IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA AND LUSAKA
(CIVIL JURISDICTION)

SCZ JUDGMENT NO. 17 OF 2009
SCZ/8/93/2009

BETWEEN:

THE PEOPLE

AND

THE PRINCIPAL RESIDENT MAGISTRATE
EX-PARTE FAUSTIN KABWE AND AARON CHUNGU

CORAM: Sakala, CJ., Chitengi JS and Chibomba Acting JS
On 2nd June and 9th July, 2009

For the Appellant	**J.P. Sangwa of Simeza Sangwa Associates**
For the Respondent	**D.Y. Sichinga, Solicitor General**

J U D G M E N T

Sakala, CJ., delivered the Judgment of the Court.

Cases Referred to

1. ***R V Civil Service Appeal Board, Ex-parte Cunningham [1991] 4 ALL E.R. 310.***

2. ***Derrick Chitala (Secretary General of the Zambia Democratic Congress) V The Attorney General [1995 and 1997] ZR91.***
3. ***Dean Namulya Mung'omba and Other V Peter Machungwa and Others [2003] ZR17.***
4. ***Council of Civil Service Unions V Minister for the Civil Service [1985] A.C. 374.***
5. ***Attorney -General V Shamwana and Other [1981] ZR.***
6. ***R V Wandsworth County Court, Ex-parte Siva Subramanian [2003] 1WLF 475.***
7. **Harrison V. Department of Security [1997] C.O.D. 220 DC**

According to the Notice and Memorandum of Appeal, this is an appeal against the Ruling of the High Court dated 27th April, 2009, refusing the application by Messrs Faustin Mwenya Kabwe and Aaron Chungu, (the Applicants in the Court below) for leave to apply for Judicial Review. For convenience, we shall continue referring to them as the Applicants.

The brief facts, which were common cause, leading to this appeal are that the Applicants are currently on trial in a criminal matter before the Subordinate Court of the Principal Resident Magistrate, holden at Lusaka, on several counts of corruption. In that trial, the prosecution closed its case. By a Ruling dated 15th

April, 2009, the Principal Resident Magistrate ruled that the Applicants had a case to answer and put them on their defence.

Aggrieved by the Ruling, the Applicants applied to the High Court for leave to apply for Judicial Review; seeking the relief in the form of an order for **Mandamus** to compel the Principal Resident Magistrate to give his reasons for finding that the Applicants had a case to answer. The application, which was supported by an affidavit verifying the facts; set out the relief sought, the grounds, the law, the interim relief and miscellaneous issues which the Applicants indicated that the Court should be aware of.

The trial Judge considered **Order 53/14/28 of the Rules of the Supreme Court, White Book** and the authorities cited on behalf of the Applicants, in particular the case of **R V Civil Service Appeal Board, Ex-parte Cunningham**[1]. The trial Judge noted the principle that a Tribunal is required to give reasons for its decisions; but observed that in the case before him, he was dealing with the Court of the Principal Resident Magistrate; that that Court is governed by the provisions of the **Criminal Procedure Code, Cap 88 of the Laws of Zambia**; and that these provisions provided for an appeal against all decisions of all the Courts that are lower than the Supreme Court of Zambia.

The trial Judge pointed out that should the Applicants be convicted of the criminal offences they are charged; and then decide to appeal against the conviction, the manner in which the Principal Resident Magistrate arrived at his decision on finding the Applicants with a case to answer would be the subject of an appeal.

The Court concluded that the decisions of the Principal Resident Magistrate are subject to appeal under the provisions of the **Criminal Procedure Code**; and that therefore Judicial Review can not lie against that Court. Leave to apply for Judicial Review was refused; hence this appeal to this Court.

The Memorandum of appeal set out only one ground of appeal; namely; that the Court below misdirected itself on a point of law only when it held that the decisions of the Court of the Principal Resident Magistrate are subject to appeal under the provisions of the **Criminal Procedure Code**, hence review is not available.

On behalf of the Applicants, Mr. Sangwa filed very detailed written heads of argument based on this ground. The heads of argument set out the facts of the case and procedural clarification before delving into the ground of the appeal itself.

We have already set out the facts of the case in this Judgment. But before summarizing the heads of argument; it is pertinent to

comment on what Mr. Sangwa has set out as procedural clarification in the heads of argument. According to Mr. Sangwa, there is need to clarify the procedure on how an application of this nature can be prosecuted before the Supreme Court. He cited the case of **Derrick Chitala (Secretary General of the Zambia Democratic Congress) V The Attorney General**[2] where 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 a 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. Sangwa pointed out that having made this observation in the **Chitala**[2] case; this Court said no more as to whether in view of the above observation, we have to follow our own Rules of the Supreme Court or the Rules of the Supreme Court of England. According to Counsel, there is a difference between an appeal against the Court's decision to grant leave to apply for Judicial Review and a renewal of the application for leave to apply for

Judicial Review before the Supreme Court, once it has been refused by the High Court.

He explained that an appeal entails a review of the decision of the Court below; whereas in the case of a renewal of an application for leave to apply for Judicial Review before the Supreme Court, the decision of the Court below is not up for consideration; as a renewal is a fresh application in which the Supreme Court is expected to make its own Judgment uninfluenced by what may or may not have been said in the High Court.

According to Mr. Sangwa; the position has been complicated further by the decision of this Court in the case of **Dean Namulya Mung'omba and Others V Peter Machungwa and Others**[3]. He pointed out that under our own Supreme Court Rules; this is an appeal and in the case of **Chitala**[2], this Court proceeded on the premises that it was an appeal and reviewed the decision of the Court below and dealt with the substantive application for judicial review.

We have considered the issue of procedural clarification as raised by Mr. Sangwa in his written heads of argument. In our view, there is nothing that requires clarification in terms of procedure on how an application of this nature must be prosecuted before the Supreme Court. The **Chitala**[2] case settled the procedure; while the

Mungomba [3] **case** explained in detail as to when a party can invoke **Order 53** of the Supreme Court Rules.

Under the Rules of the Supreme Court of Zambia; this is an appeal against the decision of a High Court Judge refusing to grant leave to bring judicial review proceedings, (see **Chitala** case). The Applicants themselves in the present case brought these proceedings to this Court styled as an appeal against a High Court Judge's decision refusing to grant leave to apply for judicial review. The record is described as "***Record of Appeal***". The Notice reads ***"Notice of Appeal".*** This Notice of appeal reads:

> ***"TAKE NOTICE that FAUSTIN MWENYA KABWE and AARON CHUNGU, being dissatisfied with the Ruling of Honourable Mr. Justice E.M. HAMAUNDU given at Lusaka on the 27th day of April, 2009, intend to appeal against the entire ruling".***

And the Memorandum of Appeal reads:

> ***"MEMORANDUM OF APPEAL PURSUANT TO RULE 58 OF THE RULES OF THE SUPREME COURT OF ZAMBIA***
>
> ***The Appellants above-named, appeal to the Supreme Court against the ruling herein dated the 27th day of***

April, 2009, on the ground that the Court below misdirected itself on a point of law when it held that the decisions of the court of the Principal Resident Magistrate are subject to appeal under the provisions of the Criminal Procedure Code, hence judicial review is not available".

Quite clearly, the Applicants brought these proceedings to this Court by way of appeal following what we said in **Chitala**[2] case. If they had followed what we said in **Mungomba**[3] case, then they would have come to this Court by way of a renewal of an application for leave. But for the benefit of the trial Courts and the Legal Practice in Zambia, we would like to indicate that by virtue of the **English Law (Extent of Application) (Amendment) Act No. 14 of 2002,** thc Supreme Court Practice Rules of England in force until 1999 now apply in Zambia. This means that Judicial Review Procedure in Zambia is no longer a default procedure, but part of our procedure and practice.

For purposes of the proceedings before us, we are satisfied that the Applicants fully understood the procedure to be followed in the prosecution of their case before this Court. The case of **Chitala**[2] made it absolutely clear that the Rules of the Supreme Court of England would ***"... apply to supply cassus omissus in our own rules of practice and procedure,"*** at that time, when

there was a **cassus omissus** in our rules. The **Mung'omba**[3] case which was the latest on the point only affirmed the position in **Chitala**[2] case as it existed then when the Court held:

> ***"1. There is no rule under the High Court which Judicial Review proceedings can be instituted and conducted. Thus, by virtue of Section 10 of the High Court Act Chapter 27 of the Laws of Zambia, the High Court is guided as to the procedure and practice to be adopted.***
>
> ***2. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC).***
>
> ***3. Order 53 is comprehensive. It provides for the basis of Judicial review: the parties; how to seek the remedies and what remedies are available."***

The position has now since changed by the passing of the **English Law (Extent of Application) (Amendment) Act No. 14 of 2002,** which amended the **English Law (Extent of Application) Act, Cap 11 of the Laws of Zambia** and made the Supreme Court Practice Rules of England in force until 1999 applicable to Zambia.

We are, therefore, satisfied that there is no uncertainty in procedure in the present case. It is an appeal against the decision

of a High Court Judge refusing to grant leave to apply for judicial review. It follows that, although the matter was argued under both as an appeal and as a renewal of an application for leave, we shall only consider the heads of argument in so far as they relate to the appeal.

The gist of the written heads of argument on the only ground of appeal is that, as correctly noted by the trial Judge, there is no provision for interlocutory appeals against decisions of the Subordinate Court made pursuant to the provisions of **Section 206 of the Criminal Procedure Code**; and that the right to appeal to the High Court against the decision of the Subordinate Court arises only following upon a conviction of an accused person pursuant to the provisions of **Section 321 of the Criminal Procedure Code.** It was contended that at the time of an appeal against conviction, the decision of the Court under the provisions of **Section 206 of the Criminal Procedure Code** will have become moot, as the accused will have already given his defence and will have been convicted on the totality of what had been said by both the prosecution and the defence.

It was also contended that the Principal Resident Magistrate's exercise of the powers under **Section 206 of the Criminal Procedure Code** is subject to judicial review. It was pointed out that to qualify for judicial review the decision must meet certain

conditions explained by **Lord Diplock** in the case of **Council of Civil Service Unions V Minister for the Civil Service**[4].

It was argued that the Ruling of 15th April, 2009 by the Principal Resident Magistrate had an impact on the Applicants and has to be reviewed by this Court as stated in the cases of **Chitala**[2] and the **Attorney -General V Shamwana and Others**[5].

It was submitted that on basis of the documents in support of the application, leave ought to have been granted and should still be granted; that the application is neither frivolous nor vexatious or hopeless; that the issue is whether it was appropriate for the Magistrate to deliver a Ruling in the exercise of his powers under **Section 206 of the Criminal Procedure Code** without providing reasons for the Ruling.

It was pointed out that the reason advanced for the application for leave to apply for judicial review is procedural impropriate in that rules of natural justice were not observed; that as a remedy , the Applicants are seeking an order of **mandamus** to compel the Principal Resident Magistrate to give his reasons to justify the finding that the Applicants have a case to answer.

In his brief oral submissions, Mr. Sangwa indicated that if this Court treated this case as an appeal in the conventional sense,

then the order of **mandamus** should be granted; but should this Court treat this as a renewal of an application, then leave should be granted and the case remitted to the High Court before a different Judge to be determined on merit and that in the interim, the granting of the leave should operate as a stay of proceedings in the Subordinate Court until after the matter has been determined by the High Court.

On behalf of the state, Mr. Sichinga, the Solicitor General, also filed written heads of argument in response. He pointed out that the State supported the whole Ruling and opposed the ground of appeal advanced by the Applicants.

The summary of the Solicitor General's written heads of argument is that the trial Court was on firm ground when he held that the decisions of the Court of the Principal Resident Magistrate are subject to appeal pursuant to the provisions of the **Criminal Procedure Code;** and that it is trite law that judicial review lies against any inferior Court, but that it is only in rare situations that judicial review will lie against a decision of the Magistrate Court because the proper remedy is an appeal than judicial review. The case of **R V Wandsworth County Court, Ex-parte Siva Subramanian**[6] was cited in support of this proposition.

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It was contended by the Solicitor -General that at the stage of the proceedings, a finding of a case to answer and putting the Applicants on their defence is infact not a finding of guilty to the charges; that there is no legal requirement under **Section 206 of the Criminal Procedure Code** that the Court must give reasons in acquitting the accused person, but that it must merely appear to the Court that a case has not been made against the accused person; and that the converse is also true that where the Court finds an accused with a case to answer, it must merely appear to the Court that a case has been made out.

In his oral submissions, the Solicitor- General pointed out that the issue for consideration by this Court is whether or not the trial Judge was right in refusing to grant leave on a true construction of **Section 206 of the Criminal Procedure Code**. He submitted that there was no procedural impropriate; but that the Court acted within the confines of **Section 206 of the Criminal Procedure Code.**

In his short reply, Mr. Sangwa pointed out that the Applicants' cry was simply one of procedural fairness; asking for the Court to point out the prosecution evidence that justifies a finding of a case to answer to enable them address that evidence in their defence.

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We have very carefully considered the facts of this appeal, the Judgment of the trial Court and the arguments by both learned Counsel.

On 15th April, 2009, the Principal Resident Magistrate, at the close of the prosecution case in a criminal trial found the Applicants and others with a case to answer and put each one of them on defence. In putting the Applicants and others on their defence, the Principal Resident Magistrate concluded as follows in his Ruling:

> ***"Taking into account all the foregoing, I am satisfied that the prosecution has made out a prima facie case on each one of the counts herein, in respect of each one of the accused persons in this case requiring the accused persons to be put on their defence. Now therefore, I have found each of the accused persons in this case with a case to answer in respect of the respective charges against each one of them and accordingly put each one of them on defence."***

Dissatisfied with this Ruling the two Applicants applied to the High Court for leave to apply for Judicial review seeking for an Order of **Mandamus** to compel the Principal Resident Magistrate to

give reasons for his Ruling of putting the Applicants and others on their defence.

The High Court Judge dismissed the application. In dismissing the application, the High Court Judge, among others, had this to say:

> ***"In summary, therefore, the decisions of the court of the Principal Resident Magistrate are subject to appeal under the provisions of the Criminal Procedure Code. Therefore, judicial review cannot lie against that court in the circumstances of this case".***
> ***Leave to apply for judicial review is not granted".***

The Applicants appealed against the Ruling of the High Court to this Court.

In Zambia, the procedure to be followed in criminal matters is set out in the **Criminal Procedure Code, Cap 88 of the Laws of Zambia**. **Section 206** of the Code reads:

> ***"206. If, at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to***

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require him to make a defence, the court shall dismiss the case, and shall forthwith acquit him".

The use of the phrase "If,.....it appears to the Court....." in the Section is not without any significance.

The learned Principal Resident Magistrate in his Ruling was "....**satisfied that the prosecution has made out a prima facie on each one of the counts..."**

The expression "**prima facie**" is from Latin. According to various English Dictionaries, among many others, the expression means: **on its first appearance**; **by first instance**; **at first sight**; **at first view**; **on its face**; **the first flush;** and **from a first impression.**

We agree with the submission by the Solicitor General that there is no requirement under **Section 206** of the Code that the Court must give reasons for acquitting an accused person; that it must merely **appear** to the Court. The converse, therefore, must also be true that where the Court finds an accused with a case to answer, it must merely **appear** to the Court that a case has been made out against the accused.

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In our considered view, a finding of a case to answer is based on the Courts' feelings or impressions and appearance of the evidence. But above all, the finding of a prima **facie case** is not a final verdict. In the case of **Harrison V. Department of Security**[7] (Also cited in Archbold page 407, 1999 ed), the Court stated: ***"Magistrates are not obliged to give reasons for rejecting a submission of no case to answer"***.

We agree with this proposition of the law because a finding of a case to answer is not a final verdict. However, a finding of no case to answer is a final verdict and therefore a Magistrate would be required and obliged to give reasons.

However, the most important issue in the present appeal is one of procedure.

We have said before that there can be no interlocutory appeals in criminal matters. Mr. Sangwa agrees with this position in his written heads of argument. His complaint is that at the time of an appeal against conviction, the decision of the Court under **Section 206 of the Criminal Procedure Code** will have become moot.

We sympathize with Mr. Sangwa; but as for now that is the law.

The issues raised in this purported appeal are only relevant at the end of the criminal trial should there be a conviction.

We are, therefore, satisfied that the trial Judge did not misdirect himself on a point of law; when he held that the decisions of the Court of the Principal Resident Magistrate are subject to appeal under the provisions of the **Criminal Procedure Code.**

This appeal was definitely misconceived. It is, accordingly, dismissed with costs to the State in this Court and in the Court below to be taxed in default of agreement. For avoidance of doubt, we direct that the criminal trial in the Subordinate Court must proceed.

E.L. Sakala
CHIEF JUSTICE

P. Chitengi
SUPREME COURT JUDGE

H. Chibomba
AG/SUPREME COURT JUDGE