IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ JUDGMENT NO. 34/99
SCZ APPEAL NO. 158/99

BETWEEN:

THE ATTORNEY-GENERAL	**1ST APPELLANT**
THE SPEAKER OF NATIONAL ASSEMBLY	**2ND APPELLANT**
AND	
THE PEOPLE	**RESPONDENTS**

EX-PARTE: Dr. Mark Mulenga, Simambo Banda, and **Haggai Chomba** (Suing in their respective capacities as Presidents for and on behalf of the University of Zambia Lecturers and Researchers Union (UNZALARU) University of Zambia Students Union (UNZASU) and the Copperbelt University Students Union (COBUSU).

Coram: Bweupe, DCJ; Chaila, Chirwa, Lewanika, Chibesakunda, JJS
22nd November and 29th November, 1999

For the Appellants : Messrs. S.L. Chisulo, Solicitor-General and J. Jalasi, State Advocate.

For the Respondents: Messrs. S. Sikota and K. Hang'andu of Central Chambers.

JUDGMENT

Chaila, JS, delivered the judgment of the court.

This is an appeal by the appellants against a High Court decision (T.K. Ndhlovu, J), granting the respondents leave for Judicial Review and granting them an order of Stay of the proceedings relating to the University Bill 1999 in Parliament. The facts and the circumstances of the case appear to be common cause as they are easily ascertained from notice of application for leave to apply for Judicial Review, the affidavits filed in support and the ruling made by Ndhlovu, J. The respondents first took out a motion under Order

53 of the Supreme Court Rules of England for Judicial Review of the University Bill 1999 before Muyovwe, J. The application was supported by the affidavit, which showed that the applicants feared that there was University Bill 1999 due for an enactment into law. The applicants were stakeholders in relation to the matters that the Bill intended to address and that the Government had not consulted them. The affidavit disclosed further that the proposed Bill would encroach upon their rights and freedoms as enjoyed under the current Act. After hearing the arguments for and against the application, Muyovwe, J. delivered her ruling on 17th September, 1999. The learned trial Judge then dismissed the application. The respondents did not appeal against her decision. The respondents instead made renewal of the application before Ndhlovu, J, on 21st September, 1999. The notice of application is worth reproducing and was in the following terms:

> **"i)** The applicants have a legitimate expectation to be consulted or heard before the University Bill can be enacted into law on account of the reasons given in the joint affidavit filed herein and sworn on 13th September, 1999.
>
> **(ii)** **AND FURTHER TAKE NOTICE** that upon the hearing of this application the applicants intend to use the joint affidavit of **Kazhila Chisembu, Ryan Brian Kanswe and Levy Ngoma**, sworn on the 13th day of September, 1999, a copy of which is served herewith"

In addition to the application there was a statement filed under Order 53 Rule 6. Again the statement is worth reproducing and it reads as follows:

> "1. The Applicants are **Dr. Mark Mulenga, Simambo Banda** and **Haggai Chomba** suing in representative capacities. Their respective addresses are University of Zambia, Great East Road Campus, Lusaka as respects the first and second applicants and the Copperbelt University, Jambo Drive Riverside, Kitwe as respects the third.

2. All the three Applicants are Presidents of the aggrieved unions.
3. The proceedings in respect of which relief is sought relate to the proposed enactment into law of the University Bill, 1999.
4. The grounds relied on to support the claims for which relief is sought is that the Applicants have a legitimate expectation to be consulted before the University Bill is considered for enactment by Parliament because their positions as unions at the two Universities constitute them major stakeholders as relates this matter."

The applicants further filed affidavits by Kazhila Chisembu, Ryan Brian Kanswe and Levy Ngoma in support of the application. We will refer to this affidavit later in our judgment. The application for renewal did not go to Muyovwe, J, who had earlier on dealt with the matter. The application went to Ndhlovu, J, who on 28th September, 1999 gave a ruling in favour of the applicants. The ruling referred to the earlier application and acknowledged that the first application had been before another Judge and it had been refused. Ndhlovu, J, concluded that the High Court had enormous powers of Judicial Review not only in respect of administrative action, but also legislation. The learned trial Judge granted leave to the applicants for Judicial Review. The application before Ndhlovu, J, was ex-parte. The appellants in this matter did not appear and were not represented. After Ndhlovu, J's, ruling, the 1st appellant took out summons for leave to appeal to the Supreme Court and for Stay of the order granting Judicial Review.

The Attorney-General's application was based on the following reasons:

1. That the Applicants initial application for leave to move for Judicial Review having been rejected by Madam E.C. Muyovwe, J, the purported renewal of the application presented before your Lordship was misconceived in law as the said process was issued in contravention of the procedure laid down in Order 53/1-14/34 for the Supreme Court Rules 1997 Edition Volume 1 at Page 868 (White Book).

2. That any person who alleges that any of his/her constitutional rights have been or are being or are likely to be infringed in relation to him or her should seek redress in this Honourable Court by way of petition.

3. That recourse to the Rules of the Supreme Court of England as contained in the Supreme Court Practice (White Book) 1997 Edition is only possible where there is an omission in our laws. Article 28 Sub Article (3) of the Constitution specifically precludes the commencement of any action on the grounds that the provisions of Articles 1 to 26 inclusive of the Constitution are likely to be contravened by reason of proposals contained in any Bill which, at the date of commencement of the action, has not become a law.

The application by the Attorney-General came up on 4th October, 1999. The Attorney-General raised the question of jurisdiction. The matter was adjourned to 12th October, 1999 when Ndhlovu, J, gave his ruling on the application for leave to appeal to the Supreme Court. In his ruling the learned trial Judge held that there was no provision for an appeal in respect of ex-parte orders. He ruled that the application for leave against ex-parte order was misconceived and was accordingly dismissed. The Attorney-General raised preliminary issues again on the point of law. The Attorney-General told the court that the main reason for the appeal hinged or centered on the jurisdiction of the court. The learned trial Judge held **"The court conferred itself with the jurisdiction at much earlier stage – but this position is subject to Supreme Court nevertheless"** and he adjourned the case to 19th October, 1999 for hearing. The Attorney-General made an application to a single Judge of the Supreme Court and was granted leave to appeal to the Supreme Court against the ruling of the learned trial Judge and the proceedings in the High Court were Stayed pending the appeal to the Supreme Court.

The appellants have relied on two grounds of appeal. The first ground is that the learned trial Judge erred both in law and fact when he decided in his ruling dated 28th

September, 1999 (at pages 24 and 25 of the Record) that the application for leave to move the High Court to grant Judicial Review proceedings presented before him by the respondents was a renewal of an earlier ex-parte application for leave to move the High Court before Honourable Madam Justice Muyovwe to commence judicial review proceedings. The Honourable Madam Justice Muyovwe had on 17th September, 1999 delivered a ruling refusing to grant leave after having heard the arguments of Counsel for the respondents on 14th September, 1999. The second ground which was argued in the alternative was that the learned Mr. Justice T.K. Ndhlovu misapprehended and misapplied the law when he decided to grant leave to the respondents to apply for judicial review for the relief of:

i) Prohibition against Parliament to restrain it from proceedings with further determination of the University Bill, 1999;

ii) An order of mandamus directed to Parliament (i.e. The President and the National Assembly) to compel it to consult the respondents before enacting the said University Bill; and

iii) A declaration that Parliament is in breach of its duty to consult the aggrieved Unions who have legitimate expectation to be consulted as stakeholders in that it has considered the said University Bill for enactment without consulting them so far.

Mr. Chisulo, the learned Solicitor-General on arguing the first ground has contended that recourse to the Rules of the Supreme Court of England as contained in the 1999 Edition of the White Book (on which the learned trial Judge entirely relied for his jurisdiction) is only possible where there is an omission or lacuna in our own rules of practice and procedure. He has argued that the provisions of Rule 50 of Supreme Court Rules made under Section 28 of the Supreme Court of Zambia Act, Cap. 25 as read with Rule 48 prescribes the procedure to be followed by a party aggrieved by a decision of a High Court Judge. In all cases the appeal lies to the Supreme Court. He has maintained that that provision precludes the High Court Judges from adopting the procedure and practice

prescribed under Order 53/14/3 of the High Court Rules which the Hon. Mr. Justice Ndhlovu placed much reliance for his jurisdiction to hear the respondents' application for leave. Mr. Chisulo has further maintained that the Hon. Mr. Justice Ndhlovu had neither appellate nor referral status when he decided to renew the application already determined and disposed off by the Hon. Madam Justice Muyovwe. He supported his arguments by the case of **Derrick K. Chitala Vs The Attorney-General, SCZ Judgment No. 14 of 1995**, in which this court said:

> **"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 any cassus omissus in our own rules of practice and procedure. this would be a renewal of the application for leave to the appellate Court."**

Mr. Chisulo continued with his argument that the application placed before the Hon. Mr. Justice Ndhlovu and subsequent proceedings before him are or were null and void ab initio for want of jurisdiction. He further relied on the following cases and authorities:

(a) **Kabwe Transport Company Ltd. Vs Press Transport (1975) Ltd. 1984 ZLR 43 at 46;**
(b) **R. Vs Secretary of State for the Home Department, ex-parte Rukshanda Begum (1990) C.O.D.107;**
(c) **Associated Provincial Picture Houses Ltd. Vs Wednesbury Corporation (1948) IKB 223;**
(d) **Mwamba and Another Vs Attorney-General (1993) 3 LRC 166, SCZ Judgment No. 10 of 1993; and**
(e) **Hugill Vs the Republic (1987) LRC (Const.) 1053 Kiribati.**

We are very much indebted to the learned Solicitor-General for these authorities. We have read them and we have taken them into consideration in our judgment. Mr. J. Jalasi, State Advocate, argued the second ground which is in the alternative. Mr. Jalasi submitted that upon perusal of the contents of the affidavit, especially contents of the

exhibits marked *"KC RBK LV3"*, it is quite clear that among other things, the respondents allege that some of their constitutional rights are likely to be infringed in

relation to the respondents and their respective members if and when the University of Zambia Bill, 1999 is enacted into law. Mr. Jalasi argued that this allegation alone brings into focus the provisions of Article 28(1) of the Constitution which provides that any person who alleges that any of his/her constitutional rights have been or are being, or are likely to be infringed in relation to him or her should seek redress in the High Court by way of a petition. Mr. Jalasi drew our attention to Statutory Instrument No. 156 of 1969 made under the Zambia Independence Order, 1964 by the High Court Rules Committee, as it existed then, in exercise of the powers conferred to it by the Constitution as it was then, promulgated the Protection of Fundamental Rights Rules, 1969. By these rules a procedure for making an application under Article 28 of the Constitution was made for in Rule 2 as follows:

RULE 2:

> **"An application under Section 28 of the Constitution shall be made by petition filed in the Registry of the High Court."**

Mr. Jalasi argued that in the present case that procedure has not been followed.

In response Messrs. Sikota and Hang'andu for the respondents have contended that the order given by Ndhlovu, J, was an ex-parte one and that the Solicitor-General has admitted that they were appealing against that order. In the present case they have argued that the orders and rulings were made ex-parte and no appeal therefore lies against those orders. They have vigorously argued that the State should have applied to the court to set aside the ex-parte orders but the State has ignored that procedure. They have relied on the case of **Vas Sales Agencies Limited Vs Finsbury Investment Limited, Norman Bloe Mbazima and Registrar of Lands, SCZ Judgment No. 2 of 1999.** In this case we said:

> **"We wish to observe here that the application before the learned Judge was not heard on the merits and ordinarily no appeal lies against a decision not on the merits. In this case there was a procedural mistake on the part of the**
>
> **learned Judge who heard the application and it is for this reason that we entertained the appeal. We have said before and we wish to reiterate here**

that in any ex-parte application, if the court is inclined to refuse the application then the proper procedure to adopt is to order that the application do stand as inter-parte summons and hear both sides instead of hearing the application only and then embark on a lengthy ruling which is not on the merits to justify the refusal. For this reason we allow the appeal, set aside the order made below and remit the matter back to the High Court for an inter-parte hearing before another Judge."

It would be observed from this case that in fact the argument advanced by the learned counsel for the respondents was not totally supported by the authority. In that case the Supreme Court went further to entertain the appeal. But assuming this authority forbids appeals from cases not decided on merits the facts of this case show that the case later became inter-partes. Earlier in our judgment we have given a brief history of the case. After the Hon. Mr. Justice Ndhlovu granted leave for Judicial Review proceedings, the Attorney-General further in his application raised a preliminary issue on the jurisdiction. Counsel for the respondents raised objection to the application of the Attorney-General. The learned trial Judge ruled that he had conferred upon himself jurisdiction and that his stand stood. When the Attorney-General made an application and raised a preliminary issue on the jurisdiction, the matter ceased to be ex-parte, the matter became inter-partes. At that point the learned trial Judge if he had wished, would have reviewed his decision, particularly that the jurisdiction was being challenged; but he maintained his stand that he had the jurisdiction. The case in our view ceased to be an ex-parte one and the appeal properly lies to the Supreme Court. This stand is supported by the case of Derrick Chitala Vs the Attorney-General. The objection by the respondents to the validity of the appeal before the Supreme Court cannot therefore be tenable.

The respondents' counsel on ground 2 contended that their clients did not complain about their rights being infringed. Their clients only complained that they were not consulted and they decided therefore, to proceed under Order 53 of the Supreme Court Rules as opposed to the procedure laid down by Article 28 of the Constitution.

In this appeal, from the arguments and affidavits of the parties, two main issues have arisen:

1. That Ndhlovu, J, should have not entertained the renewal application on the ground that he had no jurisdiction; and
2. The application by the respondents was improper in that the respondents did not follow provisions of Article 28 of the Constitution.

We have given anxious and careful considerations to the Advocates' submissions. The learned Solicitor-General in arguing ground 1 and on relying on Rule 50 of our Supreme Court Rules, gave the impression that Rule 50 precludes the High Court Judges from adopting the procedure and practice prescribed under Order 53/14/3 of the Rules of England contained in the White Book of 1999 Edition. This court dealt with this matter in the case of Derrick Chitala Vs the Attorney-General, to which we have already referred. In that case we further said:

> **"It is trite that judicial review has supplanted the old proceedings for the prerogative writ of mandamus, prohibition and certiorari. These orders can now be obtained under Order 53 as can an injunction to restrain a person from acting in an office to which he is not entitled or a declaration and/or injunction in any matter of the 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 and proposed by cases such as COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS VS MINISTER FOR THE CIVIL SERVE."**

From our decision in the Chitala's case, Judges of the High Court are not completely barred from relying on the provisions of Order 53 of the Supreme Court Rules of England. The question that arises in this case is whether or not Ndhlovu, J, was correct in conferring upon himself the jurisdiction to entertain the renewal application. The facts show that the matter had been dealt with by Muyovwe, J, who had declined to grant the leave sought. In accordance with the decision in the Chitala's case, after the application had been turned down by Muyovwe, J, the respondents should have appealed to the

Supreme Court where they were going to renew their application. The respondents' Advocates have argued that their clients were entitled to renew their application before another Judge, under Order 53 of the Supreme Court Rules of England. They have argued that the recourse to the English practice was permitted by Section 10 of the High Court Act. We agree that Section 10 of the High Court Act allows reference to the English practice if our laws have no relevant provisions. That practice has been recognized by this court in the Chitala Vs the Attorney-General case. The appellants have condemned the procedure adopted by the respondents because our laws have adequate provisions on how remedies sought by the respondents should be canvassed for. In the alternative, the appellants have argued that the use of the Judicial Review procedure was improper. On the other hand the respondents have argued that they were not enforcing their constitutional rights but they were merely complaining that the Government had not consulted them. That argument by the respondents is contrary to what their affidavits have stated. In the affidavit filed by Messrs. Kazhila Chisembu, Ryan Brian Kanswe and Levy Ngoma, the respondents have complained, particularly in paragraph 8 **that they had a genuine and real fear that once the Bill is assented to by the Republic President and becomes law, they shall lose their rights and freedoms currently enjoyed under the University Act of 1992.** On this point, Mr. Hang'andu was not very strong but he maintained that his clients did not want to enforce their rights under Article 28 of the Constitution. Article 28 of the Constitution of Zambia provides clear procedure for people to enforce their rights. The provisions have been given more force by Statutory Instrument No. 156 of 1969. In addition to the provisions, there is a case of **Patel Vs Attorney-General ZLR (1969) page 97.** This is a High Court case decided by the Hon. Chief Justice Skinner, as he then was. In the learned Chief Justice said:

> **"By virtue of Rule 2 of the Protection of Fundamental Rights Rules, 1969, application under Section 28(1) of the Constitution should be made by way of petition."**

It can be seen from the provisions of the Constitution and the fundamental rules made under Article 28 and decided cases that the law in Zambia is very clear on the procedure to be adopted in relation to the enforcement of rights under Article 28.

It is clear from what we have discussed above that there is no omission or lacuna in our laws on how to enforce the rights protected under the Constitution. The respondents, through their Advocates argued that it was not their intention to invoke the provisions of Article 28 and that their intention was merely to complain against Government's decision not to consult them on the Bill. This argument in our view is very weak and begs the question. The affidavit already referred to clearly spoke of the infringement of their rights, which they are currently enjoying under the present University Act. The learned Solicitor-General was on very firm ground when he argued in the alternative that the procedure should have been as laid down under Article 28 of the Constitution.

We now turn to the question of jurisdiction assumed by Ndhlovu, J. The learned Solicitor-General has relied on the Derrick Chitala case. He has referred us to the Kiribati's case of **Hugill Vs the Republic** reported in the Commonwealth Law Report (1987). In that case the Judge had been a Chief Registrar and Commissioner of the High Court. He was appointed a Judge of the High Court and went to sit as a single Magistrate to complete the case. It was ruled that he had ceased to have the jurisdiction. Here in Zambia the judicature is governed by Article 91 of the Constitution. Article 94(1) of the Constitution deals with the High Court. The Article reads:

> **"94(1) There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.**

(2) The High Court shall be divided into such divisions as may be determined by an Act of Parliament."

Sections 9 and 10 of the High Court Act deal with jurisdiction and procedure of the High Court. From the above provisions, it is not in dispute that we have only one High Court in Zambia consisting of the Chief Justice and Puisne Judges, who in all respects have equal power, authority and jurisdiction. In the case of **Re Hastings No. 3 of 1959 1 ALL ER 700,** Vaisey, J, said:

> **"It is beyond my comprehension how we here, Judges of the High Court, could be heard to overrule or otherwise interfere with a judgment which was the result of the Chief Justice's hearing before his Divisional Court – how we could be heard to say that the conclusion and the order of our own court, the only court which exists, the High Court of Justice,was wrong and to say that something else should be done."**

There is another English case on the matter. This is **Re Kray, Re Kray, Re Smith 1965 1 ALL ER 710.** The facts in that case were that the applicants were arrested in January, 1965, and on February 1, 1965, were committed in custody by a magistrate to the Central Criminal Court on a charge of demanding money with menaces. On February 3 and February 5 the applicants applied for bail to a judge in chambers, who declined jurisdiction as the Central Criminal Court was in session and adjourned the application to that court. On February 8 the applicants accordingly applied for bail to the Common Sergeant who refused the applications on their merits. On February 9 the applicants applied de novo for bail to a Divisional Court of the High Court and the applicants were refused on their merits. On February 12, in term, the applicants applied for bail to the Lord Chancellor at the House or to any judge however often it had been refused by another. It was held that the Lord Chancellor had no jurisdiction, either original or by way of appeal, to entertain the applications for bail for the following reasons:

i) at the time of the commencement of the Supreme Court of Judicature Act, 1873, the only right to go from court to court in term time, or from judge to judge in vacation, applying for habeas corpus on refusal of bail (or for

bail depending on the right to habeas corpus) was that provided by the Habeas Corpus Act. 1679, and

(a) since the passing of the Supreme Court of Judicature Act, 1873, when the former courts became one High Court, it was no longer possible to go from court to court in term time,

b) the right to go from judge to judge in vacation, and thus to go in vacation to the Lord Chancellor as a judge of the High Court, applying for habeas corpus on refusal of bail or for bail depending on the right to habeas corpus (which the Lord Chancellor had formerly had jurisdiction to grant) had been taken away of the Administration of Justice Act, 1960.

ii) Any jurisdiction of the Lord Chancellor, as a judge of the High Court, to grant bail independently of any right which he had prior to the Act of 1960 to issue a writ of habeas corpus, must be exercised in accordance with the Rules of Court, and by R.S.C., Ord. 79, r. 91 applications to the High Court for bail in a criminal proceeding, where the defendant was in custody, must be made in term time to a judge in chambers.

iii) The Lord Chancellor could have no jurisdiction in the matter since the Act of 1960 save as a judge of the High Court, and in that capacity he could not entertain an application for bail after a Divisional Court of the High Court had already heard and determined the application on its merits, for there was only one High Court, all the judges of which were judges of the same court.

Here in Zambia there is a case of **Rahim Obaid Vs The People** and **Nadhim Quasmi Vs The People (1977) ZLR page 119,** dealt with by Sakala, J, as he then was. In that case

Sakala, J, was faced with an application of bail from the applicants whose bail has been rejected by another High Court Judge. Sakala, J, reviewed the law in Zambia. He considered the English authorities and he came to the conclusion that he had no jurisdiction to entertain the applications. In the present case, Ndhlovu, J, entertained a renewed application and granted leave. Later the Attorney-General raised the preliminary issue on the jurisdiction.

The Solicitor-General has maintained in his argument that Ndlovu, J, had no jurisdiction to entertain the renewed application. As can be seen from the cases we have discussed above, there is only one High Court in Zambia and that a decision of one Puisne Judge or one Judge of the High Court becomes a judgment of the High Court. As was stated in the Re Hastings case, it is beyond our comprehension that here Judge of the High Court can be heard to overrule or otherwise interfere with a judgment of another High Court Judge. The proper procedure, as has been argued by the learned Solicitor-General. was for the respondents to appeal to the Supreme Court, which court would treat the appeal as a renewal of the application. In this case, the proper procedure was either to ask Muyovwe. J. if the respondents had new facts, to review her decision in accordance with Order 39 of High Court Rules, but that was not done. The renewal of the application went to Ndhlovu. J, who entertained the application. That procedure was wrong and improper. The learned Solicitor-General was on firm ground when he submitted that Ndhlovu. J, had no jurisdiction in the matter. We entirely agree with him. The learned trial Judge misdirected himself in assuming the jurisdiction.

For the reasons we have given in our judgment, this appeal must succeed. The appeal is allowed. The granting of leave of Judicial Review is quashed and set aside. We further quash and set aside all the Orders made therein. On the question of costs, we have taken into consideration the facts and circumstances of the case and we order that each party bears its own costs.

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B.K. BWEUPE
DEPUTY CHIEF JUSTICE

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M.S. CHAILA
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE

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D.M. LEWANIKA
SUPREME COURT JUDGE

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L.P. CHIBESAKUNDA
SUPREME COURT JUDGE