

IN THE SUPREME COURT OF ZAMBIA

SCZ/08/20/92

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN

LEONARD AARON CHAKULETELA KAFUNDA Appellant

vs

THE ATTORNEY GENERAL 1st Respondent

THE WORKMEN'S COMPENSATION FUND 2nd Respondent  
CONTROL BOARD

Coram: Bweupe, A.C.J., Sakala and Chaila, JJ.s

On 9th June 1993 and 9th December, 1993

For the Appellant: Mr. D. Kafunda of Kafunda & Co., and  
Mr. Chilandu

For the 1st Respondent: Mr. Jayawadena, Principal State  
Advocate

For the 2nd Respondent: Mrs J. Kabuka, Legal Counsel for  
Workmen's Control Fund Board.

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**JUDGMENT**

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Bweupe, A.C.J., delivered judgment of the Court.

Cases referred to:

- (1) GODFREY MIYANDA VS ATTORNEY GENERAL SCZ No. 15 OF 1986.
- (2) R. VS SECRETARY OF STATE EX PARTE FACTOTOME LTD (1990)  
2 AC 85 page 207.

- (3) R. v. SECRETARY OF STATE FOR EDUCATION, EX PARTE, AVON COUNTY COUNCIL (1991) 2 W.L.R. 702.
- (4) STORA MBUZI AND OTHERS VS ATTORNEY GENERAL SCZ JUDGMENT No. 10 OF 1993.
- (5) RIDGE v. BALDWIN (1963) 2 ALL ENGLAND LAW REPORTS 66.
- (6) R vs HOME SECRETARY EX-PARTE SANTILLO (1981) Q.B 778 (1981) 2 ALL E.R. 897.
- (7) KAMAYOYO vs THE PEOPLE 1974 ZR 50.

By his originating Notice of Motion, the appellant sought before the High Court the following reliefs:-

- (a) An Order of Certiorari to remove into the court for the purpose of quashing the decision of the Minister of Labour and Social Security by letter dated 11th February, 1992 purporting to terminate his services as Commissioner of the Workmen's Compensation Fund Control Board.
- (b) An Order of prohibition prohibiting him from implementing his decision to appoint one Sam Lee Chisulo or any other person as substantive Commissioner aforesaid or if already appointed to refrain from acting or in any way purporting or holding out to be such Commissioner.
- (c) A Declaration that the appellant is entitled to revert to the status quo ante of the applicant namely to the office of Commissioner together with all rights, privileges, and powers pertaining thereto afforded to him by the Workmen's Compensation Act, the Board and the Memorandum of the Conditions of Service for Senior and Non-unionised members of staff of the Board.
- (d) (i) General damages for unlawful termination of employment.  
(ii) Exemplary damages.

77 This was an application before the High Court for a judicial Review brought with leave of the Court of administrative action pursuant to the provisions of Order 53 Rule 3 of the supreme Court of England. Pursuant to the leave

granted, the applicant filed an Originating Notice of Motion for Judicial Review pursuant to the order aforementioned in respect of his dismissal as Commissioner of the Workmen's Compensation Fund Control Board by letter dated 11th February, 1992 under the hand of the Hon. Minister of Labour and Social security.

The situation is this: The applicant was appointed a Commissioner of the Workmen's Compensation Fund Control Board by a letter dated 8th November, 1990 issued by the former Minister of Labour and Social Security to the appellant effective from 1st November, 1989. The Minister copied the letter to the Permanent Secretary, Ministry of Labour who is also the Chairman of the Board to submit to him the Board Recommendations at the next Board Meeting re-the appellant's Remunerations and Terms and Conditions of his appointment for the Minister's approval. These things were not worked out or submitted to the Board. On 10th January, 1992 the Minister served the letter of suspension to the appellant that pending the investigations that were to be carried out, he should go on leave. On 21st January, 1992 the Minister served him a charge Sheet formally, requesting the appellant's exculpatory statement in which four charges were set out. The appellant exculpated himself in a letter dated 7th February, 1992 in 600 pages. On 26th February, 1992 the appellant was served with a letter of Termination of his services.

The charges were coached in the following words:-

"Dear Mr. Kafunda,

I have of late received a number of allegations against you that you have been engaged in irregular financial transactions which you entered into on behalf of the Board. In view of the seriousness of the allegations, this letter serves to afford you an opportunity to exculpate yourself within fourteen (14) days from receipt of the letter.

The charges for which I need your exculpation are as follows:-

(a) Project: Offices, Shops and Flats - Kitwe

- (i) That inspite of the recommendations by the Management Investment Committee that Bancroft Construction Limited, which was contracted to carry out the above project should not proceed to Phase II on completion of Phase I

you overruled that recommendation resulting in the Board experiencing liquidity problems.

- (ii) That you did not obtain central supply and Tender Board approval nor sign a contract for Phase II and III.

- (b) Project: Replacement of toilet concrete floor  
Ital Terrazzo stones at Compensation House,  
Ndola.

That for no apparent need and without National Tender Board approval, you authorised an expenditure of over K1.0 Million on the works above.

- (c) Purchase of two new PEW Buses

that without Tender procedure including alternative suppliers, authorised the purchase of the above buses from Mazembe.

- (d) Project: Lusaka Office Complex

That you have caused an expenditure of over 20.0 million on the above project without prior Tender Board approval or the award by Tender Board of the preliminary architectural work."

Upon receipt of the letter the appellant wrote a very long and detailed reply on 7th February, 1992 to the Minister in which he denied each and every allegation against him. He attached to his reply details of documents and the relevant minutes of either the Board, Management Investment Committee or Top Management Meetings touching on the charges. However, inspite of his reply the Minister wrote the appellant the following letter on 26th February, 1992:-

"Mr. L. A. C. Kafunda,  
C/o Workmen's Compensation Fund Control Board,  
P. O. Box 71534,  
NDOLA

Dear Mr. Kafunda,



I wish to acknowledge receipt of your letter dated 7th February, 1992. I have to inform you that I have thoroughly considered the defences and arguments you have raised in your letter. I have however, found that you have failed to rebut the charges made against you in my letter earlier sent to you dated 21st January, 1992. I wish to stress that it is not true to say that all the projects and contracts were entered into during the time of your predecessor, Commissioner Bwalya. You know that you have committed the Board to a number of projects during your time as Commissioner such as Office/Shops and flats in Kitwe Phase III, replacement of toilet concrete floor, Ital Terrazzo stones at Compensation House, Ndola, the Purchase of PEW buses and so on. These and many others were entered into without Central Supply and Tender Board approval. Further due to your careless awarding of contracts, the Workmen's Compensation Fund is now facing serious liquidity problems although Workmen's Compensation Fund Control Board should run as an economic venture, but you were running the Fund against the interest of people for which the Fund was established, that is against the contributors' interests. I wish to let you know that according to the intelligence reports reaching my office, you have been leading a life style which is beyond your means as Chief Executive of Workmen's Compensation.

The fact that you are not a reliable man is demonstrated by the fact that you have gone all the way to refuse all charges and to tell a number of lies. For instance, it is not true to say that I have a nephew in the Workmen's Compensation Fund, neither do I have any relative in the Fund but you have decided to tell a lie.

In the interest of the Fund and the Government of Zambia, I have decided to terminate your services with the Fund with immediate effect. You will be paid one month's salary in lieu of notice.

By copy of this letter the Acting Commissioner is requested to take steps to retrieve all the Fund property including personal-to-holder vehicles from you.

Notwithstanding, I wish to thank you most sincerely for the services which you rendered in various capacities at the Workmen's Compensation Fund Control Board.

Yours sincerely,

Ludwig Sondashi (DR) M.P  
MINISTER OF LABOUR AND SOCIAL SECURITY"

The appellant gave viva voce evidence in addition to his affidavit evidence. He testified that he was appointed Commissioner for the Workmens Compensation Fund by the then Minister of Labour, Mr. Lavu Mulimba by letter dated 8th November, 1990. This letter was copied to among others, His Excellency the President, State House, Lusaka. He said at the time he was appointed Commissioner, he had worked for the Board for 25 years the last fourteen years of which he was Deputy Commissioner. Upon his appointment, he was responsible for the day to day operations of the Board. He testified that he steered the affairs of the Board well after his appointment, he briefed members of the Board on its operation (day to day) and they were generally happy. He also averred he knew no one in the Board who possessed better qualifications than he had and therefore was well qualified to run it.

However, as regards his conditions of service which were supposed to be worked out and recommended by the Board to the Minister for his approval as stated in the last paragraph of his letter, the appellant stated that these were in fact never worked out nor was he furnished with such conditions of service.

After the present Government took over things began changing in mid December, 1991. He got information that he would be replaced by one Sam Lee Chisulo, who in fact later actually replaced him. The Chairman of the Board talked to him about serious allegations the Minister (of Labour) had received against him, but he himself had heard nothing about them. On 10th January, 1992 the appellant was called to see the Minister of Labour, Dr. Ludwig Sondashi at Provident Guest House in Ndola. when he went to see him the Minister handed to him a letter in which he decided to send the appellant on leave with immediate effect to facilitate investigations of the serious allegations. He said the Minister did not disclose the nature of the serious allegations to him. However, on 21st January, 1992 the Minister wrote him a letter charging him with four counts for which he was required to exculpate himself.

He said on 7th February, 1992, he wrote a very long and detailed reply to the Minister in which he denied each and every allegation against him. In spite of his reply he was dismissed on 26th February, 1992. The Appellant contended that the termination of his services was not based on true facts. In particular on the question of leading a life style that was beyond his means as Chief Executive, the appellant testified that he was not given an opportunity to exculpate himself on that charge, since it was not included on the original charges he was told to exculpate himself on.

On Charge A regarding the office/shops and flats projects in Kitwe which he was alleged to have over-ruled the Management Investment Committee's recommendation not to proceed to Phase II on completion of Phase I the appellant said that at the time the project proceeded from Phase I to Phase II and Phase III in 1986, 1987 and 1988 respectively he was not Commissioner but Deputy Commissioner. As to the failure of obtaining Central Supply and Tender Board approval for Phase II and III and failure to sign a contract thereof the appellant testified that by letter dated 7th September, 1987 the Central Supply and Tender Board gave its authority to the Board to proceed to Phase II. The appellant averred that he was unable to say anything on the approval of the Tender Board to proceed to Phase III or whether a contract was signed since he was not the Commissioner then.

As to charge B that for no apparent need and without the approval of the National Tender Board he authorised the expenditure of over K1.0m on replacement of concrete floor Ital Terrazzo at Compensation House, Ndola, the appellant said that such jobs did not require Tender Board approval. He further stated that the expenditure for such jobs is approved by the (Fund) Board at the beginning of each Financial year. He further said that it became necessary to renovate the toilets after an appeal from Ndola Health authorities following an outbreak of cholera. The appellant testified that after inspecting the premises, the architects advised that the vinyl tiles be replaced with a terrazzo floor. He also said that the contract for the job was done by the Contracts awarding and Tender Committee and not himself alone. In this connection, he contended that Ital Terrazzo who were awarded the contract although they were more expensive than Beiso Industries, were a more reputable company.

Regarding Charge C that without Tender procedures and including alternative suppliers he authorised the purchase of two PEW buses from Mazembe Tractor Company at a cost of

about K25.0 million the appellant said that it was never the practice at the (Fund) Board to seek Tender Board approval when purchasing motor vehicles. He said that after the Board makes a decision to purchase a motor vehicle, it is up to the Management to execute the decision. He said the money to purchase the buses was budgeted for. Due to transport problems workers were facing he took steps to purchase the buses and the (Fund) Board was fully aware of the decision. The Management made the decision to purchase the seven motor vehicles at a price of K25,100,756.00. However, the price of two PEW buses was K19,000,000.00. He said as there were no buses at Duly Motors it was found unnecessary to get another quotation. The two buses were therefore bought from Mazembe Tractor Company.

As to Charge D that he caused an expenditure of over K20.0 million on the Lusaka Office complex without prior tender Board approval or the award by Tender Board of the Preliminary Architectural work, the appellant said that as a Pension Fund, the (Fund) Board considered investment in real estate as most profitable. As a result instructions were issued to look for a prime piece of land in Lusaka at which to build an office complex. After the piece of land was found, the (Fund) Board decided that construction of the project commence during the 1991/92 Financial year. The (Fund) Board further approved payment of fees for preliminary work and he contended that payment of fees for such preliminary work did not require Tender Board approval. The fees were paid. He said that the (Fund) Board further made a decision that the Lusaka Project should commence only after the Kitwe project was completed. All in all the appellant testified that having heard the Minister's pronouncements his view was that he was relieved of his post due to some tribal inclination. He denied, however, having close affinity with the former Minister, Mr. Mulimba, who appointed him. The appellant testified that the Board Secretary was responsible for drawing contracts and for contracting the Zambia National Tender Board.

The appellant testified that when Kitwe project proceeded on to Phase II he was not Commissioner. However, he conceded that when he wrote the Central Supply and Tender Board requesting for the same contractor to proceed to Phase II of the project he wrote the letter in his capacity as Deputy Commissioner and did not write the letter on behalf of the Commissioner. He also said that the appeal from the Ndola Chamber of Commerce and from the Ndola District (City) Council authorities to clean up the premises in view of the cholera outbreak was a general one and that he did not manage to get a circular. However, he conceded that the

authority of the Zambia National Tender board was not sought of the removing of the concrete floor and replacing it with a Terrazzo one. He said that at the time he was relieved of his duties as a Commissioner there were no liquidity problems facing the (Fund) Board. He also conceded that when he was appointed Commissioner he was supposed to cease being on permanent and pensionable conditions but to be on Contract terms. However, the Board never worked out his terms and conditions of service up to when his services were terminated.

On motor vehicles he said that the policy of the Board was to write off vehicles after five years. However, he conceded that although the buses were old, they did not get an engineers report before selling them. He also conceded that the Top Management resolved to buy new buses subject to price comparison with AVM buses at Duly Motors. However, the buses were purchased without price comparison as there were no AVM buses at Duly Motors at the time. He also said he did not obtain Tender Board approval when buying the buses because they did not require such approval.

The appellant also revealed that he stayed at a farm in Kitwe which he has not yet bought although he has an option. To reach it a normal (and not an electronic) pontoon is used. Before he moved to the farm, he sold off a small holding in Kitwe and a farm along Kabwe road.

On the Lusaka Office complex he said it was in order to pay the fees without going through the Tender board procedure. He denied that the K90.0 million paid as fees was wasted money.

The Respondent called three witnesses. The first witness was the Minister of Labour and Security, Dr. Sondashi, DW 1. He testified that in November, 1991 he received official and private complaints that the Board was in serious liquidity problems. To facilitate investigations, he sent the appellant on leave on 16/1/92 after drawing the attention of the Permanent Secretary who was the Chairman of the Board about the reports and that investigations should be carried out and upon completion DW1 was satisfied that the allegations against the appellant had been substantiated. He, therefore, charged the appellant by letter dated 21st January, 1991. He asked the appellant to exculpate himself within fourteen (14) days upon receipt of the letter.



Later he received a reply from the appellant in the form of a letter dated 7th February, 1992 attached with bulky documents. DW1 studied the together with attached documents. The gist of the appellant's reply was that he denied all the four charges preferred against him. After studying the reply, DW1 found that the appellant had failed to exculpate himself of the four charges.

As to Charge A the office/shop and flats in Kitwe DW1 found that although the appellant was not Commissioner at the time the project was being implemented and therefore not responsible, he was responsible for carrying out the project to Phase II while he was Deputy Commissioner, he was responsible for the project as he was acting on behalf of the Commissioner as evidenced by letter dated 27th June, 1990 (marked LS1) which he himself wrote. Further when the project proceeded on to Phase III the appellant was at the time Commissioner as evidenced by an Internal Memorandum dated 22nd March, 1991 from the Acting Board Secretary to the Acting Workmens Commissioner (the appellant) (marked LS4 in the first Respondent's affidavit in opposition). Similarly DW1 discovered that when the project proceeded on to Phase II and III no Central Tender Board approval was obtained.

As to Charge B replacement of Concrete floor with Ital Terrazzo stones at Compensation House, Ndola, whereby expenditure of over 1.0 million was incurred without Tender Board approval DW1 testified that it was not true or correct as contended by the appellant that expenditure of such sum did not require Tender Board approval. He said according to the information he received there was no need to remove the concrete floors in preference to Ital Terrazzo stones and found such expenditure of public funds unnecessary. DW1 further said that there was need to have awarded the contract to Ital Terrazzo who were the more expensive while another company Bliss Industries had tendered for the job at a lower quotation of K215,000.000.

As regard the third Charge C on the purchase of two PEW buses in which a sum in excess of K19.0 was expended DW1 said such expenditure required authorisation from the

appellant failed to get three quotations when the buses were purchased.

As to Charge D regarding the Lusaka Office complex in which a sum in excess of K20.0 million was expended without Tender Board approval DW1 said that contrary to the applicant's contention architectural works were also covered by Tender Board approval and therefore the Board should have obtained Tender Board approval for the consultancy work. He further said that the applicant should not have authorised such expenditure as the board had liquidity problems which were brought to his attention by the Management Investment Committee. DW1 also said that the applicant was failing in his duties to advise that the Fund which was established to serve and look after pensioners was diverting from its function and was going into trading ventures.

After considering the reply DW1 found that the applicant failed to exculpate himself and terminated his services giving him all his benefits including one month's salary in lieu of notice.

DW1 went on to say that he also received reports that the applicant was living beyond his means and had a farm which was reported to be worthy over K100 million. However, he denied that the reports of the applicants' life-style influenced him in termination his services as he had already found sufficient grounds to do so. DW1 also testified that as Minister responsible for the Fund, he had power to remove the Commissioner whether or not he had committed offences and that he had no obligation to make any investigations, before doing so. He said that he ordered the investigations in respect of the applicant and later charged him because allegations had been made against him. He said that as he had power to appoint, he also had power to dismiss or terminate the services of the Commissioner.

DW2 testified that he was the Chief Internal Auditor responsible to the Board. He said his function was to ensure that the Management exercises proper control over the Fund and in this regard to bring to the Board's notice, through the applicant, any deviations taking place. He said the applicant lived a life style which was beyond his means. Lusaka Office Complex Project was beyond the Board's financial resources. He said he submitted to DW1 (Minister) on 23/1/92 and that since the applicant was appointed effective from 1st November, 1989 he was responsible for all the cases referred to in four charges.



DW3, testified that he was a Financial Controller of the Board. He said that when he joined the Board on 3rd December, 1990 he found that K92,817,000.00 was owing to four companies as consultancy fees. Only 3% of the Pensioners obligations could be met. The Board could not reimburse the PTC its dues amounting to K9,790,000.00 to pay their pensioners. He also said that dues to Commissioner of Taxes and ZNPF could not be met. He, as a Financial Controller, advised the applicant but he overlooked. Purchases of buses when there were buses in good running order was unwanted when the Board was facing severe financial problems. He said in all four charges Tender Board was necessary but the applicant decided not to obtain such Tender Board approval.

After carefully considering and analysing the affidavit and oral evidence adduced; the documents produced; the authorities cited; and the written submissions presented the Court made the following findings:-

- (1) That the appellant was appointed as Commissioner in terms of Section 13(1) of the Workmens Compensation Act on 1st November, 1989;
- (2) That the Remunerations terms and Conditions of Service of the applicant's appointment were to be worked by the Board but they were never done;
- (3) That the applicant's employment was not governed by the Memorandum of the Conditions of Service for senior staff Members and non-unionised Members.
- (4) That the applicant was suspended on 10th January, 1992 by the Minister pending the investigations;
- (5) That on 21st January, 1992 the appellant was formerly charged with four counts;
- (6) That the appellant exculpated himself by a letter dated 7th February, 1992 in 600 pages.
- (7) That on 26th February, 1992 the applicant was served with a letter of termination of his employment;
- (8) That in terms of the Interpretation and General Provisions Act cap 2 the Minister who had power to appoint had the likewise statutory power to remove the applicant;

- (9) That the Minister had no implied duty to act judicially since the statute did not lay down that a specific procedure should be followed in terminating the applicant's services;
- (10) That the Minister did not act ultra vires (outside his powers) and therefore acted lawfully;

The appellant has appealed against the trial Court's findings on four grounds:-

- (a) That the learned Commissioner at first instance fell into gross error when he held that the High Court of Zambia does not have jurisdiction to grant (i) a stay of the implementation of a Ministerial decision in terms of Order 53 Rule 3 (10) (a) of the Supreme Court Practice (white Book) and/or (it) and interim injunction in terms of the same order.
- (b) That the learned Commissioner in the Court below further erred in law in holding that section 31 of the Supreme Court Act 1981 (UK) does not apply to Zambia notwithstanding the provisions of Section 10 of the High Court Act;
- (c) That the learned Commissioner misconstrued and/or misapprehended the law when he held that an application for judicial Review is a "Civil proceeding" within the meaning of Section 16 of the State Proceedings Act Chapter 92 of the Laws of Zambia.
- (d) That the learned Commissioner misdirected himself in both law and fact when he held that the issue of availability of Judicial Review Remedies to the appellant was not justiciable having premised such an erroneous conclusion that the appellant served at the pleasure of the appointing authority i.e. the Minister of Labour and Social Security.

Of the four grounds filed the first three related to an appeal lodged against the decision of the High Court refusing the appellant an interlocutory remedy in form of stay and/or an injunction. The appeal was later consolidated with the main appeal to make it one appeal.

The learned Counsel for the appellant, Mr. Derrick Kafunda, argued on ground 1, that the learned High Court

Commissioner misdirected himself when he held that the High Court had no jurisdiction in an application for judicial Review. He said this matter was not an ordinary proceedings. Mr. Chisulo assumed office on 27/3/92 and leave for Judicial Review with certificate of urgency was filed on 13/3/92 and application for Judicial Review was filed on 17/3/92. Ex-parte summons for interim injunction was filed on 30th March, 1992. The Ex-parte Summons was amended on 9th April, 1992 to pray for Stay but the application for Judicial Review was before Mr. Chisulo took office. He argued that the Court below had inherent jurisdiction to grant stay or injunction. He said once leave is granted then that operates as a stay. Hence decision to appoint should have been stayed including a continuation in office pending determination of the main issue, application for stay was, therefore, proper and not ultra vires section 16 of the State proceedings Act.

Mr. Kafunda further contended that the appellant was not employed on the basis of pure master/servant relationship. He said he would concede that if the dismissal was based on the allegations contained in the Minister's letter then the rules of natural justice were followed but at the press conference the Minister showed he had a secret agenda and made allegations different from those in the letter suggesting that the appellant lived beyond his means, a thief and dishonest through and through. Natural justice or no natural justice if allegations are false the Court must interfere. Mr. Kafunda was not heard about allegations of living beyond his means or life style.

Mr. Chilandu made submissions on remedies. he argued that these were discretionary but noted that in judicial review discretion against unlawful action were limited. However, this was a perfectly normal case where remedy must accompany the right. He said GODFREY MIYANDA v. ATTORNEY GENERAL (1) case must be on its own peculiar facts. The granting of a discretion MIYANDA v. THE ATTORNEY-GENERAL would have been wholly disruptive. In the present case the appellant has a particular grievance.

Mr. Jayawardena argued the case for the 1st Respondent. He said the appointment of Mr. Chisulo was not in dispute. He said Mr. Chisulo took up his appointment on 27th March, 1992 after having been appointed on 17th March, 1992. Application for leave was made on 17th March, 1992 and the application for an injunction was made on 30th March, 1992. Summons for stay was made on 9th April, 1992. The Appellant's employment having been terminated there was no need for interim injunction.

He said the State's case was on two issues, (a) was termination right or wrong (b) was the appellant adequately heard.

Appellant was charged with four counts. He conceded all of them. The appellant's exculpatory statement opened the Pandora's box by accusing the Minister of employing his relatives.

On principle of natural justice it is not necessary to prove all the charges. It is in the discretion of the appointing authority what punishment to impose on the person charged. He said if the 5th ground in the letter of termination was the sole ground he would concede that the termination was unjustified. If many charges were preferred and only one was proved that still would justify the dismissal. What is necessary was for the Minister to find all or one of the charges proved.

The High Court Commissioner did not find that the appellant was not entitled to natural justice. The High Court Commissioner was correct to find that termination was not subject to judicial review. Where there is a provision for appointment but no provision for removal the appointment is at the pleasure of the appointing authority.

Mrs Kabuka also submitted on behalf of the 2nd Respondent. She said that in arguing her case she would rely on the submissions, she presented in the court below and on the submissions presented by the 1st Respondent. She said the main issue before the Court was one what is being impugned in the magisterial decision. She said in terms of Order 53 of the White Book the decision making process both in this court and the court below is not concerned on merits of termination. The main concern is not rehearing of the case de novo but examination of decision making process, its reasonableness and whether it is within the law.

She said it has been submitted that the decision was ultra vires the Rules of Natural Justice. Those rules were not called into play in the circumstances of this case in that the Minister was not required to comply with the rules of natural justice. She conceded that the actions of the Minister were reviewable. She said the appellant does not dispute being heard. His complaint is that he was heard but wanted to be heard more.

There was no security of tenure - no procedure of termination and no contract of employment. What existed between the parties was master/servant relationship or at most service at pleasure. She said the appellant's position is like that of a Cabinet Minister. If the appellant is entitled to be heard, she argued, he was substantially and comprehensively heard and that the rules of natural justice were complied with and the appellant exculpated himself adequately. The mere fact that his explanation was not accepted does not mean he was not heard. The appellant's exculpatory statement went beyond the four charges hence the Minister's reply that the appellant lived beyond his means.

On order 53/3/10(a) she said the Order has no application to Zambia. This is based on the history of Order 53 of 1979 Edition White Book and 824 Order 53/1/2.

It is clear that even in England before Order 53 was introduced in granting relief against the state there was need for a specific Act - The Supreme Court Act of 1981 (UK). On section 21 in proceedings of section 16 of the Zambian Act it is a misconception that in Zambia injunction can issue against the state on the basis of Order 53 unless the legislature effect an amendment to Section 16 of the State Proceedings Act - see R VS. SECRETARY OF STATE EXPARTE FACTOTOME LTD (2). In this case, amendment notwithstanding, there was extension of injunction to be given against the State. If this were a proper case this Court could have granted a declaratory order of the right of the appellant - No injunction can issue against the State.

She argued that Mr. Chisulo having assumed office there could be no stay of implementation. She said the case of R. v. SECRETARY OF STATE FOR EDUCATION, EX PARTE, AVON COUNTY COUNCIL (3) is distinguishable from the present case in that what was in issue in AVON (3) was the stay of implementation of the Education Reforms. However, what is in issue of the case at hand is the removal of a person who has already taken office.

On remedies she argued that they are discretionary and urged the court to apply the principle in MIYANDA (1) case. She said this is not a proper case to exercise the discretion in favour of the appellant.

In reply, Mr. Chilandu argued that appellant's office was a creature of Statute and power to dismiss also flow from Statute - see S. 26 Cap. 2. This is a proper case for



Judicial review. Evidence that appellant's farm was worthy K100m would have operated on the Minister's mind and that could not be said to be casual. He further argued that if reinstatement can not be granted then the appellant should be granted damages.

We have considered and analysed the affidavit and viva voce evidence adduced; the documents produced; the authorities cited and the submissions presented before us and we are of the view that the facts boil down to two issues requiring determination: (a) whether the learned trial Commissioner was in error in refusing the stay of implementation and/or the injunction of the appointment by the Minister of Mr. Chisulo (b) whether or not the trial court miscontrued and/or misapprehended the law when he held that an application for Judicial Review is a "Civil proceedings" within the meaning of Section 16 of the state Proceedings Act Chapter 92 of the Laws of Zambia. We propose to answer the first question first by revising the background as summarised by the court below.

The appellant was appointed Commissioner Workmen's Compensation Control board on 9/11/90. On 10/1/92 he was sent on leave to facilitate investigations. He was charged with our counts of irregularities on 21st January, 1992 to which he exculpated himself comprehensively on 7th February, 1992. His services were terminated by the Minister on 26th February, 1992. On 13th March, 1992 the appellant lodged an application for Judicial Review but leave for Judicial Review was filed on 17th March, 1992. Ex-parte summons for interim injunction was filed on 30th March, 1992 but ex-parte summons for Interim Injunction was filed three days after Mr. Chisulo took office and amendment to include the stay was made on 9th April, 1992. It is in the teeth of this evidence that the appellant sought for the stay of implementation and/or an injunction. The learned Counsel, Mr. Kafunda, further argued that the Court below had inherent jurisdiction to grant stay and/or injunction. He said once leave for judicial review is granted then that operates as a stay. Decision to appoint should have been stayed including continuation in office pending determination of the main issue.

There can be no dispute that Mr. Chisulo took office on 27th March, 1992 while the Ex-parte summons for an Interim Injunction was filed on 30th March, 1992 and amended on 9th April, 1992 to include the stay of Implementation. Mr. Chisulo was not cited as a party to these proceedings.

It was all too late to stay the Implementation while a person who was not cited as a party had already assumed office. We do not share the view that the grant of leave for Judicial review on 17th March, 1992 operated as stay of Implementation. We have also considered the celebrated case of AVON (3) and are of the view that the facts of that case are distinguishable from the case at hand. AVON (3) was for the stay of Implementation of the Educational Reforms. In that case no one's rights had been adversely affected at that time. Grant of stay of Implementation in Avon (3) case was proper. In the instant case, however, Chisulo's rights which had matured by assuming office were adversely going to be affected. Chisulo was going to be condemned without being heard thereby breaching the principle of "audi alteram partem". (See STORA MBUZI AND OTHERS V. THE ATTORNEY-GENERAL (4)).

This brings us to the question: On what grounds can Judicial Review be granted? The grounds can fall under the following main heading (a) Want or excess of jurisdiction; (b) where there is an error of law on the face of the record; (c) Failure to comply with the rules of Natural Justice; or (d) The wednesbury principle. we have considered the four headings above and propose to deal briefly with (a) (b) and (d) as they do not appear to be the bone of contention. We confirm that under Section 13 (1) of Workmen's Compensation Act the Minister had power to appoint the Commissioner. He likewise had power to dismiss or terminate the appointment according to the provisions of Section 26 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia. We have no reasons to find otherwise. we also confirm that the relationship between the appellant and the employer was no more than that of Master and Servant relationship. The appellant was therefore employed at pleasure of the appointing authority. we have arrived at this conclusion because the appellant's appointment was governed by Section 13(1) of the Workmen's Compensation Act and there were no remunerations, terms and conditions of service worked out for the appellant, as was required by the letter of appointment written by the Minister. One, may ask: Who was supposed to work out those conditions? The appellant was appointed a Commissioner. He was responsible for day to day working of the Board. One would have hoped that his terms and conditions of service were to be drafted by him and submitted to the Board for their recommendation to the Minister to approve. The appellant did not do so and for reasons best known to him he decided to sleep on his rights. He can not now blame the Board for inaction.



We now turn to consider whether there was failure to comply with the rules of natural justice. In his submissions, Mr. Kafunda argued that while the appellant was given the opportunity to defend himself on four grounds he was denied the right to defend himself on the allegation of living beyond his means. On account of that the appellant was entitled to Judicial Review because there was a breach of the rules of natural justice. He referred the Court to the cases of RIDGE VS. BALDWIN (5). He said in that case of RIDGE (5) a Chief Constable was dismissed by the Police authority. The first decision to dismiss him was taken without giving him a hearing at all which was held to be a breach of natural justice. Although the matter was reconsidered by the Police authority on a later occasion after he had been given a hearing the second decision to dismiss him was also found to have been reached in breach of the rules of natural justice because he was not informed of the allegations made against him or the reasons why it was proposed to dismiss him.

The case of Ridge (5) appears to be distinguishable from the the case at hand in that although in this case the Minister was under no obligation in the absence of any procedure, to resort to charge the appellant thus affording him an opportunity to be heard, the Police Authority in Ridge case were under such an obligation. Failure, therefore, to inform him of the allegations made against him or reasons why it was proposed to dismiss him breached the rules of natural justice. Broadly the rules of natural justice embody a duty to act fairly. whether those rules apply and the extend of the duty depend upon the particular type of case concerned.

"The rules of natural justice - or fairness are not cut and dried. They vary infinitely" R. VS. HOME SECRETARY EX-PARTE SANTILLO (6) per Lord Denning M.R."

We are in total agreement that the rules of natural justice will normally apply where the decision concerned affects a person's rights, for example where his property is taken by compulsory purchase or he is dismissed from a public office (as in Ridge vs Baldwin case above). We also agree that the rules can also apply where the applicant for Judicial Review does not have a right; for example where he is applying for some requisite statutory licence; in such cases although he has no right to a licence unless and until it is granted, there is a duty to comply with the rules of

natural justice and to act fairly because a legal power which affects his interests is being exercised.

In the instant case, it is not denied that the appellant was charged with four counts of which he extensively exculpated himself even to the extent of bringing in issues which the Minister did not embrace in the allegations. He even went to the extent of accusing the Minister of employing his nephew or relative.

It is this accusation which prompted the Minister to deny at a press conference the imputation of abuse of office and for the Minister to casually say "by the way you have been living beyond your means in that you own a farm worth over K100 million." The appellant opened a pandora box as it were by referring in his letter of exculpation to extraneous matters. Silence on the part of the Minister would have meant acceptance of the alleged abuse of office. The appellant violently argued that the charge of living beyond his means having not been brought against him so that he would have had an opportunity to be heard or exculpate himself as he did in other four charges levelled against him breached the rules of natural justice. The learned Advocate for the appellant argued that he would concede that if the dismissal was based on allegations contained in the Minister's letter then the rules of natural justice were followed but at the press conference the Hon. Minister showed he had a secret agenda and made allegations different from those in the letter suggesting that the appellant lived beyond his means, a thief and dishonest through and through. Natural justice or no natural justice if the allegations are false the court must interfere. Mr. Kafunda was not heard about allegations of living a life-style beyond his means.

Be that as it may, however, we are satisfied that Mr. Kafunda was adequately heard and adequately exculpated himself on all the charges contained in the Minister's letter. In our view whether he would have been heard on the issue of leading a life style beyond his means the position would still have been the same. Accordingly, we are not prepared to make a finding whether he lived a life style beyond his means.

In an event the Minister's letter clearly showed that the Minister had considered the appellant's exculpatory statement. He said: "----- I have considered the defence and arguments you have raised in your letter. I have however, found that you have failed to rebut the charges made against you in my letter ----- I wish to stress that it is not true to say all the projects contracts were entered into during the time of your predecessor, Commissioner Bwalya. You know that you have committed the Board to a number of projects during your time as Commissioner such as office/shops and flats in Kitwe Phase III; replacement of toilet concrete floor Ital Terrazzo stones at Compensation House, Ndola; the purchase of PEW buses etc. These and many others were entered into without Central Supply and Tender Board approval. Further due to your careless awarding of contracts the Workmen's Compensation Fund is now facing serious liquidity problems although Workmen's Compensation Fund Control Board should run as an economic venture, but you were running the Fund against the interests of the people for which the Fund was established. That is against the contributors' interests --- The fact that you are not a reliable man is demonstrated by the fact that you have gone all the way to refuse all charges and to tell a number of lies. For instance, it is not true to say that I have a new share in the Workmen's Compensation Fund, neither do I have any relative in the Fund but you have decided to tell a lie -----."

The appellant admitted in his testimony that no Tender Board approval was obtained and that in case of the purchase of buses he did not also obtain three quotations for the purpose of price comparison but denied there was no liquidity problem at the time. Whether or not there was liquidity problem is not the question, the question is that the projects should have gone for Tender. Moreover, the fact that the Board had failed to settle over K93 million owed to other companies and could only meet 3% of the contributors requirement was a clear indication that the Board was in acute liquidity problems. It was in the face of these problems that the appellant decided to defy the advice rendered to him by his Chief Financial Controller and the Management Investment Committee. We do not think that any reasonable man would sit idle-by comfortably looking on while the Fund was collapsing. We are satisfied that the appellant was adequately heard and that the rules of natural justice were not breached. All that the appellant is saying is that he was not heard enough. The relationship between the employer and the appellant being that of master and

servant the appellant was not entitled to be heard and could have been dismissed with or without reasons as amply demonstrated in KAMAYOYO vs THE PEOPLE (7) case.


We now turn to the question of damages. Having hereinbefore held that the appellant served at pleasure of the appointing authority he could be dismissed instantly with or without reasons. However, in the instant case the appellant was given an opportunity to be heard which legal right he did not have under the law and on termination of service he was paid one month's salary in lieu of notice. Although the decisions of Ministers are reviewable there was no cause for review in this particular case.


All in all we are satisfied from the foregoing reasons that the learned trial High Court Commissioner was not in error when he refused to make the declaration. We confirm his findings that the Minister, having had the power to appoint under Section 13(1) of the Workmen's Compensation Act, had likewise powers to dismiss or remove the appellant; that the appellant served at the pleasure of the appointing authority; that he was adequately heard as there was no breach of natural justice; that the appellant failed lamentably to show cause why his services could not be terminated; and that the appellant belonged to category of employment whereby he served at pleasure of the appointing authority and that that being the case the action for Judicial Review was not available to the appellant.

For the reasons aforesaid, we are satisfied that the findings of the Learned Trial High Court Commissioner were safe and satisfactory. Accordingly we would dismiss this appeal.

The appeal is unsuccessful but since it raised an important issue of general interest each side will bear its own costs of this appeal.

  
B. K. Bweupe  
DEPUTY CHIEF JUSTICE

  
E. L. Sakala  
SUPREME COURT JUDGE

  
M. S. Chaila  
SUPREME COURT JUDGE