DERRICK CHITALA (Secretary of the Zambia Democratic Congress) v ATTORNEY GENERAL (1995) S.J.

SUPREME COURT
NGULUBE, C.J., BWEUPE, D.C.J AND SAKALA, J.S.
20TH OCTOBER AND 1ST NOVEMBER, 1995
S.C.Z. JUDGMENT NO. 14 OF 1995
APPEAL NO. 92 OF 1995

Flynote

Constitution - Adoption of Constitution by the National Assembly - Whether this reflected the will of the people.
Judicial review - Leave for Judicial Review denied - Renewal of application before the Supreme Court.
Grounds for Judicial Review - Illegality - Irrationality - Procedural impropriety - Unreasonableness.

Headnote

The President, Acting under s.2 of the Inquiries Act, Cap 1981, appointed a Commission to be chaired by the learned John Mwanakatwe, SC. To this end, the Commission travelled around the country collecting views from the Zambian people. At the end of the exercise, the Commission formulated a draft constitution most of whose provisions the government refused to accept. Instead the government drafted a constitution with controversial clauses in it and sent it to Parliament for enactment and subsequent adoption. The Commission had recommended that the Constitution be adopted by a constituent assembly and national referendum. The appellant, in an effort to challenge the government's decision, sought leave to apply for judicial review of the goverment's decision to have the Constitution adopted by parliament. The High Court denied leave and the appellant appealed to the Supreme Court.

Held:

(i) Although the application was neither frivolous nor vexatious, it was legally an untenable application on the face of it such that it was not wrong for the judge below to refuse leave summarily
(ii) The applicant had sufficient interest in the matter

Cases referred to:

1) Ridge v Baldwin (1964)
2) Mwamba and Another v Attorney General (1993) 3 L.R.C. 166; S.C.Z. Judgement No. 10 of 1993
3) Council of Civil Service Unions and Others v Minister for the Civil Service
4) Patriotic Front ZANU v Minister of Justice, Legal and Parliamentary Affairs (1986) L.R.C. (const.)672
5) Leonard Kafunda v The Attorney General and Another, Appeal No. 20 of 1992
6) Padfield v Minister of Agriculture, Fisheries and Food (1968) A.C. 997
7) Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948)IK.B. 223
8) Reg. v Home Secretary, Ex.p Brind 21WLr of 22nd February 1991, 588 at 601

For the Appellant: R. Simeza and J. Sangwa, of Simeza Sangwa and Associates
For the Respondent: S. L. Chisulo, Solicitor General, and A. G. Kinariwala, Principal

State Advocate

Judgment

NGULUBE, C.J.: delivered the judgement of the court.

Under the Supreme Court of Zambia Act, this is an appeal against the decision of a High Court Judge refusing to grant leave to bring judicial review proceedings. Under the Rules of the Supreme Court of England which apply to supply and cassus omissus in our own rules of practice and procedure, this would be a renewal of the application for leave to the appellate court. The issue was whether the learned judge below was wrong to refuse to grant leave and whether we should now do so in the particular circumstances of this case.

The facts and circumstances of the case appear to be common cause, and are to be distilled from the Notice of application for leave to apply for judicial review, the affidavit filed in support, and the report of the constitutional Review Commission (the Mwanakatwe Commission) together with Government Paper No. 1 of 1995 (the White Paper).

The last named two documents were not filed with the court which was requested to take judicial notice of these published public documents. The Notice of Application is worth reproducing and was in the following terms:

> "Name of Applicant: The Zambia Democratic Congress (ZDC) a political party constituted pursuant to the provisions of the Societies Act.
>
> Judgement, order, decision or other proceeding in respect of which relief is sought:
>
> The decision by the President and his Cabinet to have the next Constitution enacted by the present National Assembly
>
> Relief Sought:
> 1. an order of certiorari to remove into the High Court for the purpose of quashing the decision by the President and his Cabinet to have the next constitution enacted by the present National Assembly.
>
> 2. An order of mandamus directed to and compelling the President and his Cabinet to take such measures as may be necessary to ensure that the constitution is debated by and finally determined by a constituent assembly or any other broad based group and subjected to a referendum
>
> 3. If leave to move is granted, a direction that such grant should operate as a stay of the implementation of the decision to which this application relates pursuant to Rule 3(10) (a) of Order 53 of the Rules of the Supreme Court.
>
> 4. An order for costs
>
> 5. And that all necessary and consequential directions be given.
>
> Grounds on which Relief is sought.

1. The decision to have the Constitution enacted by the current National Assembly has been made in bad faith, it is calculated and designed to enable the present Government to single handedly determine the constitution, which will favour it and disadvantage other interested parties.

2. The decision has been made in bad faith in that it is contrary to the recommendations made by the Mwanakatwe Constitution Commission after touring the country and receiving submissions from the people.

3. By virtue of this decision the President and his Cabinet have acted unfairly and unreasonably in that they have totally ignored the recommendations of the commission arrived at after receiving submissions from the people and taking into account the need for legitimacy and durability of the Constitution.

4. The decision to have the constitution enacted by the present National Assembly as opposed to the Constituent Assembly and a referendum, is not in furtherance of the general objectives and purposes of the Inquiries Act and Terms of reference No. 1 and 9.

5. That the decision to have the Constitution enacted by the National Assembly has been made in bad faith in that the objective is not to ensure the legitimacy and durability of the constitution by for the President and his Cabinet to determine aConstitution which will further their own interests at the expense of those of the broad majority of the people."

It was not in dispute that the President, Acting under S.2 of the Inquiries Act, CAP 1981, appointed a Commission to be chaired by the learned John Mwanakatwe, SC. The terms of reference should be referred to for their full import but for present purposes, the appellant drew particular attention to terms (1) and (9) which were in the following terms:

"To (1) collect views by all practical means from the general public both in rural and urban areas and from Zambians living outside Zambia, on what type of Constitution should enact, bearing in mind that the constitution should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of time;

(9) recommend on whether the Constitution should be adopted by the National Assembly or by a Constituent Assembly, by a National Referendum or by any other method;

The Mwanakatwe Commission's finding and recommendation on term of reference No. 9 is to be found at page 204 of the report under the heading "Mode of adopting the constitution" and the subheading "Legitimacy and the Constitution". For the sake of completeness, it is worthwhile quoting the whole of that finding and recommendation which reads:

"The Government directed the Commission in Term of Reference No. 9 to recommend the best method of adoption of the Constitution. In the Commission's view there are three methods of adoption, namely by the current legislature, the Constituent Assembly and a national referendum. In evaluating the best method of adoption the Commission addressed itself to the need for legitimacy and durability of the Constitution and the views of the people.

In this latter regard, petitioners were overwhelmingly agreed that the Constitution

should be adopted through the Constituent Assembly and a national referendum. Adoption by the current legislature was the least favourable because of the dangers of a one party dominance and a repetition of the past experiences in formulation of the Constitution.

In agreeing with the overwhelming views of petitioners and the rationale or reasons advanced, the Commission finds it unavoidable and compelling to recommend unanimously adoption by a Constituent Assembly and a national referendum."

The reaction of the Government to this part is to be found on pages 104 to 106 of the white paper where, after rejecting the recommendations, the Government pointed out a number of what were called "legal and practical limitations of the difficulties necessitating a rejection of the recommendation and they should be read for their full terms and effect. For present purposes, we quote only the conclusion at page 106 where the Government said:

"As a consequence of the above, the Government has decided:

(a) to encourage public discussion of both the Commission Report and Draft Constitution in order to arrive at the broadest possible consensus on the content of the Proposed Constitution

(b) that with the exception of the provisions in the Draft Constitution touching on Part III of the existing Constitution, all other parts of the Draft, on which a consensus will have been reached should be enacted by the existing Parliament.

(c) That provisions in the Draft Constitution seeking to amend, modify re-enact or replace any provisions relating to the Fundamental Human Rights will be enacted by Parliament following their approval through a National Referendum."

We have taken the trouble to set out the background facts in some detail in order to place in proper context the legal arguments and issues that arose in this case. When counsel for the appellant appeared before the learned High Court judge, he simply relied on the notice of application and supporting affidavit, together with the provisions of Order 53, and invited the learned judge to grant leave. The judge declined to do so holding that the two reliefs specifically claimed, namely Certiorari and Mandamus were not available against the President and his Cabinet. In the case of certiorari, the learned judge was of the opinion that it could not lie against a body or authority not exercising a judicial or quasi-judicial function. Accordingly, it was held that an order could not be made directing that the records of a Cabinet meeting or of the President be brought to court for the purpose of quashing them. In the case of mandamus, the learned judge was of the opinion that the White paper contained mere proposals which could not be regarded as raising a binding duty which the court could order anybody to perform.

The major ground of appeal alleged a misdirection on the part of the court below allegedly by determining the substantive application before leave was granted and without hearing the parties. It was argued that all that had to be shown at the stage of considering leave was whether the applicant had a sufficient interest; whether there was a sufficiently arguable case to merit investigation at a substantive hearing and whether the application had been made promptly. Whether one agrees with the learned judge's argument on certiorari and mandamus or not, one must agree that the judge was engaged in discussing the second issue, that it , whether there was any point in granting leave. Both sides referred us to the observations made by the learned authors of the White Book, the Rules of the Supreme Court. In vol. 1 of

the 1995 Edition at page 864 under Order 53/1-14/30m the learned authors have this to say:

> "The purpose of the requirement of leave is: (a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless and (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration (see below).
>
> The requirement that leave must be obtained is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived" (R. v Inland Revenue Commissioners, ex p National Federation of self-employed and Small Business Ltd (1982). A.C. 617, p.642. (1981)2All E.R. 93, P.105 per Lord Diplock). Leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant (ibid. at p.644/106). In R.v Secretary of State for the Home Department, ex p. Rukshanda Begum (1990) c.o.d.107, the court of Appeal held that the test to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full interpartes hearing of a substantive application for judicial review (see par 53/1-14/34). If, on considering the papers, the Judge cannot tell whether there is or not, an arguable case, he should invite the putative respondent to attend the hearing of the leave application and make representations on the question whether leave should be granted (ibid.)."

We have no reason to disagree with the foregoing. The judge below can not validly be criticised for forming an opinion on the papers before him without hearing the parties. whether he was correct or not in his conclusion is a different question which we are capable of addressing since an appeal operates as a rehearing on the record. A renewal of the application would also be to the same effect. To the extent that the learned High Court judge chose to decide the question whether there was disclosed a sufficient case to warrant further investigation at a full inter parte hearing by characterising the functions as a non judicial and the decision as simply a proposal, we choose to go at large in order to do fuller justice to this case. After all, since *Ridge v Baldwin* (1), the distinction between judicial and administrative activities has been swept away and as a general proposition judicial review now lies against inferior courts and tribunals and against any persons or bodies which perform public duties or functions. There is, of course, no blanket immunity from judicial review even for the President: see *Mwamba And Another v Attorney General* (2)

It is trite that judicial review has supplanted the old proceedings for the prerogative writs of mandamus, prohibition and certiorari. These orders can now be obtained from acting in an office to which he is not entitled or a declaration and/or injunction in any matter of a public nature suitable for judicial review. Rather than look at the prerogative remedies in the old classical style, it is, in our considered opinion, preferable to adopt the current trends as proposed by cases such as *Council of Civil Service Unions and others v Minister for the civil Service* (3). A formulation which has gained much acceptance in the commonwealth was that proposed by Lord Diplock who said, from letter d at page 1026 to letter b at page 1027:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further

development on a case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice. 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. Whether he has or not is par excellent a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationable" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness (*Associated Provincial Picture Houses Ltd v Wednsbury Corporation* (1948) IKB ""£. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with out judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* (156) Ac 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

The above has been cited with approval in a number of cases, including the Zimbabwean case of *Patriotic Front Zanu v Minister of Justice, Legal and Paliamentary Affairs* (4). We too respectfully agree with Lord Diplock's three grounds on the review ability of decisions taken under, in our case, Executive prerogative. What we said in the unreported case of *Leonard Kafunda v the Attorney General and Anther* (5) which the learned solicitor General cited, though not so comprehensive, was consistent with this general formulation to the extent that we had identified some grounds for judicial review based on want or excess of jurisdiction, error or law, breach of natural justice and legal unreasonableness.

We heard strong public spirited submissions in support of the Mwanakatwe Commission's recommendation and against the Government's preference as expressed in the white paper. We have to be guided by the three grounds enunciated by Lord Diplock and will not be able to say whether from any other point of view the Government is making a mistake or failing to grasp the opportunity to fashion a constitution that will not be considered as tailor-made for some immediate convenience. It would be wholly improper for the court to make any such political comment or to try and substitute its own view for that of the Government under the guise of judicial review. Our immediate task is to resolve, against the backdrop of the three grounds, whether leave should be granted or if, though obviously not frivolous or vexatious, the application is legally hopeless such that we are satisfied that there is no case fit for further investigation at a full inter parte hearing.

We begin by considering whether there is on the face of it an arguable case of illegality. Section 2(1) of the Inquiries Act, Cap. 181, reads:

> "2 (1) The President may issue a commission appointing one or more commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare."

The Act does not say what the President must do once a commission renders its report on a matter. However, it is quite clear from the language of the stature which we have quoted that a commission can only lawfully be appointed to promote the public welfare. In this regard, a decision arising from the report of a commission could be challenged quite legitimately if the decision frustrated the policy and the objects of the Act since a decision which does not promote but frustrates the object of the law would be an improper exercise of a discretion: see *Padfield v Minister of Agriculture ture,Fisheries and Food* (6). The question which arises is whether the Executive, that is to say the President and the Cabinet in this case, in exercising their discretion as set out in the white paper (relevant portions of which we have alluded to) exceeded the statutory powers under the Inquiries Act? It is obvious that this is not the case. What is more, the white paper showed that the Government has not sought to frustrate the object of the Inquiries Act but has suggested to address the concerns of the applicants and many other citizens by the decisions at page 106 of the white paper which we have already quoted. There was in this case no issue of illegality fit to be left to a full hearing.

Next is the question of irrationality. We heard submissions that the decision not to set up a constituent assembly, which flew in the teeth of the recommendation of the commission, was unreasonable and was actuated by bad faith and improper motives. In law, a decision can be so irrational and so unreasonable as to be unlawful on "Wedsbury" grounds 00 see *Associated Provincial Picture House LTD v Wedsbury Corporation* (7). The principle can be summarised as being that the decision of a person or body performing public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision. This principle should be applied with circumspection.

In this regard, the words of Lord Ackner in *Reg v Home Secretary, Ex.p. Bring* (8) are rather apt. He said:

> "There remains however the potential criticism under the Wednesbury grounds expressed by Lord Greene M.R. (1948) 1 K.B. 223, 230 that the conclusion was "so unreasonable that no reasonable authority could ever have come to it." This standard of unreasonableness, often referred to as "the irrationality test," has been expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision that is, to invite an abuse of power by the judiciary."

A perusal of the relevant documents and consideration of the arguments does not support that there is an issue of irrationality fit to go to a full hearing. There was here the danger of the court merely substitution its own views when the term of reference invited suggestions; the report observed that there were three possible methods of adoption and recommended on very good grounds one method. The Government game a number of reasons for wanting to proceed in a different manner. We can not say such reasons were “Wednesbury” unreasonable.

This brings us to consider whether there was any procedural impropriety. This aspect does not arise since the case is not concerned with the proceedings of an administrative tribunal at all. The Inquiries Act does not lay down any procedural rules to be observed by the President once a report has been rendered to him. There was thus nothing fit to be referred for further inquiry at a full hearing under this ground.

From the documents in this case, there could not have been a problem in finding that the appellant had a sufficient interest in the matter. The formulation of a new constitution or causing major amendments to the existing constitution is a matter of serious interest to all the citizens, including the members of the political party represented by the appellant. There was also no issue of promptness or tardiness since the application was made within a reasonable time after the release of the white paper. The sole issue could only have been whether or not there was disclosed, to borrow the words of learned counsel, a sufficiently arguable case to merit investigation at a substantive hearing.

We suspect that the generally negative and argumentative tone adopted by the white paper provoked the reasonable apprehension in the appellant that the Government intended to massage the outcome of the review, to the disadvantage of the others in the country. However, on the specific points raised in the case and on the portion of the white paper relevant to the same which we have earlier quoted, it is apparent that the Government has neither slammed the door nor taken the position that the people’s views will not find a place in the final product which would otherwise be discredited and transient, and not enduring as planned. Above all, for the reasons we have discussed, although the application was neither frivolous nor vexatious, it was legally an untenable application on the face of it such that it was not wrong for the judge below to refuse leave summarily.

For the reasons we have adumbrated, the appeal is unsuccessful. However, since it raised for the first time a matter of general public importance of this nature, each side will bear its own costs.

Appeal dismissed.
