons. The argument is that despite the amendment to the law, Clause 18 of the Recognition Agreement has never been amended to reflect the provisions of Section 65A.

Therefore, there is inconsistency between the Recognition Agreement and the Industrial and Labour Relations Act, with regard to termination of a recognition agreement. Reliance is placed on the cases of ***James Banda v Neria's Investments Limited 2016*** *(17)* and ***Almaz Lulsegen v British Airways Limited*** *(11)* to argue that where the provisions of a contract are in conflict with the law, the law prevails.

It is the 2nd respondent's argument that the procedure in Section 65A of the Industrial and Labour Relations Act was followed to the latter, but that should this court find that the procedure in Clause 18 of the Recognition Agreement should have been followed, then their submission is that the said Clause does not conclusively provide for the settling of disputes.

In support of this position, the 2nd respondent contends that Clause 18 only provides for the declaration of a dispute, without providing for how the same should be settled. Thus, their submission is that a dispute under the Recognition Agreement could only have been conclusively determined by an application under Section 65A of the Industrial and Labour Relations Act.

Further in their arguments, the 2nd respondent states that Clause 18 of the Recognition Agreement is not couched in mandatory terms, as it provides that a party may give three months' notice to the other, stating the reasons for such intention to terminate. Reliance is placed on the case of ***Nursing Council of Zambia v Inutu Milambo Mbangweta*** *(12)*, which held that;

> ***"the primary rule of construction or interpretation of statues is that enactments must be construed according to the plain and ordinary meaning of words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to a declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified".***

That this position was emphasized in the case of ***Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others*** *(10)*. Thus, it is argued, that the use of the word "may" in the agreement entails that the 2nd respondent had the option to either go by Clause 18 of the Recognition Agreement, or by Section 65A of the Act. The submission is also that in 2018, the 2nd respondent being aggrieved

with the applicant, wrote to the Labour Commissioner, invoking the provisions of Section 65A of the Industrial and Labour Relations Act to terminate the Recognition Agreement.

However, the Labour Commissioner rejected the 2nd respondent's application, but the applicant was warned not to conduct itself outside it's mandate. Thus, the procedure in Section 65A of the Act is not foreign, and has been used before, and the applicant's allegations as regards procedural impropriety are an afterthought, as the decision of the Acting Labour Commissioner was not in their favour.

The applicant filed an affidavit in reply to the 1st respondent's affidavit in opposition on 14th April, 2020, which is deposed to by Kelvin Mambwe. That affidavit repeats the averments in the affidavit in support of the application for judicial review, and reiterates that the Acting Labour Commissioner was conflicted at the material time, as regards the termination of the Recognition Agreement, as she had written to the applicant on 7th January, 2020, based on the same facts and issues that the 2nd respondent had premised in its' letter dated 13th January, 2020, asking the Acting Labour Commissioner to terminate the Recognition Agreement.

The applicant also states that it denies that its' conduct was contrary to the spirit of a trade union, warranting the 1st respondent to express concern. It is contended that the Acting Labour Commissioner was in any event duty bound to consider the terms of the Recognition Agreement, and in particular Clause 18 of the said agreement, when considering the application to terminate the recognition agreement.

Further, that the deponent of the 1st respondent's affidavit in opposition has not denied that on 3rd February, 2020, in the absence of the applicant, a meeting was held at the Ministry of Labour and Social Security at which the Minister of Labour Security, the Permanent Secretary under the Ministry of Labour and Social Security, Mr Chanda Kaziya, UNZA Registrar, UNZA Vice Chancellor, Professor Luke Evuta Mumba, and the Acting Labour Commissioner were present.

The averment is also that in that meeting, the subject of discussion was the approval of the application to terminate the Recognition Agreement. The applicant also reiterates that the Acting Labour Commissioner breached Clause 18 of the Recognition Agreement, as the 2nd respondent's application did not disclose sufficient reasons relating to gross misunderstanding between the applicant and the 2nd respondent, in a manner that may be said that the relationship between the parties had broken down irretrievably.

The contention is further that the letter of termination did not indicate anywhere the said unbridled insults on the 2nd respondent's management. The applicant also avers that Clause 18 of the Recognition Agreement has a clear procedure for termination of the Recognition Agreement.

In reply to the 2nd respondent's affidavit in opposition, also filed on 14th April, 2020, the applicant confirms that the Recognition Agreement that was signed between the applicant and the 2nd respondent has never been amended. That the applicant in the

meeting of 6th January, 2020, was within its mandate, objectives and functions is reiterated.

The averment is further that the 2nd respondent has not highlighted the remarks that the deponent of the affidavit in support of the application for judicial review made, that fell outside the objects and mandate of the applicant. The deponent states that the views that he expressed were in the context of the issues that had prompted the meeting of 6th January, 2020. Further, that the 2nd respondent has not demonstrated or provided evidence of how the alleged remarks incited industrial disharmony.

The deponent denies that any derogatory, disparaging, demeaning, spiteful remarks, as well as insults, were hurled at the 2nd respondent's management, warranting the termination of the Recognition Agreement. This it is deposed, can be seen from the failure by the 2nd respondent to cite any examples of the alleged insults.

It is also denied that all the remarks that were made by the members of the applicant during the meeting of 6th January, 2020, expressed the views of the applicant, as not everything that is said by a member of the applicant amounts to the applicant's position, unless the majority of the members attending a duly convened meeting of the applicant, resolves to adopt the views of a member, in line with the rules of the applicant.

The applicant still in the affidavit in reply, states that it responded to the 2nd respondent's application for termination of the Recognition

Agreement in its letter dated 20th January, 2020 to the Acting Labour Commissioner, which is exhibited as 'KM6' to the affidavit in support of the application for judicial review, stating that the Acting Labour Commissioner in her letter dated 14th January, 2020, had not indicated the reasons that the 2nd respondent had advanced meriting the application.

It is also contended that the applicant has not been availed the letter that the 2nd respondent wrote to the Acting Labour Commissioner setting out the reasons that the 2nd respondent wanted the Recognition Agreement terminated, save for letter exhibited as 'KM4' to the affidavit in support of the application for judicial review, dated 13th January, 2020.

Further in the affidavit in reply, the applicant states that Clause 18 of the duly registered Recognition Agreement of 1993, specifically sets out the procedure for termination of the said Recognition Agreement, and therefore, the Acting Labour Commissioner, and indeed the 2nd respondent were legally and contractually obligated to adhere to the provisions of said clause.

The applicant goes on to further depose that past decisions of the 2nd respondent to invoke the provisions of Section 65A of the Industrial and Labour Relations Act should not have had a bearing on the Acting Labour Commissioner's determination of the 2nd respondent's application for termination of the Recognition Agreement in January, 2020, as each application has to be dealt with on its own merits.

Rules of the Supreme Court of England, 1999 Edition. The reliefs sought in the Notice are;

a) A **DECLARATION** that the decision of the Acting Labour Commissioner made on 4th February, 2020 in which she approved the 2nd respondent's application to terminate the Recognition Agreement dated 23rd March, 1993 entered into between the applicant and the 2nd respondent (The Recognition Agreement), does not amount to termination of the Recognition Agreement, and that the applicant and the 2nd respondent are still under an obligation to comply with the termination provisions of the Recognition Agreement;

b) **CERTIORARI** requiring the decision of the Acting Labour Commissioner to approve the termination of the Recognition Agreement to be moved into the High Court for purposes of determination and quashing;

c) **MANDAMUS** directing the University of Zambia Council, the 2nd respondent herein to comply with the terms of the Recognition Agreement;

The grounds on which the reliefs above are sought are threefold, being;

1. Illegality
2. Irrationality
3. Procedural impropriety

I will deal with the grounds as set out.

a) ILLEGALITY

The applicant contends that the decision of the Acting Labour Commissioner was illegal, as she did not understand and give effect to her duties under the provisions of Section 65A of the Industrial and Labour Relations Act when she:

a) with the full knowledge that she was incapable of being impartial, as she had written to the applicant on 7th January, 2020, to show cause why its' certificate of registration should not be cancelled, she decided the 2nd respondent's application to terminate the Recognition Agreement.

b) The Acting Labour Commissioner on 3rd February, 2020, held a meeting with the 2nd respondent's Vice Chancellor, Professor Luke Mumba, the 2nd respondent's Registrar Mr Sitali Wamundila in the presence of the Minister of Labour and Social Security, the Permanent Secretary, in the Ministry of Labour and Social Security, Mr Chanda Kaziya at which the approval of the application for termination of the Recognition Agreement was discussed, and a decision to approve the termination was reached.

The 1st respondent has argued that the decision of the Acting Labour Commissioner was not illegal, as Section 65A of the Industrial and Labour Relations Act clothed the Acting Labour Commissioner with authority to either approve or reject the application to terminate the Recognition Agreement. The argument is further that it is part of the Labour Commissioner's mandate under the Industrial and Labour

Relations Act, Chapter 269 of the Laws of Zambia to regulate the relationship between employers and employees registered under trade unions.

The argument is further that on account of the Acting Labour Commissioner having acted within her mandate under the law, there can be no imputation that she was biased towards the applicant.

The 2nd respondent has argued in the same manner as the 1st respondent, that the Acting Labour Commissioner had power under Section 65A of the Industrial and Labour Relations Act to consider the application to terminate the Recognition Agreement, and either to approve or deny the application.

I should state right at the outset, as submitted by the parties, that judicial review is not concerned with the merits of the decision, but with the decision making process. In this regard, the authorities cited by the parties refer. The basis of the claim by the applicant, as can be deciphered from the notice in support of the application for judicial review, is that the applicant does not contend that the Acting Labour Commissioner did not have power to consider the application.

This is in contrast to the arguments by the respondents that the applicant has not shown that the Acting Labour Commissioner acted outside or in excess of her jurisdiction, which would render the decision that she made illegal. The argument by the respondents is anchored on the decision in the case of ***Col Crispin Kashweka Kayombo v The Committee on the Sale of Government Pool House,***

the Commander Zambia Air Force and the Attorney General [13] that they have relied on. In that matter, it was stated that;

> ***"briefly, illegality refers to a situation where an inferior court or Tribunal or public authority, charged with a public duty acts without or in excess of its jurisdiction".***

The applicant's contention is that the Acting Labour Commissioner, while having power pursuant to Section 65A of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia to consider the application, did not correctly understand the law that regulated her decision making power. In support of that position, reliance has been placed on the case of ***Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General*** [8].

In that matter, citing the case of ***Council of Civil Service Unions and others v Minister for the Civil Service*** [5], it was stated that;

> ***"By "illegality" as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it".***

The applicant has also relied on the case of ***Padfield and others v The Minister of Agriculture, Fisheries and Food and others*** [2] in that regard. ***De Smith Woolf and Jowell on Judicial Review of Administrative Action, Sweet and Maxwell, London, 1995*** at page 295 states that a decision is illegal if;

1. *It contravenes or exceeds the terms of the power which authorizes the making of the decision.*

2. *It pursues an objective other than that for which the power to make the decision was conferred.*

In arguing that the Acting Labour Commissioner's decision to approve the termination of the Recognition Agreement between the applicant and the 2nd respondent was illegal, the applicant's argument is firstly that, the Acting Labour Commissioner on 7th January, 2020, had written to the applicant to show cause why its' certificate of registration as a Union should not be cancelled, following the meeting that the applicant held on 6th January, 2020, at which among other concerns, the delay to pay the applicant's members salaries for December, 2019 was raised.

Secondly it is contended that after the Acting Labour Commissioner had convened the meeting at which the termination of the Recognition Agreement between the applicant and the 2nd respondent was considered on 22nd January, 2020, on 3rd February, 2020, she met representatives of the 2nd respondent, being the Vice Chancellor and the Registrar, in the presence of the Minister of Labour and Social Security and the Permanent Secretary for that Ministry, in the absence of the applicant.

At that meeting, the fate of the application made by the 2nd respondent for the termination of the Recognition Agreement between the applicant and the 2nd respondent was decided and reached. Exhibit 'KM5' to the affidavit in support of the notice of the application for judicial review is the letter that the Acting Labour Commissioner wrote to the applicant on 7th January, 2020, asking it show cause why its' certificate of registration should not be cancelled, following the press

briefing that it held concerning the unpaid December salaries. As deposed to by all the parties, the meeting to consider the 2nd respondent's application was held on 22nd January, 2020.

Exhibit 'KM6' to the affidavit in support of the application for judicial review, is a letter that the applicant wrote to the Acting Labour Commissioner on 20th January, 2020 stating that on 7th January, 2020, that office had written to the applicant asking it show cause why its certificate of registration as a union should not be cancelled. Further, that the Acting Labour Commissioner on 14th January, 2020 had written to the applicant requesting it to appear before her on the hearing of the application that had been made by the 2nd respondent for termination of the Recognition Agreement between the applicant and the 2nd respondent.

In that letter, the applicant had noted that the office of Labour Commissioner is a public office, and that in executing the duties of that office, regard must be had to the rules of natural justice. The applicant in that letter went on to highlight the fact that the Acting Labour Commissioner had written to it to show cause why its certificate of registration should not be cancelled, on account of the press briefing that was held with regard to the unpaid December salaries. Therefore, she was a complainant.

However, despite that, she had invited the applicant to a hearing of the 2nd respondent's application to terminate the Recognition Agreement between the applicant and the 2nd respondent, based on the same facts as those on which she had asked the applicant to show cause why, its' certificate of registration should not be cancelled.

There is nothing on the record to show that the Acting Labour Commissioner responded to the concerns that were raised by the applicant in the letter exhibited as 'KM6' to the affidavit in support of the application for judicial review, relating to her being a complainant on the same facts as those made by the 2nd respondent in the application to her for termination of the Recognition Agreement between the applicant and the 2nd respondent.

It can be seen from the documents that the basis of the Acting Labour Commissioner writing to the applicant to show cause why its certificate of registration should not be cancelled was on the basis of the meeting that the applicant held on 6th January, 2020, regarding the delay in payment of the December, 2019 salaries.

This was also the basis upon which the 2nd respondent wrote to the applicant on 7th January, 2020, alleging that the applicant was inciting industrial disharmony, and had breached the Recognition Agreement, as seen on exhibit 'KM2' to the affidavit in support of the application for judicial review.

Exhibit 'KM3' to the said affidavit is the response that the applicant wrote to the 2nd respondent on 8th January, 2020, as regards the allegations in exhibit 'KM2'. Exhibit 'KM5' is the response by the 2nd respondent to the applicant dated 13th January, 2020, indicating that the 2nd respondent was not satisfied with the applicant's response, and it was invoking the provisions of the Industrial and Labour Relations Act, and had made an application to the Labour Commissioner.

From the letter exhibited as 'KM5' to the affidavit in support of the application, the Acting Labour Commissioner was clearly aggrieved with the applicant. She however proceeded to hear the 2nd respondent's application to terminate the Recognition Agreement between the applicant and the 2nd respondent on 22nd January, 2020, which application was also based on her grievance with the applicant.

In the case of ***Andreas Panani v Attorney General*** *(15)* it was held that;

> ***"The task for the Courts in evaluating whether a decision is illegal is essentially one of constructing the content and scope of the instrument conferring the duty or power upon the decision maker.***
>
> ***The primary purpose of judicial review is to ensure that an individual or entity is given fair treatment by the authority to which he or it has been subject"***.

Section 65 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia provides for recognition agreements, while Section 65A of the same Act provides for termination of recognition agreements. It states that;

> ***"(1) A party to a recognition agreement may apply to the Commissioner for termination of the recognition agreement stating the reasons therefor.***
>
> ***(2) The Commissioner shall, where the Commissioner receives an application under subsection (1) inform the other party to the recognition agreement in respect of***

which the application is made and set a date on which the application shall be heard.

(3) The Commissioner may, where the Commissioner hears the parties pursuant to subsection (2)-

a) approve the termination of the agreement; or

b) reject the application and give reasons therefor".

The above section gives the Labour Commissioner discretionary power to hear an application to terminate a recognition agreement, as it uses the word "may". This entails that it is not mandatory for the Labour Commissioner to hear an application once it is made. In this matter, the Acting Labour Commissioner had already written to the applicant on 7th January, 2020, asking it show cause why its' certificate of registration should not be revoked, and she thereafter went ahead to consider the application to terminate the Recognition Agreement which had been made by the 2nd respondent, and which related to the applicant and the 2nd respondent, based on the same facts as her grievance against the applicant.

She had discretion under Section 65A of the Industrial and Labour Relations Act not to proceed to determine the 2nd respondent's application, as she was also aggrieved with the applicant. By proceeding to determine the application, the Acting Labour Commissioner, exercised her powers under the section for a purpose for which it was not granted. As such, she breached the rules of natural justice, as there was no fairness in the applicant appearing before her, when she was also aggrieved with the applicant.

This is compounded by the fact that the applicant alleges that on 3rd February, 2020, the Acting Labour Commissioner met representatives of the 2nd respondent, being the Vice Chancellor and the Registrar in the presence of the Minister of Labour and Social Security and the Permanent Secretary for that Ministry, to the exclusion of the applicant, at which the decision to terminate the Recognition Agreement between the applicant and the 2nd respondent was reached.

Whilst the respondents have argued that no proof of the meeting has been provided, there has been no express denial of the averments relating to that allegation. In fact, the 1st respondent in its skeleton arguments agrees that the meeting was held. Therefore, there was illegality in the decision making process, as the Acting Labour Commissioner exercised her powers under Section 65A of the Industrial and Labour Relations Act for a purpose for which they have not been conferred. I accordingly find that the ground of illegality succeeds.

b. IRRATIONALITY/UNREASONABLENESS

Under this ground, the applicant alleges that the decision by the Acting Labour Commissioner to approve the application to terminate the Recognition Agreement between the applicant and the 2nd respondent violated Section 6 of the Industrial and Labour Relations Act, and breached Article 18 of the Recognition Agreement. It is argued that the decision to terminate the Recognition Agreement was irrational, unreasonable and made in bad faith because the 2nd respondent had not complied with the provisions of Clause 18 of the Recognition Agreement.

This is on account of the fact that the 2nd respondent did not give the applicant three months' notice of the intention to terminate the Recognition Agreement, stating the reasons for such intention. That such reasons should be of such a nature as to sufficiently justify such a move, and must relate to gross misunderstanding between the parties, in a manner that could be said that the relationship between the parties had broken down irretrievably.

The applicant further contends that the 2nd respondent's application to the Acting Labour Commissioner to terminate the Recognition Agreement did not disclose sufficient reasons relating to gross misunderstanding between the applicant and the 2nd respondent, that it could be said that the relationship between the two had broken down irretrievably.

This the applicant has argued, is because the letter terminating the Recognition Agreement does not indicate anywhere, the alleged misunderstanding between the parties or the unbridled insults on the 2nd respondent's management, which were in fact not even disclosed to the Acting Labour Commissioner during the hearing on 22nd January, 2020.

The applicant further on this ground argues that the decision that the Acting Labour Commissioner made to terminate the Recognition Agreement was irrational or unreasonable, as it was not a decision that could have been made by any person, properly exercising their mind to the question of the continued existence of the Recognition Agreement. The cases of ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** [1], ***Roy Clarke v The Attorney***

General *(9)* and ***The Attorney General v Nigel Kalonde Mutuna and others*** *(16)* have been relied on to support this proposition.

The argument is that these authorities held that a decision is ***"Wednesbury unreasonable"*** if it so outrageous in its defiance of logic or accepted moral standards, that no sensible person who has applied his mind to the question to be decided, could have arrived at it.

The 1st respondent argues that the Acting Labour Commissioner was not mandated to consider whether the 2nd respondent had applied for termination of the Recognition Agreement under Section 65 of the Industrial and Labour Relations Act, read together with Clause 18 of the Recognition Agreement. Further, that there are two methods of terminating a recognition agreement, being, firstly under Section 65A of the Industrial and Labour Relations Act and secondly, under the Recognition Agreement.

Therefore, the 2nd respondent had an option of which route to invoke. The argument is also that it is the 1st respondent's understanding that under the Recognition Agreement, Article 18 subjects a dispute to a Bargaining Unit, which does not mandate the Bargaining Unit to reach a final determination of the dispute. This is because it states that where the parties fail to agree, they must declare a dispute.

The 2nd respondent on the other hand, has argued like the applicant, that a decision will be irrational or unreasonable, popularly known as ***"Wednesbury unreasonable***", if it is so outrageous in its' defiance of logic or of accepted moral standards, that no person properly directing

themselves on the relevant law, and acting reasonably, could have reached that decision. However, the 2nd respondent contends that the applicant has failed to demonstrate that the decision made by the Acting Labour Commissioner was ***"Wednesbury unreasonable***".

The case of ***Derrick Chitala*** has been referred to, stating that in that case, it was stated that "***Wednesbury unreasonable"*** applies to only those exceptional cases where the unreasonableness of a decision verges on absurdity.

Section 6 of the Industrial and Labour Relations Act provides as follows;

> ***"6. Every employee shall promote, maintain and co-operate with the management of the undertaking in which the employee is employed in the interest of industrial peace, greater efficiency and productivity".***

This section imposes obligations on employees in respect of trade unions and their activities in a work place. It can be seen from the arguments that the applicant contends that the Acting Labour Commissioner breached this provision by determining the application to terminate the Recognition Agreement which was made by the 2nd respondent.

That this is because the Recognition Agreement between the applicant and the 2nd respondent in Clause 18, provides for how it may be terminated. The 1st respondent has however argued that there are two choices with regard to how a collective agreement may be terminated. That the first is by invoking Section 65A of the Industrial and Labour

Relations Act, while the second is by invoking the terms of the Recognition Agreement. It has been seen that Section 65A of the Industrial and Labour Relations Act provides that an application may be made to the Labour Commissioner for termination of a recognition agreement.

The 2nd respondent in the skeleton arguments states that this provision came into effect in 2008 when the Act was amended. However, following that amendment to the law, the Recognition Agreement between the applicant and the 2nd respondent which was entered into on 23rd March, 1993 was not amended, to reflect the amendments that were introduced to the Industrial and Labour Relations Act in 2008.

Clause 18 of the Recognition Agreement which is exhibited as 'KM7' to the affidavit in support of the application for judicial review states that;

> ***"This agreement may be terminated by three months prior notice given by either party to the other side, stating the reasons for such intention, which reasons must be of such a nature, as sufficiently strong to justify such a move, and must relate to gross misunderstanding, between the parties, in a manner that may be said that the relationship between the parties has irretrievably broken down.***
>
> ***Provided that where a party does not agree to the termination, it may refer the matter to the Bargaining Unit for negotiation. Where no agreement is reached by the***

Bargaining Unit, either party may declare a dispute in accordance with the relevant provisions of the Act".

This Clause uses the word *"may"*, and Section 65A of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia in empowering the Labour Commissioner to hear applications for the termination of Recognition Agreements also uses the word *"may"*. This entails that neither of these two modes are mandatory, and a party has a choice which option to choose.

Part VII of the Industrial and Labour Relations Act, particularly in Section 64 (1) of the Act, mandates a registered employer and a trade union to which employees belong, to enter into recognition agreements, within three months of a certificate of registration being issued.

Section 65 (1) of the Act on the other hand states that;

"65. (1) Every recognition agreement shall be in writing, signed by the representatives of the parties to it and shall provide-

(a) that the employer or employers' organisation, as the case may be, has recognised the trade union as representative of, and bargaining agent for, the eligible employees represented by the trade union so recognised for the purpose of regulating relations between the employer or employers' organisation and the trade union;

(b) for the rules relating to grievances and bargaining procedures

(c) for the methods, procedures and rules under which the agreement may be reviewed, amended, replaced or terminated".

It can be seen from the above provision, that prior to the introduction of Section 65A of the Act, the law provided that the parties to recognition agreements would in the said agreements make provision on how the said recognition agreements could be terminated by the parties. The regulator being the Labour Commissioner was ousted from that process.

However, the applicant and the 2nd respondent herein did not go back and amend their Recognition Agreement following the introduction of Section 65A of the Industrial and Labour Relations Act, thereby leaving it open for a party thereto, to choose which method they wanted to use to terminate the Recognition Agreement, and it has been seen that Clause 18 of the said agreement uses the word *"may"*.

That being the position, and as the 2nd respondent invoked the provisions of Section 65A of the Industrial and Labour Relations Act to have the Recognition Agreement terminated, the Acting Labour Commissioner was bound only by the provisions of that Section which conferred her with the power to determine the application, and not the Recognition Agreement that the applicant and the 2nd respondent signed.

Thus, it accordingly follows that the Acting Labour Commissioner was not bound to consider the provisions of Clause 18 of the Recognition Agreement, regarding how termination of the Recognition Agreement was to be done, in terms of the notice period to be given for the intention to terminate the Recognition Agreement, as well as the sufficiency of the reasons advanced for the termination of the Recognition Agreement, which are that the relationship between the applicant and the 2nd respondent could be said to have broken down irretrievably.

What applied, in line with Section 65A of the Industrial and Labour Relations Act, was that there were reasons that were advanced. Exhibit 'KM8' to the affidavit in support of the application for judicial review shows that the Acting Labour Commissioner considered the reasons that the 2nd respondent had advanced for making the application.

As to whether the decision that the Acting Labour Commissioner made was ***"Wednesbury unreasonable"***, the applicant has argued that this is on account of the failure by the Acting Labour Commissioner to comply with the provisions of the Recognition Agreement that was signed by the applicant and the 2nd respondent. As seen from the authorities relied on by all the parties, a decision is ***"Wednesbury unreasonable"*** if it so outrageous in its defiance of logic or accepted moral standards, that no sensible person applying their mind to the question to be decided, could have arrived at it.

I have said that the Acting Labour Commissioner was not bound to consider the provisions of Clause 18 of the Recognition Agreement

that was signed between the applicant and the 2nd respondent, as what bound her was Section 65A of the Industrial and Labour Relations Act, the provision that vested her with power to hear the application.

Therefore, it cannot be said that the Acting Labour Commissioner's decision to approve the termination of the Recognition Agreement between the applicant and the 2nd respondent was ***"Wednesbury unreasonable"*** on account of not considering the provisions of Clause 18 of the Recognition Agreement. The ground of irrationality/unreasonableness fails.

c) PROCEDURAL IMPROPRIETY

On this ground, the applicant argues that the Acting Labour Commissioner approved the termination of the Recognition Agreement without regard to the procedure for the cancellation of the said agreement as provided in Clause 18 of the agreement. That this procedure required reference of the question to the Bargaining Unit, and if the parties failed to agree, a dispute could be declared.

It has also been contended that there was procedural impropriety on the part of the Acting Labour Commissioner to approve the termination of the Recognition Agreement, when she had prior to the application being heard, served the applicant with a notice to show cause why the applicant's certificate of registration should not be cancelled. She thereby acted in breach of the rules of natural justice, and her decision was procedurally flawed or improper.

The other basis on this ground, is that the Acting Labour Commissioner held a meeting with representatives of the 2nd respondent in the presence of the Minister of Labour and Social Security and the Permanent Secretary for that Ministry, to the exclusion of the applicant, on 3rd February, 2020, at which the approval of the termination of the Recognition Agreement was discussed, and a decision to approve the same was reached.

The applicant has relied on the case of ***Shilling Bob Zinka v The Attorney General*** *(6)*, stating that in that matter, it was held that the principles of natural justice are implicit in the concept of fair adjudication. Also relied on is the case of ***Andreas Panani v Attorney General*** *(15)*.

The 1st respondent in response has repeated their arguments in relation to the ground of illegality, and have also relied on the case of ***R v Mental Health Review Tribunal, ex parte Clatworthy***.

The 2nd respondent has however argued that Section 65 of the Industrial and Labour Relations Act makes it mandatory for all unions to have recognition agreements, which must provide for the methods, procedures and rules relating to the settling of disputes or remedying of grievances. That pursuant to that provision of the law, Clause 18 of the Recognition Agreement between the applicant and the 2nd respondent was crafted.

The 2nd respondent has further argued that in 2008, an amendment was made to the Industrial and Labour Relations Act, which saw the introduction of Section 65A, giving power to a party to a recognition

agreement to apply to the Labour Commissioner to terminate a recognition agreement. It is argued that there is inconsistency between the Recognition Agreement that the applicant and the 2nd respondent signed, and the Industrial and Labour Relations Act, with regard to termination of the Recognition Agreement.

Reliance has been placed on the case of ***James Banda v Neria's Investments Limited*** *(17)* stating that it was observed in that case as follows;

> ***"The statute has however given clear directive of what needs to be done when an employee invokes a termination clause. It there is conflict between the contract of employment and the statute as regards the application of the notice clause, then the provisions of the law reign supreme"***.

Further reliance has been placed on the case of ***Almaz Lulsegen (female) v British Airways Limited*** *(11)* stating that it was stated in that case that at common law, it is a fundamental principle, well grounded in commercial transactions, that a person is free, unless restricted by statute to enter into a contract with another. The 2nd respondent has argued that as Section 65A of the Industrial and Labour Relations Act provides for how a recognition agreement should be terminated, it is what should be applied.

The alternative argument by the 2nd respondent is that should I find that the provisions of Clause 18 of the Recognition Agreement should apply, then their argument is that this Clause is not exhaustive. This

is on account of the fact that it provides for the declaration of a dispute, without providing for how the same should be settled, while Section 65A of the Industrial and Labour Relations Act provides for conclusive settlement.

It has been further argued that Clause 18 uses the word *"may"*, and it is therefore not mandatory that the procedure thereunder should be employed. As authority, the case of ***Nursing Council of Zambia v Ingutu Milambo Mbangweta*** *(12)* has been relied on, as well as the case of ***Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others*** *(10)*.

The gist of the argument with respect to those authorities, is that the primary rule of construction or interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words unless, such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case, the grammatical sense of the words may be extended or modified.

As regards the argument that the Acting Labour Commissioner made the decision to approve the termination agreement between the applicant and the 2nd respondent, without having regard to the procedure in Clause 18 of the Recognition Agreement, when I dealt with the ground of irrationality/unreasonableness, I noted that both the Recognition Agreement and Section 65A of the Industrial and Labour Relations Act which provide for the termination of the Recognition Agreements, are not couched in mandatory terms, as they use the word *"may"*.

Thus, a party to a recognition agreement may invoke either of those two provisions. I further noted that the Acting Labour Commissioner exercised her powers under Section 65A of the Industrial and Labour Relations Act, which is the statute that empowered her to hear the application to terminate the Recognition Agreement, and not the Recognition Agreement between the applicant and the 2nd respondent, as that Recognition Agreement did not vest her with power to terminate it.

I did also note that the reasons required to be given for termination of a recognition agreement under the two provisions differ, with Section 65A of the Industrial and Labour Relations Act providing that reasons must be given for the application, while Clause 18 of the Recognition Agreement states that those reasons must be sufficient enough to conclude that the relationship between the parties to the said agreement has broken down irretrievably.

Further, while Clause 18 of the Recognition Agreement requires notice of three (3) months in writing to be given of the intention to terminate it, that provision is not stipulated in Section 65A of the Industrial and Labour Relations Act. Therefore, as I found earlier, it consequently follows that the Acting Labour Commissioner was not duty bound to consider the provisions of Clause 18 of the Recognition Agreement between the applicant and the 2nd respondent, as she was only bound by the provisions of Section 65A of the Industrial and Labour Relations, Act, under which she exercised her powers.

On that basis, the argument that the decision of the Acting Labour Commissioner was procedurally flawed and improper, cannot stand.

With regard to the assertion that the Acting Labour Commissioner approved the termination of the Recognition Agreement between the applicant and the 2nd respondent, when she has already written to the applicant to show cause why its certificate of registration should not be terminated, and that she met representatives of the 2nd respondent in the presence of the Minister of Labour and Social Security and the Permanent Secretary for that Ministry, in the absence of the applicant at which the decision to approve the termination of the Recognition Agreement was reached, after hearing the application, I have already found that this was improper.

I have stated that by proceeding to determine the application to terminate the Recognition Agreement between the applicant and the 2nd respondent on an application made by the 2nd respondent, the Acting Labour Commissioner, exercised her powers under the section for a purpose for which it was not granted. This was because she had also asked the applicant to show cause why its' certificate of registration should not be cancelled, based on the same facts that the 2nd respondent had advanced in its application.

Further, it was improper for the Acting Labour Commissioner to meet only one party after having heard the application to terminate the Recognition Agreement, and thereafter approve the application, as this shows that she was not impartial in the execution of her duties. As such, the Acting Labour Commissioner breached the rules of natural justice, as there was lack of fairness in the applicant appearing before her, when she was also aggrieved with the applicant. The outcome of the hearing was not impartially reached.

In the case of ***Andreas Panani v Attorney General*** *(15)*, the Honourable Judge with regard to procedural impropriety stated that;

> ***"The Learned authors of De Smith's Judicial Review state that there is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law, or created by statute. These include rights in property, personal liberty, status, and immunity from penalties, or other fiscal impositions***".

It has also been seen that the case of ***Shilling Bob Zinka v the Attorney General*** *(6)* also reiterated this principle. Thus, it was procedurally improper for the Acting Labour Commissioner to approve the termination of the Recognition Agreement between the applicant and the 2nd respondent, as she was an aggrieved person in relation to facts giving rise to the 2nd respondent making the application for the reasons I have given. The third ground succeeds on that basis.

The first and third grounds of the application having succeeded, I declare that the decision by the Acting Labour Commissioner made on 4th February, 2020, approving the 2nd respondent's application for termination of the Recognition Agreement dated 23rd March, 1993 between the applicant and the 2nd respondent does not amount to a termination of the said agreement. The applicant and the 2nd respondent are still under obligation to comply with the termination provisions of the said agreement.

Further, I grant the order of certiorari, quashing the decision of the Acting Labour Commissioner, and I grant an order of mandamus directing the University of Zambia Council, the 2nd respondent herein to comply with the terms of the Recognition Agreement. The applicant is also awarded costs of the proceedings, to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 17th DAY OF AUGUST, 2020

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE