Selected Judgment No. 4 of 2019

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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.89/2016**
HOLDEN AT NDOLA
(CIVIL JURISDICTION)
BETWEEN:
AGRO-FUEL INVESTMENT LIMITED **APPELLANT**
AND
ENERGY REGULATION BOARD **RESPONDENT**

CORAM : Wood, Musonda and Mutuna, JJS
On 5th March 2019 and 11th March 2019

For the Appellant : Mr. R. M. Simeza SC of Messrs Simeza Sangwa and Associates

For the Respondent : Ms C. Mhango, in-house counsel for the Respondent

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J U D G M E N T

MUTUNA, JS. delivered the judgment of the court.

Cases referred to:

1) **Derrick Chitala v Attorney General SCZ judgment No. 14 of 1995**

2) Council for Civil Service Union v Minister for the Civil Service (1985) AC 374
3) R v Secretary of State for Home Department, exparte Rukshanda Begum (1990) C.O.D. 107
4) R v Independent Television Commission, ex parte TVNI Limited (1991) The Times December 30
5) Hodgson v Armstrong and another (1966) ALL ER 594
6) United Engineering Group Limited v Mackson Mungalu and others SCZ judgment No. 4 of 2001
7) City Express Limited v Southern Cross Motors (Formerly Marounochi Motors Limited) SCZ/8/262/2006
8) Bellamano v Ligure Lombarda Limited (1976) ZR 267
9) Mungomba and others v Machungwa and others (2003) ZR 17
10) Zambia Wildlife Authority and others v Mutete Community Resources Board Development Co-operation Society SCZ judgment No. 16 of 2009
11) R v Inland Revenue Commissioner ex parte National Federation of Self-Employed and Small Business Ltd (1981) 2 ALL ER 93
12) Arthur Nelson Ndhlovu and Another v Alshams Building Materials C. and another (2002) ZR 48
13) Krige and another v Christian Council of Zambia (1975) ZR 152
14) Virginia Hospital Association v Baliles 868F.2d 653
15) Sanatan Dharma Maha Sabha of Trinidad and Tobago v The Honourable Mr. Patrick Manning H.C.A. S1095 of 2004
16) Camelot UK Lotteries Limited v The Gambling Commission and others (2012) EWHC 2391
17) Kaluo Joseph Andrew and 2 others v The Attorney General and six others Miscellaneous cause No. 106 of 2010

18) **R v Dairy Produce Quota for Tribunal for England and Wales ex parte Casewell (1989) 1 WLR 1089**
19) **R v Stratford-on-Avon District Council ex parte Jackson**
20) **Savenda Management Services Limited v Stanbic Bank Zambia Limited and Gregory Chifire SCZ judgment No. 47 of 2018**
21) **R (on the application of H) v London Borough of Brent (2002) EWHC 1105**
22) **R (Burkett) v Hammersmith and Fulham LB (2002) UKHL 23**
23) **R (G) v Secretary of State for Justice (2010) EWHC 3407 (Admin)**
24) **R (On an application of G) v Secretary of State**
25) **R (on the application of H) v London Borough of Brent**

Works referred to:

1) **Blacks Law Dictionary by B. Garner, 8th edition Thomson West, USA.**
2) **De Smiths Judicial Review, 7th edition, by Harry Woolf, Jeffrey Jowel, Andrew Le Sieur, Catherine Donnelly and Ivan Hare, Sweet and Maxwell Thomson Reuters, South Asian edition**

Legislation referred to:

1) **The Supreme Court Rules, 1965**
2) **Supreme Court Act, 1981 of England and Wales**

Introduction

1) This appeal arises from a decision by a Learned High Court Judge dismissing an application for leave to commence judicial review proceedings on the ground that

the launching of the application by the Appellant was grossly, inordinately and inexcusably delayed. Consequently, the grant of leave would be detrimental to good administration.

2) The appeal considers decisions that constitute one off acts where the cause of action arises when the decision is made and continuing breaches where the cause of action continues for as long as the act is not corrected.

3) It also addresses the discretion enjoyed by the Court to extend time for doing an act, in this respect, launching an application for leave to commence judicial review proceedings.

Background

4) The facts leading up to this appeal are hardly in dispute. The Appellant is an Oil Marketing Company (OMC) and consumer of oil products while the Respondent is a regulator and licensor of OMCs.

5) In the year 2005, the Respondent issued a directive to all OMCs that they should pay a monthly fee known as the

Strategic Reserve Fund (SRF). The fee, though payable by the OMCs was to be collected from all consumers of oil products by the OMCs for and on behalf of the Respondent. After such collection, the fee would be remitted to the Respondent by the OMCs on a monthly basis for purposes of establishing the SRF intended to stabilize oil prices.

6) The fee was payable over and above the licence fees charged by the Respondent to all OMCs. As such, any OMC which failed to pay the fee risked having its licence suspended. This was a threat issued by the Respondent to all OMCs and indeed, action was taken against defaulting OMCs.

7) The Appellant complied with the directive and has from the year 2006 to date been remitting the monthly fees to the Respondent.

8) However, in the year 2015, the Appellant felt aggrieved by the decision of the Respondent prompting it to launch

the proceedings in the High Court for leave to commence Judicial Review proceedings.

The Appellant's case in the High Court and arguments

9) The Appellant filed a notice of application for leave to apply for judicial review pursuant to Order 53 rule 3 of the ***Rules of the Supreme Court, 1965 (White Book)***. It sought to challenge *"[t]he decision of the [Respondent] to impose a tax or fee called the Strategic Reserve Fund in the cost line for the fuel price build-up for Oil Marketing Companies holding ... petroleum products licence".*

10) The Appellant sought the following relief:

10.1 an order of certiorari to remove into the High Court for purposes of quashing the decision of the Respondent imposing the tax or fee;

10.2 a declaration that the Respondent's decision to impose a tax known as the Strategic Reserve Fund on OMCs is unlawful;

10.3 an order that the strategic reserve fund levied on OMCs is illegal and therefore, null and void *ab initio*;

10.4 the hearing be by way of an oral application pursuant to Rule 3(3) of Order 53 of the White Book;

10.5 if leave to apply for judicial review is granted, a direction that the hearing of the application for judicial review be expedited;

10.6 costs; and

10.7 all necessary and consequential directions be given.

11) Prior to setting out the grounds upon which the relief was being sought, the Appellant stated brief facts in support of the application. These were that it is an OMC and is also engaged in the oil transportation business.

12) In addition, the facts reiterated the decision by the Respondent to charge the fees for purposes of setting up a SRF and to stabilize the fuel prices in the country.

13) This fee was tied to the OMC licence in that the Respondent announced that a failure to remit it would result in the suspension of the licence. For this reason, the Appellant diligently paid the fee on a monthly basis.

14) Subsequently, on 26th June 2015, the Appellant through its counsel questioned the legal basis for the Respondent's decision to impose the fee. There was no response from the Respondent prompting the Appellant to institute these proceedings.

15) In terms of the grounds for review, the Appellant had one sole ground of illegality. It contended that the decision by

the Respondent was not authorized by the ***Energy Regulation Act***. The Appellant went on to describe what constitutes illegality with reference to our decision in the case of ***Derrick Chitala v Attorney General***[1] and the English case of ***Council for Civil Service Union v Minister for the Civil Service***[2].

16) In explaining the ground of illegality further, the Appellant contended that where illegality is established the Court should quash a decision which is the subject of the challenge.

17) The Appellant also argued that there is no statute in Zambia which governs the law on judicial review, therefore, Courts in Zambia are bound to follow Order 53 of the ***White Book***.

18) The Appellant concluded with what it termed *"miscellaneous matters which the Court should be aware of"* in which it explained its delay in challenging the decision. It argued that it, with other OMCs, engaged the Respondent in an effort to settle the matter *excuria*.

Therefore, it was engaged in exhausting administrative avenues prior to resorting to litigation. Lastly, since the Respondent has continued to levy the fee, the decision has continued and the Appellant is not out of time.

The Respondent's case in the High Court and arguments

19) In response the Respondent filed a notice of intention to raise a preliminary issue on a point of law pursuant to Order 53 rule 4 of the ***White Book,*** an affidavit in support and skeleton arguments. The two former documents contended that the Appellant's application was outside the prescribed three months and as such misconceived and statute barred. It also contended that the Appellant did not have sufficient interest in the matter to warrant the grant of leave to apply for judicial review. For this reason it submitted that the Appellant's application should be dismissed pursuant to Order 14A rule 1 of the ***White Book.***

20) In the first set of arguments the Respondent argued from three fronts. The first front was that the Appellant had not satisfied the test of demonstrating sufficient interest in the matter. The need to show sufficient interest, it was argued, is contained in order 53 rule 14 sub-rule 24(3) of the ***White Book***.

21) The two stage process of judicial review which requires leave to be obtained first and if leave is granted the matter proceeds to the substantive hearing, has built into the first stage, the need for an applicant, in terms of Order 53 rule 3 sub-rule 5, of the ***White Book***, to show that he or she has sufficient interest in the matter. In this case, the Appellant had failed to demonstrate sufficient interest because the subject matter of the dispute are fees it collected from customers built into the fuel cost. It, thus stood to suffer no loss whatsoever if the practice continued.

22) Secondly, the Respondent argued on the need for an applicant to establish a *prima facie* case fit for investigation if leave is to be granted. It set out the test in accordance with the *English* case of ***R v Secretary of State for Home Department, exparte Rukshanda Begum***[3] that the judge must be satisfied on the material presented before him that there is a case fit for further investigation at a full *inter partes* hearing of the substantive application.

23) Applying the test to the facts of the case, the Respondent argued that it collected the fees pursuant to Section 20 (2)(c) of the ***Energy Regulation Act***, as such, the contention by the Appellant that the collection was illegal was untenable. As a consequence of the foregoing, the Appellant had not placed sufficient material before the Judge which established a *prima facie* case to warrant the grant of leave to commence judicial review proceedings.

24) Thirdly, the Respondent contended that, in any event, the Appellant's application for leave was out of time. It reiterated the position taken by the Appellant that Courts in Zambia are to be guided strictly by the provisions of Order 53 of the ***White Book*** in judicial review proceedings. That the said Order under rule 4 provides for applications for leave to apply for judicial review to be made within three months of the decision sought to be challenged.

25) In addition, the Respondent argued that even if an application is filed within the prescribed three months, the Court has a discretion to refuse it where the application is not made promptly. It relied on the English case of ***R v Independent Television Commission, ex parte TVNI Limited***[4].

26) The Respondent went on to argue that by the application filed on 13th August 2015, the Appellant sought to challenge the decision by the Respondent made in 2005.

In doing so, the Appellant did not lay before the Court any evidence which revealed that in the three months subsequent to the decision it had pursued administrative avenues for resolving the issue. According to the Respondent, the ten year delay between the decision by the Respondent and lodging of the application is unjustifiable.

27) In relation to a Court's discretion to extend time within which to file an application for leave, the Respondent argued that the Court has no such discretion where, as in this case, the time limit was set by statute. This, it was argued, is reinforced by the fact that Order 53 rule 4 of the ***White Book*** does not give a Court such discretion. The Respondent relied on the English case of ***Hodgson v Armstrong and another***[5] and our decision in the case of ***United Engineering Group Limited v Mackson Mungalu and other***[6]. The former states that time limits set by statute must be adhered to strictly, while the latter states that Acts of Parliament can make provision for

limitation and a plea of statute bar can be taken as a defence or preliminary point.

28) As a consequence of the arguments in the preceding paragraph, the Respondent argued that if the Learned High Court Judge found that the Appellant had sufficient interest and had established a *prima facie* case, it would plead the defence of statute bar. Further, where statute bar is established, the Court has no jurisdiction to entertain the matter.

29) Revisiting the contention by the Appellant that the delay in instituting proceedings arose from the fact that it was engaged in negotiations with the Respondent, it was argued that this has no bearing whatsoever on the computation of time for purposes of limitation of actions. To hold otherwise would be to suggest that there can be estoppel against a statute which is against precedent which shows that a litigant can plead the benefit of a statute at any stage of the proceedings. To this end, our attention was drawn to our decision in the case of ***City***

Express Limited v Southern Cross Motors (Formerly Marounochi Motors Limited)[7] and the text ***Halsbury's Laws of England***, 4th edition, volume 28.

30) The position we took in the ***City Express Limited*** case was that a defendant can at any stage of the proceedings successfully raise the defence of statute bar. Whilst ***Halsbury's*** states at paragraph 807 that a person is not prevented from raising a claim of statute bar merely because he was engaged in negotiations with the other party even though the said negotiations resulted in delay in bringing the action.

31) In conclusion, the Respondent prayed that the Appellant's application for leave to apply for judicial review should be dismissed.

The Appellant's reply to the Respondent's response

32) The Appellant's reply initially addressed the preliminary issue raised by the Respondent. It argued that the preliminary issue as presented was misconceived

because it cited Order 53 rule 4 of the ***White Book*** as the basis of the application. The said Order is a regulatory and not a procedural order and as such could not be relied upon in moving the preliminary issue. Consequently, the Respondent was in breach of ***Supreme Court Practice Direction number 1 of 2002*** which requires all process filed in Court to indicate the Act and section, order or rule pursuant to which it is presented. In this regard the Appellant placed reliance on the case of ***Bellamano v Ligure Lombarda Limited***[8].

33) The Appellant also took issue with the Respondent's reliance on Order 14A rule 1 of the ***White Book*** on the ground that the procedure under that Order can only be resorted to in actions other than judicial review proceedings. Further, one of the conditions precedent to resorting to the Order is that a defendant must have given notice of intention to defend. The Respondent in this case had not filed any response to the substantive

application for judicial review by way of a notice of intention to defend.

34) Concluding its arguments on when resorting to Order 14A rule 1 is permissible, the Appellant contended that we have pronounced ourselves in our decision in the case of ***Mungomba and others v Machungwa and others***[9] case that practice and procedure in judicial review is restricted to Order 53 of the ***White Book***. That our rules, for purposes of judicial review matters, are completely ignored and there is a strict following of Order 53 of the ***White Book***. Our attention was also drawn to our decision the case of ***Zambia Wildlife Authority and others v Mutete Community Resources Board Development Co-operation Society***[10] where we restated the position taken in the ***Mungomba*** case and went further to state that an application for judicial review cannot be impeached by way of a preliminary application.

35) In reply to the arguments and evidence by the Respondent on the application for leave, the Appellant

filed an affidavit in reply and skeleton arguments. The former document revealed that the Appellant's challenge of the Respondent's decision was based on the fact that it is recurrent on a monthly basis. Secondly, the Appellant also challenged the decision on the basis that it is also a transporter with a fleet of over one hundred trucks. Consequently, it is affected by the decision because each time it purchases fuel it is levied the fee. It also contended that the Respondent does not remit the fee to the Government but retains it in a separate account.

36) The Appellant then addressed the three contentions by the Respondent that: it had not demonstrated sufficient interest in the subject matter of the action; it had not established a *prima facie* case fit for further investigation; and, the application is barred as it is made out of time and contrary to Order 53 rule 4 of the ***White Book.***

37) The Appellant opened its arguments on the time bar issue and in doing so contended that the decision it was challenging was the Respondent's imposition of the fee on

a daily or monthly basis which is a continuing activity. This is contrary to the argument by the Respondent that it sought to challenge the one off event of establishing the SRF which took place in 2005. The Appellant argued that a fresh cause of action arises everyday or month the Respondent imposes the fee which is liable to challenge by way of judicial review. As a result of this, the decision made in 2005 only amounted to a ground for challenging an illegal act in the future while the actual imposition, demand of the fee and threats of sanction in case of non-payment as well as the collection of the moneys is what creates grounds for challenging the unlawful act.

38) The Appellant relied on a number of English cases which we have discussed in the latter part of this judgment. In doing so it argued that the two cases relied upon by the Respondent of ***City Express Services Limited v Southern Cross Motors Limited***[7] and ***United Engineering Group Limited v Mackson Mungalu and others***[6] have no bearing on the issues before the High

Court because they involved actions other than judicial review actions. By way of concluding arguments under this head, the Appellant referred to a number of authorities in an effort to show that the charging of the fees by the Respondent is an illegal act which we have not referred to because this appeal is not against a full hearing of judicial review proceedings but rather refusal to grant leave to commence judicial review proceedings.

39) The second issue the Appellant replied to was the Respondent's contention that the Appellant had not disclosed sufficient interest in the matter to warrant the grant of leave. Here the Appellant began by citing the words of Lord Roskill in the case of ***R v Inland Revenue Commissioner, ex parte National Federation of Self-Employed and Small Business Ltd***[11], defining the word *"interest"* to the effect that it should include any connection, association or interrelation between the applicant and subject matter of the application.

40) In justifying that it had sufficient interest in the matter the Appellant argued thus: there was sufficient evidence in the form of receipts presented to the Court which show that the Appellant has been remitting the fees and thus has interest in the matter: there is no evidence to show that the fees which are collected from members of the public are ultimately passed on to the general reserve of the Government of the Republic of Zambia by the Respondent; and, it had demonstrated in the affidavit in reply that not only is it an OMC but also a consumer, running a fleet of one hundred trucks. These trucks, the Appellant argued, consume thousands of litres of diesel daily.

41) In regard to the issue of establishing a *prima facie* case, the argument by the Appellant was simply that Section 20 of the ***Energy Regulation Act*** pursuant to which the Respondent purported to charge the fees, does not provide for the creation of a SRF or impose the fee. The

fees contemplated under Section 20(2)(c) in particular are in respect of services provided by the Respondent and are paid voluntarily by patrons who chose to participate in the services rendered.

42) The last argument advanced by the Appellant was a response to the Respondent's contention that the Appellant is estopped from raising the objection to the fees in view of time lapse. It argued that in view of the constitutional provision which prohibits the imposition of tax in the absence of specific legislation and since there is no specific legislation providing for the fee, the Respondent cannot invoke the provision of time limitation pursuant to Order 53 of the ***White Book***. Here, the Appellant was arguing that no estoppel can be set up against a statute, and consequently, he who flouts a constitutional provision cannot hide behind procedural or regulatory rules of Court as an estoppel. Our attention was drawn to our decisions in the cases of ***Arthur Nelson Ndhlovu and Another v Alshams Building***

Materials C. and another[12] and ***Krige and another v Christian Council of Zambia***[13].

Considerations by the Learned High Court Judge and decision

43) Prior to rendering the judgment appealed against in this matter, the Learned High Court Judge considered the appropriateness of the Respondent raising the preliminary issue. She found that it was an attempt to short circuit the main application for leave and that the arguments could be made in the said application.

44) The Learned High Court Judge then heard the application for leave and in determining it considered the three contentions made by the Respondent that the Appellant: lacks sufficient interest in the subject matter of the dispute; had failed to establish a prima facie case fit for further investigation; and, was out of time because the application was brought to Court ten years after the decision sought to be challenged.

45) In addressing the first contention, the Learned High Court Judge set out the sequence of events leading to the filing of the affidavit in reply by the Appellant. She found that the affidavit revealed that the Appellant is not only an OMC but a transporter with a fleet of one hundred trucks which consume thousands of litres of fuel per month. As a result, she held the view that the Appellant had a direct interest in the subject matter of the proposed application in terms of Order 53 rule 14 sub-rule 24 of the ***White Book***.

46) Turning to the second contention which is the making out of a *prima facie* case, the Learned High Court Judge described what amounts to a *prima facie* case with reference to Lord Diplock's decision in the case of ***R v Inland Revenue Commissioners and National Federation of Self Employed and Small Business Limited***[11]. She said it is a *prima facie* view in favour of an applicant which view may alter on further

consideration in the light of further evidence which might be before the Court.

47) Having set out the test, the Learned High Court Judge examined the relevant provisions of the ***Energy Regulation Act*** pursuant to which the Respondent acted. She, in this regard, looked at Sections 12, 20 and 21 of the Act with the caveat that at this stage she was not called upon to delve in detail in the matter. Whilst she found that Section 21 provides for fees paid under the Act to be remitted to the general reserve of the Republic, which would be applied to development of the energy sector, the other two sections, on their face, did not appear to provide for charging of the fee. As a consequence of this, she held that there was a case fit for further investigation.

48) In regard to the last contention alleging that the Appellant was out of time when it presented the matter to Court ten years after the decision was made, the Learned High Court Judge dismissed the argument by the

Appellant. She found that the decision sought to be challenged had been made ten years earlier and that it was not a continuing decision merely because the fees were collected on a monthly basis from 2005. She found further, that the collection of the fees on a monthly basis was not a continuing decision but rather the implementation of the decision made once in 2005. There was thus, no continuing ground for the challenge.

49) In arriving at the decision, the Learned High Court Judge considered in detail the case law referred to by learned counsel for the Appellant and distinguished it from the circumstances that prevailed in the case before her. She also discussed the purpose of obtaining leave to apply for judicial which is to weed out frivolous and vexatious applications and the need to protect public authorities from having to deal with applications that are unjustifiably late.

50) The Learned High Court Judge also considered constitutional provisions on limitation of actions and on

disposal of matters on technicalities. She concluded by finding that although the Appellant had satisfied the test for sufficient interest and *prima facie* case, the presentation of the application was inordinately delayed and would be detrimental to good administration. She thus refused leave.

The Appellant's grounds of appeal and arguments presented to this Court by the parties

51) The Appellant is unhappy with the decision of the Learned High Court Judge and has launched this appeal on two grounds as follows:

50.1 The lower Court erred in law and fact when it held that the delay to approach the Court for leave to launch judicial review was grossly inordinate and inexcusable; and;

50.2 The lower Court further erred in law when it held that the grant of leave in this case would be detrimental to good administration

52) Prior to the hearing, counsel for the parties filed heads of argument which they relied upon at the hearing. They also complimented the arguments with *viva voce* arguments.

53) In opening the substance of the Appellant's arguments under ground 1 of the appeal, counsel for the Appellant argued that contrary to the findings by the Learned High Court Judge, there was no delay on the part of the Appellant in approaching the Court for leave to apply for judicial review. The basis for counsel's argument was that the imposition of the fee, which is the subject of this matter, is not a one off act by the Respondent but a continuing act.

54) Counsel clarified his submission in the preceding paragraph by contending that while the decision to set up or introduce the fund was a one off event in 2005, the decision to impose the fee is a continuing one and takes place whenever the Respondent demands of the

Appellant as an OMC to include the fee in its monthly returns or when it incorporates it in the fuel pump price which, the Appellant as consumer, is forced to pay whenever it purchases fuel at a filing station. To this end, the view taken by counsel was that the decision to set up the SRF made in 2005 only amounted to a ground for challenging an illegal act in the future while the actual imposition of the fee (and threats for non-payment), creates the grounds for challenging the unlawful acts which have continued to take place.

55) In the consequence, counsel submitted that the decision to set up the SRF in 2005 was not what triggered the three month time line in the ***White Book*** but rather the actual imposition of the fee on the Appellant. This, counsel argued, is a continuing illegality until it is stopped. Counsel distinguished this from a situation where a decision is made to impose a one off fee or tax which, it was contended, can be limited in time to a specific date.

56) In the *viva voce* arguments counsel for the Appellant, Mr. R. M. Simeza SC, reiterated that the cause of action arises each time the Appellant as an OMC is compelled by the Respondent to submit monthly returns on its collection of the SRF products and is compelled to pay the fee.

57) Counsel then turned to observe that the distinction made by the Learned High Court Judge of the decision and implementation of the decision as a misdirection. He contended that what the Learned High Court Judge termed as implementation of the decision was in fact evidence of the continuation of the illegal act. Counsel went on to contend that the cause of action actually arises whenever an illegal or wrongful decision is implemented. To this end, counsel argued, the Learned High Court Judge misdirected herself when she tied the date when time started running to the date when the Respondent board met and decided to set up the SRF.

58) In support of the argument set out in the preceding paragraph counsel relied on a number of authorities which we have discussed in detail later in this judgment.

59) The second part of counsel's arguments in relation to ground 1 of the appeal addressed the Court's discretion to grant leave in case of delay in bringing an application for leave to commence judicial review proceedings. The first argument advanced by counsel was that the statute of limitation does not apply in relation to an action challenging an unconstitutional act. He relied on the American case of ***Virginia Hospital Association v Baliles***[14].

60) The second argument by counsel was threefold. He argued that the Court should exercise its discretion to entertain an application out of time where the matter is of sufficient importance. Further, where the case alleges a continuous or continuing illegality, the delay should not be stringently regarded. Lastly, that the time limit set by Order 53 rule 4 sub-rule 1 of the ***White Book*** is

intended to ensure expeditious determination of judicial review applications and not to oust the jurisdiction of the Court entirely.

61) Counsel invited us to have sight of the following cases: ***Sanatan Dharma Maha Sabha of Trinidad and Tobago v The Honourable Mr. Patrick Manning***[15]***; Camelot UK Lotteries Limited v The Gambling Commission and others***[16]; and ***Kaluo Joseph Andrew and 2 others v The Attorney General and six others***[17].

62) Counsel's last argument under ground 1 addressed the decision by the Learned High Court Judge in relation to the effect of Article 118(2) (e) of the ***Constitution*** (as amended). We have not restated these arguments because at the time the matter was heard the ***Constitution*** (as amended) had not yet come into force.

63) Counsel argued ground 2 of the appeal as an alternative to ground 1 of the appeal. In addressing arguments under this ground, counsel questioned the finding by the

Learned High Court Judge that granting leave would be detrimental to good administration. According to counsel, there was no evidence to prove this and the Learned High Court Judge relied solely on the ten year delay.

64) To support his arguments counsel referred to the case of ***R v Dairy Produce Quota for Tribunal for England and Wales ex parte Casewell***[18] which, he argued, has been referred to in Order 53 rule 14 sub-rule 59 of the ***White Book*** as setting out the test of what constitutes detrimental to good administration thus:

> **"(i)The subsection requires proof of detriment to good administration; anything else such as inconvenience will not suffice. To constitute such detriment the foreseen consequences of granting the relief sought must be positive harm to good administration.**
>
> **(ii) in considering whether the consequences would be harmful to good administration, the Court can take into account not only the particular case but also the effect on other potential applications and the consequences if their applications were successful**

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(iii) There must be affirmative evidence of such detriment or at least evidence from which it can properly be inferred."

65) Counsel concluded his arguments by quoting from three cases on the definition of the phrase *"detriment as to good administration"* and its effect. We have not restated these arguments for reasons that become apparent in our determination of this ground of appeal.

66) In the *viva voce* arguments and arising from a question posed by the Court, Mr. R. M. Simeza SC, conceded that the principle of *'detrimental to good administration'* is introduced into Order 53 of the ***White Book*** by virtue of Section 31 of the ***Supreme Court Act***, 1981 of England and Wales. He also conceded that that particular piece of legislation is not applicable to Zambia and as such the Learned High Court Judge ought not to have referred to it.

67) We were urged to allow the appeal.

68) In response to ground 1 of the appeal, counsel for the Respondent restated its position that the decision sought to be challenged by the Appellant was made in 2005 and as such the delay launching the challenge is inordinate. She reiterated that the decision which was subject to the challenge is the decision to establish the SRF which was brought to the attention of the Appellant in 2005 and it commenced implementing or complying with it. To this end, counsel submitted that it was at that point that the ground for challenging the decision arose, thereby triggering the three month time limit set by Order 53 of the ***White Book***.

69) In the *viva voce* arguments, counsel for the Respondent Ms C. Mhango, urged us to interpret the phrase *"the date when grounds for the application first arose"* contained in Order 53 rule 4 in determining when the cause of action arose. According to counsel, ***Black's Law Dictionary*** defines the word *"first"* which is used in the phrase as

implying *"preceding all others, almost or earliest in time"*. She thus insisted that it can only be the decision to set up the SRF and not the act of implementing the decision on a monthly basis, which is subject to challenge.

70) Counsel rejected the Appellant's argument that the decision is a continuing decision which is revisited on a monthly basis each time the Respondent charges the fees because there is no evidence on record to show that the Respondent's board of directors sits every month or week to decide on issues surrounding the establishment of the SRF. Applying the reasoning she applied in the preceding paragraph, Ms Mhango argued that even if the decision were a continuing one, in view of the definition ascribed to the phrase, *" the date when grounds for the application first arose"* the cause of action arose at the point when the Appellant became aware of the Respondent's decision to set up the SRF and not whenever there was a demand for the payment of the fees.

71) In addition and by way of interpreting the provisions of Order 53 rule 4 of the ***White Book***, counsel argued that the wording of the Order requires the filing of an application promptly and within three months. Further, even where an application is filed within three months it may be refused because it was not filed promptly. Our attention was drawn to the English case of ***R v Stratford-on-Avon District Council ex parte Jackson***[19].

72) Counsel argued further that for purposes of determining whether or not an application was filed promptly, Courts shall have regard to the time when an applicant became aware of the making of the decision. He argued that in the case on hand, the Appellant has accepted that the directive for the implementation of the SRF was issued by the Respondent in 2006 and has since complied with the directive and paid the SRF without protest or resistance. Therefore, counsel agreed with the finding by the Learned

High Court Judge that there was a point of inception for the imposition of the fee which was 2006, thus being the point at which the ground for review and or challenge arose against the Respondent's decision.

73) To reinforce the arguments in the preceding paragraph counsel referred to the originating process filed in the matter by the Appellant which she contended reveals that it sought to challenge the decision to set up the SRF, and for this purpose impose the fees, which it became aware of in 2006. The challenge is not against the daily, weekly, monthly or yearly recurring act of implementation of the Respondent's decision.

74) In addition, counsel argued that the Learned High Court Judge was on firm ground when she found that there was need for the Appellant to file an application for leave out of time. This was in view of the mandatory requirement of filing the application within three months. She, in this regard, reiterated that in our jurisdiction judicial review is governed strictly by the provisions of

Order 53 of the ***White Book*** and as such they must be applied to the letter.

75) In conclusion, counsel distinguished the situation as it prevailed in the ***Kuluo Joseph Andrew*** case from the situation in this case on the basis that in the former, the Ugandan Constitution was already in place at the time of commencing of the case with a provision similar to our Article 118(2)(e) while in this case the ***Constitution*** (as amended) was not yet in force. Ms Mhango, also argued that the rules that were applicable in Uganda at the time the ***Kuluo Joseph Andrew*** case was decided did not provide for a first step of obtaining leave and that the delay in launching the application in that case was only for a month.

76) Coming to ground 2 of the appeal, the first limb of counsel for the Respondent's arguments was that the failure by the Appellant to observe the strict requirement of an application for leave to apply for judicial to be filed promptly was in itself detrimental to good administration.

Further, the impact which the re-opening of the matter after ten years of the decision would have is in itself defeating of good administration.

77) The other line of argument taken by counsel was that this Court should not entertain the Appellant's appeal which is akin to renewing the application for leave because it neglected to apply for an extension of time to file the application in the High Court. She argued, in this regard, that the provisions of Order 53 rule 4 of the ***White Book*** are mandatory provisions and should thus be adhered to strictly. She could not, however, imagine what good reason the Appellant would advance for such inordinate delay to warrant an extension of time being granted to it by the Court. She relied on the cases of ***Royal Trading Limited v Zambia Revenue Authority***[20] and ***The People v The Registrar of Industrial Relations Court ex parte Zambia Revenue Authority***[21].

78) In conclusion, counsel argued that if we dismiss ground 1 of the appeal it will render consideration of ground 2 of the appeal *otiose* and as such we should not consider it. This, she argued, would be within our power in line with our decision in the case of ***William Harrington v Dora Siliya and Attorney General***[22] in which we held that a trial or appellate Court, is at liberty not to rule on an issue raised before it, if it is of the view that ruling on such an issue is unnecessary.

79) We were urged to dismiss the appeal.

Considerations by this Court and decision of the Court

80) We have had occasion to consider the record of appeal and arguments by counsel and must state from the outset that as convincing as most of the arguments by counsel are, they address issues that are not before us. This appeal contests the refusal by the Learned High Court Judge to grant leave to commence judicial review proceedings. It does not contest a decision by the

Learned High Court Judge on the substantive issue of whether or not the act of setting up the SRF by the Respondent was illegal. Therefore, we have disregarded all the arguments by counsel for the two parties in relation to this.

81) Having made the clarification in the preceding paragraph we now proceed to determine the appeal by dealing with ground 2 of the appeal first, which in our view is quite straight forward. The basis of the challenge by the Appellant of the decision of the Learned High Court Judge under this ground is the holding that granting leave in the cause would be detrimental to good administration. The Appellant contends that there was no evidence to support such a finding. The Respondent contends that the inordinate delay and mandatory nature of filing the challenge within three months would render it detrimental to good administration to grant leave at such a late stage.

82) Although counsel for the Appellant retracted the arguments in the preceding paragraph and essentially conceded that the ground of appeal had no merit, we have, for completeness, decided to consider and rule on the ground. The phrase detrimental to good administration is contained in Order 53 rule 14 sub-rule 58 of the **White Book**. Its definition is given in the case of ***R v Dairy Produce Quota Tribunal For England and Wales, ex parte Casewell***[18] as argued by counsel for the Appellant and there is a reference to Section 31(6) of the ***Supreme Court Act, 1981*** of England and Wales. This Section is dedicated to judicial review and compliments Order 53 of the ***White Book*** in terms of practice and procedure in judicial review matters in England and Wales.

83) A copy of the ***Supreme Court Act, 1981*** is in volume 2 of the ***White Book*** and the relevant Section, being, 31(6)

is at page 1617 of the volume. The Section states as follows:

> **"31(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant-**
>
> **(a) leave for the making of the application; or**
> **(b) any relief sought on the application,**
>
> **if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."**

84) The parties are agreed, and indeed that is the position this Court also takes, that we do not have a local statute that governs judicial review proceedings in our jurisdiction. We, therefore, rely entirely on Order 53 of the ***White Book***. In doing so, however, we are not affected by the statutes in England and Wales post 1911 which compliment practice and procedure in judicial review proceedings. The ***Supreme Court Act, 1981*** of England and Wales is one such statute, consequently, to the extent that the principle of *"detrimental to good*

administration" is not specifically provided for in Order 53 of the **White Book** but introduced by the ***Supreme Court Act, 1981***, it is not applicable in our jurisdiction.

85) The position we have taken in the preceding paragraph is not unique to this case. Recently, in the case of ***Savenda Management Services Limited v Stanbic Bank Zambia Limited and Gregory Chifire***[23] we held that the ***Contempt of Court Act, 1981*** of England and Wales is not applicable to Zambia despite being referred to in Order 52 of the ***White Book*** in relation to the sentence that a Court in Zambia can mete out in contempt of court matters. Like in Order 53, a section of the ***Contempt of Court Act*** is mentioned in Order 52 of the ***White Book*** which limits the term of imprisonment a Court can impose on a contemnor.

86) Arising from the foregoing, there was no need for the Learned High Court Judge, as Mr. R. M. Simeza SC, correctly pointed out, to refer to and or find that granting leave would have been detrimental to good

administration. She was, however, on firm ground in considering the purpose of judicial review in deciding whether or not leave should be granted. She, in this regard restated the principle in the case of ***Krige and another v Christian Council of Zambia***[13] that it is to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints of administrative error. And to remove the uncertainty in which public officers might be left in as to whether they could safely proceed with administrative action while proceedings for judicial review were actually pending even though misconceived. She concluded that leave also serves to protect public authorities from having to deal with applications that are unjustifiably late.

87) We agree entirely with the test set out by the Learned High Court Judge which we have explained in the preceding paragraph and have returned to it and re-emphasized its importance later in this judgment. As a consequence, ground 2 of the appeal must collapse.

88) We now turn to consider ground 1 of the appeal. In doing so we shall begin by stating that we do not feel the need to consider the arguments in relation to Article 118(2)(e) of the ***Constitution*** (as amended) because of the reasons we have given earlier.

89) The thrust of the Appellant's arguments under ground 1 are that the Respondents decision to set up an SRF is a continuing decision and as such the Appellant was not out of time. Put simply, each month that the Respondent levies and demands for a fee a cause of action arises for the Appellant to challenge the decision. The Appellant also suggests that each time the fee is levied a decision is made by the Respondent.

90) The reasoning by the Learned High Court Judge which is embraced by the Respondent is that the decision sought to be challenged was a one off decision made in 2006 to establish the SRF. The act of levying and demanding a fee

on a monthly basis amounts to implementation of the decision as opposed to decision making.

91) We have no difficulty in agreeing with the reasoning of the Learned High Court Judge because clearly there was only one decision made between 2005 and 2006 to establish a SRF by compelling OMCs to collect the fee on its behalf. This is the decision which affected the Appellant and is indeed the decision it sought to challenge in the application made in the Court below as revealed by the notice of application for leave to apply for judicial review filed in the High Court on 13th August 2015. By the said notice, the Appellant contends that it seeks to challenge *"The decision of the Energy Regulation Board to impose a tax or fee called the Strategic Reserve Fund ..."* The wording of this challenge is thus against the establishment of the SRF and not the monthly collection of the fees. The former is therefore, *"the date when grounds for the application arose"* as argued by Ms Mhango. Even assuming the challenge was against the

collection of the fee, it would still not change the position because the challenge should have been made on the first demand made by the Respondent being the earliest in time as, once again, was argued by Ms Mhango.

92) Further, although we have considered the arguments made by counsel for the Appellant, the paragraphs that follow, that the decision was a continuing decision because, the illegality is perpetrated each month the Respondent levies and demands payment of the fee, we consider them a contradiction. This is because in the notice of application for leave to apply for judicial review under the heading *"Miscellaneous Matters Which The Court Should Be Aware Of,"* the Appellant actually acknowledges that the decision was made a long time ago, thus confirming that it was a one off decision and as such the cause of action arose then.

93) The decision we have made in the preceding paragraph is in the light of the case of ***R (on the application of H) v London Borough of Brent***[24] referred to by the Appellant.

The case involved the refusal by a local council to provide transport to a child with a disability so that he could attend school outside his local council. The decision of the Court in deciding whether there was delay in applying for leave was that there was no delay as the act of denying the child transport was a continuing breach by the local council as he continued to attend school.

94) The Learned High Court in dismissing counsel for the Appellant's arguments in relation to this case distinguished it from the matter before her by stating that there was indeed a continuing breach in that matter whilst in this matter there was no analogous continuing duty. If one considers the finding by the Learned High Court Judge which we agree with, that the decision under challenge in this case is the one off decision to set up a SRF as opposed to the implementation, which is the continuing levy of the fee, one would agree entirely with the Learned High Court Judge.

95) We have also considered the arguments raised by counsel for the Appellant that the ground for judicial review arises each day or month, the Respondent charges the fees. He, in this regard, relied on the case of ***R (Burkett) v Hammersmith and Fulham LB***[25]. In that case, the question that stood to be decided was whether the grounds for judicial review arose when a resolution was adopted by a local authority to grant consent for planning permission or when the planning permission was actually granted. The then House of Lords held that the three month time limit for bringing judicial review proceedings ran from the date when planning permission had actually been granted, not from the date of an earlier resolution. In relying on this case counsel for the Appellant argued that it is persuasive because in this case, like in that one, grounds for judicial review continue to arise each time the fee is charged ***De Smiths Judicial Review,*** Seventh edition, explains the decision

in the ***Hammersmith*** case by stating at page 919 as follows:

> **"Generally grounds to make the claim" arise when the public authority does an act with legal effect, rather than something preliminary to such an act. So in the context of town and country planning, time runs from when planning permission is actually granted rather than from when a local authority adopts a resolution to grant consent."**

The case, therefore, distinguishes preliminary steps in the decision making process from the actual decision which is what is amenable to a challenge. It did, however, state that an applicant could challenge a decision in its preliminary stage but that such a move may expose him to losing his right to challenge the substance of the decision made later. In doing so, the House of Lords did not suggest that there was a continuing decision and as such we hold the view that the ***Hammersmith*** case has no bearing on the case we are confronted with and was quoted out of context by counsel for the Respondent.

96) Similarly we have had occasion to look at the case of ***R (G) v Secretary of State for Justice***[26] which counsel for the Appellant relied upon to reinforce the arguments made on a continuing breach. The facts of that case were that the Claimant had a long history of self harming conduct. This conduct from time to time caused the Claimant to attempt committing suicide. It was argued that, as a consequence of this, there was an obligation upon the Defendant, a state institution in which she was kept, to have held an investigation into her condition in accordance with certain articles of the European Convention on Human Rights.

97) The Claimant later took out an action against the Crown to compel the institution she was kept in to conduct an investigation into her condition. An issue arose as to whether the Claimant was out of time in lodging the application for leave for judicial review in view of the fact that the requests for the investigation and failure by the

institution to carry them out had gone on for more than three months.

98) In rendering its judgment the Court made the following observation which counsel for the Appellant relied upon in his quest to persuade us that there is a continuing breach in this case:

> **"There is no doubt about the principle, particularly in European law but obviously extendable to Human Rights legislation, in many authorities that where there is a continuing obligation, a continuing state of affairs, which continues, not to be put right by the Defendant, time does not run against a Claimant at least until that state of affairs has come to an end."**

99) Our understanding of the passage we have reproduced in the preceding paragraph is that there are two situations that can arise. The first is one where, as in this case, a positive act was taken, that is to say a decision made. The second is where there is a negative act, that is to say, a party is demanding that a certain course of action be taken by a public body but there is inactivity on the part of the public body. In the former case, an applicant

complains about the decision taken and, as such, his cause of action arises from the date of the decision. Consequently the three month period also begins to run then.

100) On the other hand, in the latter instance, since the inactivity persists an applicant's cause of action also continues to persist until, the action sought to be taken is taken. The example of a negative act should be distinguished from the implementation stages of a decision as was the case in the matter we are confronted with, being, the levying of the fee on a monthly basis.

101) There is a further qualification discussed by the Judge in the ***R(G) v Secretary of State for Justice***[26] case which Mr. R. M. Simeza SC omitted to refer to in his arguments. The judge in the case distinguished continuing obligation from a continuous obligation. He, in this regard, found that, since they were occasional incidents calling for the review of the Claimant's condition in that case, and thus an obligation to hold an inquiry arose frequently, there

was a continuous obligation. The occasional incidents would be breaks in the continuing period which would trigger the three month period for the cause of action. The other situation the judge referred to was one where, for instance, a prisoner is kept in a permanently miserable state. This he said resulted in a continuing obligation to hold an inquiry. In such a case the cause of action is continuous. Mr. R. M. Simeza SC, did not demonstrate to us using this distinction how the cause of action was continuous as a consequence of the alleged continuing obligation by the Respondent using the judge's reasoning aforestated.

102) Although this case is a High Court case from the Queen's Bench Division in England and thus not binding on us, we are persuaded by the sound principles it has articulated and, accordingly, adopt them. Further, like in the ***London Borough of Brent***[28] case, the act in that case was a negative act which was sought to be

challenged as opposed to a positive act in this case. As such it is distinguishable from our case.

103) The other matter which the Appellant took issue with is the refusal by the Learned High Court Judge to extend time within which to apply for leave to commence judicial review proceedings. The Appellant has argued that this was a misdirection on the part of the Learned High Court Judge because: the statute of limitation does not apply to an action in relation to the challenge of an unconstitutional act; the levying of the fee is of sufficient public importance which requires adjudication; and the time limit set by Order 53 rule 4 of the ***White Book*** is not for purposes of ousting the jurisdiction of the Court.

104) In response, the Respondent argued that not only was the decision sought to be challenged made ten years earlier and thus, opening the doors to justice to the Appellant so late would be detrimental to good administration, especially that the Appellant is complying with the decision in any event.

105) Before we revisit the findings by the Learned High Court Judge on this issue, it is important that we address the first argument advanced by counsel. The other two arguments are addressed as we revisit the Learned High Court judge's findings.

106) The argument by Mr. R. M. Simeza SC that the statute of limitation does not apply to an action which challenges an unconstitutional act sounds quite attractive. Counsel has in this regard quoted a passage from the case of ***Virginia hospital Association v Bailes***[14] *"that the limitations period cannot protect an allegedly unconstitutional program".* In the context of the matter with which we are confronted, it is important to remind ourselves that judicial review proceedings are a two stage process, that is, leave stage and if leave is granted, the substantive judicial review application. One must also not lose sight of the fact that in applying for leave to commence judicial review proceedings, one is asking the

Court to allow him to commence his or her action. Thus, there is no matter or contest before the Court prior to the grant of leave.

107) The relevance of what we have said in the preceding paragraph is that the fact that leave was not granted in this matter attests to the fact that there is no action in the Court below to warrant our consideration of whether or not the matter should be subjected to the limitation period.

108) Secondly, the arguments of unconstitutionality of the fees levied by the Respondent contradicts the process filed by the Appellant in the Court below. In the earlier part of this judgment we have stated that the sole ground upon which the Appellant sought to challenge the levying of the fees (if leave was granted) was illegality. There is no ground of unconstitutionality as, in any event, no such ground exists for launching of judicial review proceedings, because a challenge of such a nature should be by way of a petition in the appropriate forum and not

by way of judicial review. For these reasons, the argument by Mr. R. M. Simeza SC is flawed and we do not accept it.

109) Coming to the other two reasons of public importance and three month time limit not to oust jurisdiction but to ensure expedition. Regrettably, Order 53 is bereft of any explanatory notes in relation to instances where it is suitable for a Court to exercise its discretion to extend the three month time limit. From a purely common sense position we take the view that a Court should exercise its discretion in a matter such as this one which is of public importance. However, we must and as the Learned High Court Judge observed, be mindful of the function of the Court in considering whether or not to grant leave to apply for judicial review.

110) The Learned High Court Judge, re-stated that the purpose of leave to move for judicial review is to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints of administrative error,

and to remove the uncertainty in which public officers or authorities might be left as to whether they could safely proceed with the administrative action. We must also note that, the three month period is not a given, because the Order requires an application to be made promptly in any event. Such that in fitting cases, even where an application is made within three months, if the facts are such that the application should have been made earlier than it was made (though still within three months) leave must be refused.

111) In view of the foregoing, we must hold that the decision to refuse leave was not a misdirection on the part of the Learned High Court Judge.

112) The questions we have asked ourselves in arriving at the decision in the preceding paragraph are: why did the Appellant not challenge the decision immediately it was made: why did the Appellant comply with the decision and only first question it after ten years; do these two preceding acts not suggest that the Respondent waived it

right to sue as indeed it accepted the decision; what impact would the grant of leave have on the economic activity in the petroleum industry and the nation as a whole (here we have in mind, the uncertainty it would cause to public bodies in the execution of their administrative functions); what is the precedent we will set in view of the various precedents we have set on the need for litigation to be instituted and concluded promptly. Here we are alive to the public policy behind the principle of limitation of actions; and, how many busy bodies will come out of the *"wood work"* with claims such as the Respondents? The answers to all these questions are against the grant of leave because it was inordinately delayed and as the Learned High Court Judge said, there is no precedent where leave was granted after ten years. Ground 1 of the appeal must also fail.

Conclusion P.169

113) In view of the failure of both grounds of appeal, we dismiss this appeal. The issues and arguments presented in this appeal are novel and of public importance. For that reason we order that each party bears its own costs in relation to this appeal and the matter in the court below.

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A. M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE