

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2020/HP/003



IN THE MATTER OF:

AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW

AND

IN THE MATTER OF:

ORDER 53 RULE 3 OF THE RULES OF THE
SUPREME COURT 1999 EDITION

BETWEEN

GRADUARE PROPERTY DEVELOPMENT LIMITED

APPLICANT

AND

ZAMBIA ENVIRONMENTAL MANAGEMENT AGENCY

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

Before Honourable Lady Justice C. Lombe Phiri in Chambers

For the Applicant: Mr M. Ndalameta – Messrs Dudhia & Co

For the 1st Respondent: Ms K. Banda – Director Legal Service -ZEMA

For the 2nd Respondent: Ms D. M. Mwewa – AG PSA

RULING



CASES REFERRED TO:

- 1. Zambia Wildlife Authority, Mukela Manyando, Mubiana Munyinde and African parts Zambia Limited v Muteeta Community Resources and Board Development Co-operative Society (2009) ZR (S.C.Z. Judgment NO. 16 of 2009)**
- 2. North-Western Energy Company Limited v Energy Regulations Board (2011) ZR (HC)**
- 3. Bank of Zambia v Access Leasing Limited, Access Financial Services Limited (2008) Z.R. 159 vol. 1 (SC)**
- 4. Amanda Muzyamba Chaala (Administrator of the Estate of the late Florence Mwiya Siyunyi Chaala) v Attorney General Mukelabai Muyakwa (2012) ZR**

LEGISLATION AND OTHER WORKS REFERRED TO:

- 1. Order 53 Rule 3 of the Rules of the Supreme Court of England and Wales (RSC) Whitebook (1999 edition)**

The applicant herein seeks leave of the Court to commence Judicial Review proceedings against the Respondents. The Court was moved by way of ex-parte summons pursuant to Order 53 Rule 3 of the Rules of the Supreme Court of England and Wales (RSC) Whitebook (1999 edition) filed into Court on 3rd January, 2020.

In the Notice of the Exparte Application for Leave it was stated that the reliefs sought were:

- 1) *an order of mandamus to compel the 1st Respondent to enforce the compliance order issued to the Ministry of Local Government by resorting to any of the 3 measures provided in section 106(3) of the Environmental Management Act; Further and in the alternative;*
- 2) *an order of mandamus directed to the Minister of Environmental Protection to hear and determine the Applicant's review application within 7 days of the decision of the Court; and*
- 3) *damages for breach of statutory duty on the part of both Respondents.*

Further, under the heading "Grounds on which relief is sought" the Applicant proceeded to give facts in relation to the 1st Respondent and the Ministry of Environmental Protection. The Applicant also stated the law relating to when Judicial Review lies.

The Applicant further applied that if leave for judicial review is granted it should operate as a stay of the conditional approval for the Project granted by the 1st Respondent to the Ministry of Local Government.

Further, the Applicant in their notice outlined the facts surrounding the subject matter before Court. The project in question is dubbed "the Lusaka Roads Decongestion Project" (the Project). The main issue under contention is that the Ministry of Local Government has not consulted and agreed with the Applicant on how the road widening at the entrance of East Park Mall off

Great East Road should be conducted. That this failure to comply is contrary to the Conditional Approval given to the Ministry of Local Government therefore it is proceeding illegally. It was stated that the Applicant engaged the 1st Respondent regarding the non-compliance by the Ministry of Local Government and they have not received a response nor have the 1st Respondent made any decision regarding non compliance by the Ministry of Local Government.

It was further stated that the Applicant treated the 1st Respondent's failure to respond to the Applicant's letter of 10th June 2019 as a rejection of the request by the Applicant for the 1st Respondent to enforce the conditions in the approval it gave the Ministry of Local Government. That as a result the Applicant applied to the Minister of Environmental Protection for review of the 1st Respondent's refusal to enforce the conditions of the approval of the Project. That the Minister of Environmental Protection continues to ignore the application by the Applicant. It was stated that by the time the 2nd Respondent renders a decision, the road works and construction will have advanced so far the Applicant's grievance will be rendered an academic exercise.

The applicant then proceeded in the notice to state the powers of the Court on Judicial Review. They also stated the circumstances that will merit the grant of an order of mandamus per Order 53/14/42

In the Affidavit Verifying Facts in support of the Application the Applicants outlined the facts surrounding the case. Fundamentally, that the Respondents are currently undertaking a road construction project which includes the construction of a flyover over bridge on a main road that grants access to their business premises being a shopping mall. Further, the Affidavit revealed that to undertake the said project the 2nd Respondent ought to have complied with certain regulatory requirements which were supposedly to be enforced by the 1st Respondent but this has not been done. That they have made various efforts to get the 2nd Respondent to comply to no avail. That it is with this background that they seek the Court's intervention to have the necessary authorities act as they should, as is required by law. The Applicant also filed into Court a Bundle of Supporting documents to the tune of 237 pages containing documents relating to the road construction project, various correspondence between the parties and images of the project.

Each of the Respondents filed into Court Affidavits in Opposition.

The 1st Respondent's affidavit was deposed to by Constantino Mwembela a Principal Inspector in the employ of the 1st Respondent. He averred that the Applicant had not provided grounds upon which the relief is being sought. He deposed to facts relating to the construction of 120 km length roads within Lusaka and ancillary works by the Ministry of Local Government. That the Applicant wrote to the 1st Respondent requesting that the approval that was granted to the 2nd Respondent be suspended or cancelled owing to an alleged breach of the approval conditions. It was stated that the Applicant was advised that consultations were ongoing. That regardless the Applicant

commenced an action against the Attorney General seeking an Order of Prohibition to restrain the Ministry of Local Government from constructing a flyover bridge on Great East Road and the Arcades Roundabout. That following this the Compliance Order was issued. That regarding these proceedings the Applicant wrote to the 1st Respondent requesting that a Prevention Order be issued against the Ministry of Local Government to halt the construction of the flyover bridge at the Arcades roundabout. That at this time the 1st Respondent advised the Applicant that the issue of halting the construction of the fly over bridges was still in Court. It was further deposed that the 1st Respondent advised the Applicant that the appropriate Order under the circumstances was a Compliance Order and the same had been issued on August 31, 2019. It was further averred that the 1st Respondent has not received any request from the Applicant on the alleged breach of the Compliance Order which the 1st Respondent has refused or omitted to enforce. Further that the Applicant has not exhausted the administrative remedies available to them.

The 2nd Respondent's Affidavit in Opposition was deposed to by one Mabvuto Sakala, the Permanent Secretary in the Ministry of Water Development, Sanitation and Environmental Protection. It was deposed to that the Applicant had not provided any proof before the Court that the 1st Applicant had constructed East Park Mall at a cost of US\$110,000 over a period of six years. It was further averred that the some facts contained in the Affidavit Verifying facts were contained in the matter before Honorable Justice Chitabo. It was deposed to that the Ministry of Local Government had consulted with all the relevant stakeholders including the Applicant, on the road widening at

the entrance of East Park Mall off Great East Road and that the Respondent need not have any express agreements with the Applicants as suggested by the Applicant. It was further deposed that the Ministry of Local Government are not proceeding illegally and that they had obtained approval from the 1st Respondent. The Decision Letter dated January, 17 2020 was exhibited to demonstrate that approval had been obtained. It was also deposed to that the compliance order was issued to the Ministry of Local Government. It was also deposed to that the Ministry of Local Government was required to submit an Environmental Impact Assessment Report for the construction of the fly over bridges and other changes to the project which was done and an Environmental Project Brief for all the proposed Flyover bridges was done on 18th November, 2019. Further that the Ministry of Local Government was required to submit a Resettlement Action Plan which was done on 18th November, 2019. It averred that the Applicant had not exhausted all the available remedies and had come too early to the Court. It was further deposed that the works, constructions, projects, activities additional or not of the Applicant are of no relevance to the proceedings and any estimations and quantifications are baseless and should not be considered by this Honorable Court. It was finally deposed to that the Ministry of Local Government was issued with a Compliance Order and the Applicant should have waited for the outcome of process.

The gist of the 1st Respondent's arguments was that the Applicant had failed to comply with the requirements of Order 53 Rule 3(ii) of the Rules of the Supreme Court of England (RSC) Whitebook (1999 edition). It was submitted that the failure by the Applicant to state the ground upon which they

relied in their leave application was fatal to the case. It was further submitted that the failure by the Applicant to show the decision against which the relief is sought falls short of the threshold required in demonstrating that there is a prima facie case fit for further investigation. Lastly it was argued that the Applicant had not exhausted all the available remedies.

At the hearing of the application the Applicant and 1st Respondent relied entirely on their filed documentation. The 2nd Respondent made brief submissions in addition to their affidavit filed into Court. The brief the oral arguments focused on the point that the Applicant had not exhausted the available remedies and had come too early to Court. It was emphasized that the action they were complaining of having not taken place had been taken and there was evidence in the affidavit to demonstrate this.

In Reply the Applicant's Counsel responded orally stating that the omission of stating the Grounds upon which the Court was moved on Judicial Review can be corrected by way of an amendment after the Court has allowed the Applicant to proceed.

I am grateful to counsel for all the parties for their spirited and well presented arguments.

LAW

An application for leave to commence Judicial Review is premised on the provisions of Order 53 of the RSC. **Order 53 Rule 3(2)** provides that:

(2) An application for leave **must** be made *ex parte* to a Judge by filing in the Crown Office -

(a) a notice in Form No. 86A containing a statement of

(i) the name and description of the applicant,

(ii) the relief sought and the grounds upon which it is sought,

(iii) the name and address of the applicant's solicitors (if any) and

(iv) the applicant's address for service; and

(b) an affidavit verifying the facts relied on.

Further, the Order 53 r 6 provides that:

53/6 6.—(1) Copies of the statement in support of an application for leave under rule 3 must be served with the notice of motion or summons and, subject to paragraph (2) **no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.**

(2) The Court may on hearing of the motion or summons allow the applicant to amend his statement, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used by him.

(3) Where the applicant intends to ask to be allowed to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party.

(4) Any respondent who intends to use an affidavit at the hearing shall file it in the Crown Office and give notice thereof to the applicant as soon as practicable

and in any event, unless the Court otherwise directs, within 56 days after service upon him of the documents required to be served by paragraph (1).

(5) Each party to the application must supply to every other party on demand and on payment of the proper charges copies of every affidavit which he proposes to use at the hearing, including, in the case of the applicant, the affidavit in support of the application for leave under rule 3.

(emphasis mine)

Further, Order 53/14/54 provides for the two -stage process for judicial review and discusses what the Applicant ought to demonstrate at the leave stage. The following is stated:

The applicant for leave must:

(a) have a “sufficient interest”;

(b) have a case sufficiently arguable to merit investigation at a substantive hearing; and

(c) must apply for leave promptly.

In the case of **Zambia Wildlife Authority, Mukela Manyando, Mubiana Munyinde and African parts Zambia Limited v Muteeta Community Resources and Board Development Co-operative Society (2009) ZR (S.C.Z. Judgement NO. 16 of 2009)⁽¹⁾ (ZAWA case)** it was held inter alia that:

6. Where an applicant has presented an arguable case, the Court is perfectly entitled to grant leave to that applicant to allow for full investigations even after granting leave.

7. The requirement under common law for leave, underscores the importance of the protection which the Courts gives the public administrative bodies against vexatious, and hopeless claims by busy bodies.

Further, in the case of North-Western Energy Company Limited v Energy Regulations Board (2011) ZR (HC)⁽²⁾ it was held inter alia as follows:

- 1. The requirement that leave must be obtained for judicial review is designed 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, and authorities might be left as to whether they could safely proceed with the administrative action, while proceedings of judicial review of it were actually pending even though misconceived.*
- 2. Leave for judicial review should be granted if on the material available, the Court thinks without going into the matter in depth, that there is an arguable case for granting the relief claimed by the claimant.*
- 3. The test to be applied in deciding whether to grant leave to move for judicial review is whether the Court is satisfied that there is a case fit for further investigation at a full inter partes hearing of a substantive application for judicial review.*
- 4. If on considering an ex parte application for leave for judicial review, the Court cannot tell whether there is or on not an arguable case, the Court should*

invite the putative respondent to attend the hearing of the leave application, and make representations on the question whether leave should be granted.

In the case of **Bank of Zambia v Access Leasing Limited, Access Financial Services Limited (2008) Z.R. 159 vol. 1 (SC)**⁽³⁾ the Supreme Court held inter alia that:

- 1) *The purpose of the remedy of judicial review is to ensure that an individual is given a fair treatment by the authority to which he has been subjected and that it is not part of the purpose to substitute the opinion of the judicial officer or individual judges for that of the authority constituted by the law to decided the matters question.*

The foregoing underscores the reason why it is important at leave stage that the Applicant demonstrates not only the act they are complaining about but on what grounds they move the Court. Basically, in Judicial Review these comprise of illegality, irrationality and procedural impropriety. At the leave stage the Applicant must clearly state which ground the application concerns itself with. The Court must not be sent on a fishing expedition to comb through the volumes of affidavits and submissions to decipher what ground the Applicant wishes to pursue its application.

It must also be borne in mind that the remedy of judicial review is one premised on public law. It is trite that a remedy under public law is within the discretion of the Court. In the case of **Amanda Muzyamba Chaala (Administrator of the Estate of the late Florence Mwiya Siyunyi Chaala) v**

Attorney General & Mukelabai Muyakwa (2012) ZR⁽⁴⁾ the Supreme Court stated as follows:

“We are alive to the fact that public law remedies are discretionary; meaning that although an applicant may prove their case, the Court may decline to grant the remedy if in the circumstances of the particular case, it may not be justifiable to do so. As we stated in the case of Parmer and Others v Parmer (7), the Court has, “to consider the circumstances of each case before arriving at a decision. Considerations of fairness, reasonableness and rationality are very relevant.”

However, it must be stated that at the leave stage the Court is not required to delve in detail into the issues of standing. In the **ZAWA case** cited above it was also held that:

4. Except in simple cases, where it is appropriate at the earliest stage to decide the fate of the application for judicial review, it is desirable that the Court should not delve into the question of whether the applicant has “sufficient interest” or “locus standi”, as a preliminary issue.

5. The question of “sufficient interest” is a question of law mixed with facts resulting in the requirement that except in simple cases, that question can only be resolved after sufficient inquiry”.

The process of Judicial Review does not act to question the outcome of a decision or action by a public officer or authority. It seeks to investigate the process followed and to see whether such process was legal, rational and within the powers of the person or authority that undertook it. However, the

needs of the claimant must be measured against the needs of good administration which include the need for speed, finality in decision making, public interest, the purpose of the administrative process and the need to consider substance not form. Further, in considering whether or not to grant leave the Court must consider whether the remedy sought would be of any practical effect. For instance if the application sought is one of mandamus but it is shown at the leave stage that the action which the claimant seeks to be done has already been done the Court is quite entitled to refuse to grant leave to the applicant. It is also a possible further consideration by the Court whether the error that is of concern with is one that is procedural and that procedural error is outweighed by other considerations.

ANALYSIS

As has been stated what is important at this stage is for the Applicant to demonstrate that it has an arguable case. The Court will not delve into the issues of locus standi or a full inquiry into the merits of the case at this stage.

In showing whether there is an arguable case it is important that the Applicant state, without doubt, on which of the grounds it relies on in demonstrating that the public body or person has offended it. The grounds upon which an applicant can rely are basically illegality, irrationality or procedural impropriety. It is no wonder the framers of the law provided in Order 53/3/2/a the full list of requirements that ought to be fulfilled. One of the items on that list is that the Applicant must show the reliefs sought and the grounds upon which the relief is sought. The provision does not give the

Applicant an option to provide either the relief sought or the grounds upon which it will rely. The Applicant must state both unequivocally. These requirements are set out in such a manner in order to achieve the purpose of the leave application which is to give the Court an opportunity to determine on the face of the record what ground to consider in the event that there is need for further investigation. The requirements under this Rule are therefore, not cosmetic but must be complied with to the last letter to insure orderliness and predictability in the application of the law. A perusal of the Notice filed by the Applicant will show that the requirement to state on what ground the Court is being moved has not been complied with. The Applicant has instead submitted that the Court can deduce from the Affidavit what the issue is. In the alternative that the omission is one that is curable by way of a simple application for an amendment after leave has been granted. I find that this is not the sort of defect to the pleadings that can be cured by a simple application for an amendment as the omission goes to the very root of the application. The Court cannot make a decision premised on future intentions of a party to amend its pleadings. The Court is being called upon to make a decision based on the documentation that is before it. Making a decision premised on the future intentions of the Applicant would actually be prejudicial to the interests of the Respondents.

The decision by the Court at this point lies in determining whether on the face of the record there is an arguable case before it. The Court must not be left to guess into which box to place the facts presented before it in the Affidavit. For the purposes of the leave application before it, it is imperative that the

Applicant clearly state which ground of judicial review they rely on. On that score alone this application fails.

Even though it has been found that the failure to state the ground relied on shows that there is no arguable case it has further been observed after perusal of the Affidavits by the parties that the non-action complained of has been carried out. The facts as deposed to by the Applicant show that Applicant wrote to the 1st Respondent as Regulator and to the Minister under whose portfolio the 1st Respondent fall under in order to seek the intervention of the Regulator on the non-compliance by the Ministry of Local Government regarding some condition of the permission granted to proceed with the construction of the fly over bridge. The Applicant stated that they have not received a response or the response that they desire from the 1st Respondent or the Minister. It is this “silent treatment” from these public authorities that has caused them to seek leave of the Court to proceed under Judicial Review for an order of Mandamus to compel the public authorities to ensure compliance to the conditions laid out by the Regulator. The 2nd Respondent has exhibited in its affidavit a letter from the 1st Respondent to the 2nd Respondent showing that the decision that the Applicants were moving the public authority to make had been made, albeit when these proceedings had already commenced. Peradventure should I have found that there was an arguable case this is one such scenario where it would be futile to grant leave as the non-action which is being complained of has been carried out. A perusal of the notice shows that the relief sought is one of an order of mandamus. An order of mandamus is issued to a public official to compel them to perform an act that the law recognizes as an absolute duty. As has been stated the condition that the

Applicant wanted the 1st and 2nd Respondents to act on has been carried out. Therefore, an Order of this Court resulting from this Application, if it were found to be of merit, would be of no effect.

In view of the foregoing, I find that there are no sufficient grounds for leave to be granted in this case. The Application is accordingly dismissed.

Due to the public interest of the matter I will order that each party bear its own costs.

Leave to appeal is granted.

Dated at Lusaka this 25th day of February, 2020.



C. LOMBE PHIRI
JUDGE