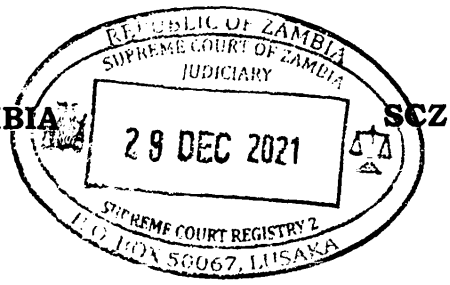

IN THE SUPREME COURT OF ZAMBIA **SCZ/8/15/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	**ARTICLE 18, 28 AND 128 OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**SECTIONS 3 AND 6 OF THE JUDICIAL (CODE OF CONDUCT) ACT No. 13 OF 1999 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**AN APPLICATION FOR JUDICIAL REVIEW**
IN THE MATTER OF:	**THE DECISION OF THE PRINCIPAL RESIDENT MAGISTRATE HONOURABLE DAVID SIMUSAMBA MADE ON 2ND JUNE 2020, IN OPEN COURT DECLINING TO RECUSE HIMSELF FROM PRESIDING OVER THE CASE OF THE PEOPLE vs CHISHIMBA KAMBWILI CAUSE NUMBER SSPC/003/18**
IN THE MATTER OF:	**THE DECISION OF THE PRINCIPAL RESIDENT MAGISTRATE HONOURABLE DAVID SIMUSAMBA TO DECLINE, UPON THE ACCUSED'S REQUEST, TO REFER THE MATTER TO THE HIGH COURT FOR DETERMINATION OF A CONSTITUTIONAL ISSUE OF THE ACCUSED'S RIGHT TO A FAIR HEARING BEFORE AN INDEPENDENT AND IMPARTIAL TRIBUNAL**

B E T W E E N :

ATTORNEY GENERAL **APPLICANT**

AND

CHISHIMBA KAMBWILI **RESPONDENT**

Before Hon. Justice Dr. Mumba Malila SC, in chambers on the 28th October 2020 and 29th December 2021

For the Applicant: Mr. A. Mwansa SC, Solicitor General with Mrs. D. Mwewa, Principal State Advocate – Attorney General's Chambers.

For the Respondent: Mr. Musa Mwenye SC – Messrs Mwenye Mwitwa & Associates with Mr. E. Kaluba

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R U L I N G

Cases referred to:

1. *People v. Chishimba Kambwili (SSPC/003/19)*
2. *Savenda Management Services v. Stanbic Bank Zambia Ltd. (Selected Judgement No. 10 of 2018)*
3. *Bidvest Food Zambia Limited, Chipkins Bakery supplies (Pty) Ltd., Crown National (Pty) Ltd, Bidvest Food Ingredients (Pty) Ltd and Bidvest Group Ltd. v. CAA Import and Export Ltd (Appeal No. 56/2017)*
4. *Dean Mung'omba & 2 Others v. Peter Machungwa & 2 Others (2003) ZR 17*
5. *Agro Fuel Investments v. Energy Regulations Board (Selected Judgement No. 4 of 2018)*
6. *Savenda Management Services Ltd. v. Stanbic Bank Zambia Ltd & Gregory Chifire*
7. *Rodgers Chibwe v. Kasempa District Council (Selected Judgment No. 15 of 2015)*
8. *Law Association of Zambia v. Attorney General (2008) Vol.1 ZR 21*
9. *Jonathan V. Blerk v. Attorney General & Others (Appeal No. 7 of 2020)*

Legislation referred to:

1. *Supreme Court Rules, Chapter 25 of the Laws of Zambia*
2. *Court of Appeal Act No. 7 of 2016*
3. *Order XI Rule 1(1) of the Court of Appeal Rules*
4. *Order 3 of the Rules of the Supreme Court of England 1965 (1999) Edition*
5. *Section 35 of the Interpretation and General Provisions Act, Chapter 2 of the Law of Zambia*
6. *Rule of the Supreme Court (White Book 1999 Edition)*

I sincerely regret the delay in delivering this ruling. It was purely by an administrative oversight on my part.

The application before me is for leave to appeal to the Supreme Court against a judgment of the Court of Appeal given on the 6th October 2020. The application is expressed to be made pursuant to Rule 48(1) and 50(3) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia.

The application is supported by an affidavit deposed to by Mr. Abraham Mwansa SC, the learned Solicitor General. In the said affidavit, the facts upon which the application is made are set out.

Briefly, the respondent had applied to the High Court for leave to commence judicial review proceeding against the decision of Principal Resident Magistrate, David Simusamba, in refusing to recuse himself in the matter of the **People v. Chishimba Kambwili**[1] and in refusing to refer the case to the High Court for determination of a constitutional issue touching on the respondent's right to a far trial.

Ruling on the application for leave to commence judicial review proceeding, Chitabo J, held that the refusal by Magistrate Simusamba, to grant the applications made before him entailed the exercise of discretion. A challenge of such a decision should be by way of an appeal and is not amenable to judicial review. He thus declined to grant leave and dismissed the application. The ruling was given on the 3rd September 2020.

The respondent, thereupon, approached the Court of Appeal by way of renewal of the application on the 11th September 2020. Convinced that the renewed application was filed out of the prescribed period, the applicant raised a preliminary issue effectively impeaching the propriety of the Court of Appeal entertaining the renewed application which the applicant argued was filed out of time.

The Court of Appeal ruled on the preliminary issue on 25th September 2020, dismissing it. That decision so riled the applicant that it sought leave from the Court of Appeal to appeal against the ruling. The application for leave to appeal suffered the same fate. In refusing leave to appeal, the Court of Appeal opined that the

issues raised by the intended appeal were fairly straight forward and did not deserve the attention of the Supreme Court. The applicant then renewed the application before me.

There was no affidavit in opposition filed. State Counsel Musa Mwenye explained that the issue was purely legal in substance and hence the absence of any apposing affidavit.

On behalf of the applicant a list of authorities and skeleton arguments in support of the application were filed. At the hearing of the application, State Counsel Mwansa chiefly relied on the skeleton arguments.

In the skeleton arguments, the learned counsel for the applicant reproduced section 13 of the Court of Appeal Act No. 7 of 2016 specifying the circumstances in which an appeal will be allowed from a judgment of the Court of Appeal. Order XI Rule 1(1) of the Court of Appeal Rules which echoes section 13(1) of the Court of Appeal Act was also adverted to.

Counsel's point was simply that leave to appeal must be obtained from either the Court of Appeal or the Supreme Court.

Further, that as the Supreme Court stated in the case of **Savenda Management Services v. Stanbic Bank Zambia Ltd**[1] the allowable grounds for the grant of leave to appeal in civil matters are set out in section 13(3)(a), (c) and (d).

Counsel acknowledged that in the case of **Bidvest Foods Zambia Limited, Chipkins Bakery Supplies (Pty) Ltd, Crown National (Pty) Ltd, Bidvest Food Ingredients (Pty) Ltd and Bidvest Group Ltd. v. CAA Import and Export Ltd**[3], the Supreme Court directed that the requirements for the grant of leave must be applied strictly. Counsel also referred to the court's views in that case on what constitutes a point of law of public importance.

Turning to the issue whether in this particular case the applicant's proposed appeal satisfies the threshold set out in section 13 of the Court of Appeal Act, it was submitted that the issues in the intended appeal do indeed raise a point of law of public importance.

I have, of course, not lost focus of the proposed grounds of appeal as set out in the draft memorandum of appeal. The two grounds are structured as follows:

1. **Ground One**

   The court below erred in law and in fact when it held that computation of time in judicial review matters in this jurisdiction is governed by Order 3 of the Rules of the Supreme Court of England 1965 (1999 edition) and section 35 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia does not apply.

2. **Ground Two**

   The court below erred in law and in fact when it held that the Applicant's notice of renewal of application for leave to commence judicial review proceedings was not filed out of time.

Counsel submitted that where a dispute arises, as it did in the present case, on whether the application for renewal was filed within time or not, Order 53 cannot be of assistance to the parties because there is no provision in that Order for computation of time. In these circumstances, it becomes crucial to identify the legislation which a litigant should property consult to establish whether one is within time or not.

Counsel for the applicant suggested that the following questions require crucial analysis and answers:

(i) **Must litigants refer and restrict themselves to Order 53 in line with the *Dean Mung'omba*[4] or *Agro Fuel Investments*[5] cases to compute time?**

(ii) **Must litigants refer to our Rules or Practice and Procedure, that is, Zambian Legislation currently obtaining on the subject matter of computation of time (e.g. Chapter 2 of the Laws of Zambia) and not English Practice and Procedure as was stated in the *Savenda Management Services Ltd. v. Stanbic Bank Zambia Ltd & Gregory Chifire*[6] *(Selected Judgment No. 47 of 2018)* at p. 60 where the Supreme Court stated:**

> **This arises and as counsel quite rightly argued, from the fact that resort to the White Book will only be made where there are lacunas in our law and practice?**

(iii) **Would reference to Order 3 of the RSC go against all the above cited authorities on applicability of the White Book when referring to computation of time more so that Order 3 Rule 2(5) is significantly different as it excludes days such as weekends which are ordinarily included in our local statute thereby significantly affecting the way time may be computed in a matter where it arises and comes into issue [see Order 2(3)(5)?**

(iv) **Within what period must an applicant seeking to renew his application before the Court of Appeal lodge in the form?**

Counsel submitted that the Supreme Court must clarify the foregoing issues for the benefit of future litigants.

At the hearing of the application, both the learned Solicitor General Mwansa SC and Principal State Advocate Ms. Mwewa, augmented the skeleton argument. Before doing so, however, Mr. Mwansa SC, informed me that the renewed application for judicial

review before the Court of Appeal has since been heard and judgment is now pending. That position, notwithstanding, Mr. Mwansa SC, was still of the conviction that a point of law or public importance which the intended appeal raises still subsists and ought to be addressed by the Supreme Court. That point of law being whether in this jurisdiction in computation of time in judicial review proceedings, a court should resort to Order 3 of the Supreme Court of England 1965 (1999 edition) or look to our own statutes? This, according to Solicitor General Mwansa, is a point of law of public importance deserving of the Supreme Court's consideration.

State Counsel Mwansa, cited the case of **Rodgers Chibwe v. Kasempa District Council**[7] and quoted page J32 where we stated as follows:

> **From the above, it is clear that with the latest amendments of section 2 of the English Law (Extents of Applications) Act, as read together with section 10 of the High Court Act, which we have referred to above, the position of the law is, as we have earlier stated, that now the White Book applies in Zambia by way of default procedure to fill in the gap where there is no specific provision in our own local statutes and rules on a particular subject matter.**

As I understand him, the point he was making was that although we have adopted the Order 53 procedure for purposes of judicial review in this jurisdiction, that Order does not provide for computation of time. The question for the Supreme Court to determine on appeal will be whether outside Order 53 of the White Book, litigants and the courts should resort to Order 3 of the White Book or should have recourse to our own statutes, including our Constitution and other laws that provide for computation of time.

With the foregoing submission, State Counsel Mwansa concluded that the threshold set by the Supreme Court in **Bidvest Foods Ltd & 4 Others v. CAA Import & Others**[3], has been satisfied. He accordingly prayed that we grant the application.

In her brief supplementation, Ms. Mwewa, stressed that judicial review proceedings are a vital public law remedy used to check the decision-making processes of different public bodies. It is important that the future litigant is guided as to how to deal with computation of time. The issue in contention goes beyond the private interests of the parties and it is not about who should win or lose; it is about

seeking clarity and guidance from the Supreme Court. She reiterated the prayer made by the learned Solicitor General.

State Counsel Musa Mwenye, for the respondent, prefaced his submissions by pointing out that the law as laid out in the **Savenda**[2] and **Bidvest**[3] cases regarding the requirements of section 13(3) of the Court of Appeal Act, are very clear. The real question for determination in the current application is whether there is an extra ordinary question that the Supreme Court is, by the proposed appeal, being urged to reflect upon. Stripped to its bare bone, this, according to State Counsel, is the issue in contention before me.

Put differently, the question in this case is whether, in computing time under Order 53 of the White Book, recourse should be had to Order 3 of the White Book which is the computation of time Order that applies to all the rules of the Supreme Court (White Book 1999 edition).

The learned State Counsel submitted that this is an elementary question requiring no consideration by the Supreme Court. He further submitted that in fact the question has already been settled by the Supreme Court in the case of **Dean Mung'omba & 2 Others v.**

Peter Machungwa & 2 Others[4]. It was held in that case that with regard to judicial review proceedings, the courts in Zambia are to follow the practice and procedure applicable to the High Court of Justice of the United Kingdom in 1999. The practice and procedure in that jurisdiction is that computation of time is done in accordance with Order 3 of the Rules of the Supreme Court (White Book).

The final point State Counsel Mwenye made was with regard to the value of the application before me. He submitted that as the learned Solicitor General had informed me in his address, the renewed application for judicial review before the Court of Appeal now merely awaits judgment having already been heard.

In these circumstances, the application by the applicant has, according to Mr. Mwenye SC, been overtaken by events. He cited the case of **Law Association of Zambia v. Attorney General**[8] as authority for the position that it is not the court's vocation to engage in academic exercises.

I was urged to dismiss the application.

In reply, Mr. Mwansa SC, reiterated that the point of law raised by the appeal remains one of public importance, notwithstanding,

that the parties have been heard in the court below and now await judgment. The guidance, submitted State Counsel Mwansa, from the Supreme Court on appeal will no doubt guide future litigants and lower courts on the issue of computation of time.

As regards the applicability of the White Book in regard to judicial review proceedings under Order 53, the learned Solicitor General agreed with the position taken by the court in the **Dean Mung'omba**[4] case but pointed out that not the entire White Book is applicable in this jurisdiction.

As far as the computation of time is concerned, there is, according to Mr. Mwansa SC, no lacuna in the local laws so that reliance on Order 3 of the White Book is legally inappropriate. He once again adverted to the **Rodger Chibwe v. Kasempa District Council**[7] case and quoted from page 30 of our judgment in that case. He stressed that the point of law raised in the intended appeal is not elementary.

Mrs. Mwewa also shortly replied to the arguments in opposition. As regards the submission premised on our holding in **Law Association of Zambia v. Attorney General**[8], she submitted that not all cases are

similar and should be determined on their own peculiarities. She cited the case of **Jonathan Van Blerk v. Attorney General**[9] as authority for that submission.

Mrs. Mwewa finally cited the case of **Agro Fuel Investments v. Energy Regulations Board**[5] and quoted from page 44 of the judgment in that case.

I have carefully considered the arguments of the parties in this case. The question is whether indeed the issues in the proposed appeal do raise a point or points of law of public importance. I think that there is not much merit in rehashing the principles that should form any decision to grant leave. The statutory provisions as set out in section 13 of the Court of Appeal Act have been repeatedly discussed in various cases since the decision of the Supreme Court in **Bidvest**[3]. That provision requires no further rendition.

There is, however, an important point that has been raised by the respondent's learned counsel regarding the value that this whole application is bound to bring forth. It has been contended that the application is academic in effect because the main matter has

proceeded anyhow and that following a hearing of the main matter a decision was at the time of hearing the application, being awaited.

When an application before a court has been rendered moot or academic the court should generally not exercise its discretion to hear it unless there are special or compelling reasons. The learned Solicitor General has submitted that such special or compelling grounds to hear this otherwise moot application exist in the present case.

The doctrine of mootness or academic futility is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An application is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. A live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. As I have stated already, the general policy is enforced in moot cases unless the court, for good cause, exercises its discretion to depart from it.

I must take the liberty to clarify that the approach with respect to mootness involves a two-step approach. First, a determination of whether or not the requisite tangible and concrete dispute has disappeared, rendering the issues academic. If so, and second, whether it is necessary for the court to exercise its discretion to decide the questions in the application despite the absence of controversy.

One rationale for the policy with respect to mootness is that the court's competence to resolve legal disputes is rooted in the adversary system. The adversarial context demands that both parties have a full stake in the outcome of judicial proceedings. This is fundamental to the system. Another rationale is based on the concern for judicial economy which requires that we judges examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. Finally, there is need for courts to be sensitive to the effectiveness or efficacy of judicial intervention. In particular, the courts should not be seen to take infinite pleasure in making decisions which are ineffectual owing to changed circumstances.

Viewed against the backdrop that this matter has proceeded to hearing, I form the view that the doctrine of mootness and academic futility dictates against my proceeding to determine the application.

In **Law Association of Zambia v. Attorney General**[8] referred to by State Counsel Mwenye, the Supreme Court stated thus:

> **Even if the Petitioner was to be successful on the cross-appeal, it is quite clean that the order would serve no purpose apart from being an unnecessary academic exercise. This court frowns upon making academic orders.**

In any event, the questions raised have been determined time and again and can thus not constitute any point of law of public importance. The learned counsel for both parties are agreed that the case of **Dean Mung'omba & 12 Others v. Peter Machungwa & 2 Others**[4] is largely instructive on the question of computation of time in judicial review proceedings.

I am thus inclined to dismiss the application, and I so do. The respondent shall have his costs.

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Dr. Mumba Malila SC

CHIEF JUSTICE