

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2010/HP/786

(Civil Jurisdiction)

IN THE MATTER OF: THE LICENCE NOs. ES/NWEC/0072008

AND

IN THE MATTER OF: THE ELECTRICITY CHAPTER 433 OF
THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE ENERGY REGULATIONS ACT
CHAPTER 436 OF THE LAWS OF
ZAMBIA

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW

BETWEEN:

**NORTH WESTERN ENERGY
COMPANY LIMITED**

APPLICANT

V

THE ENERGY REGULATIONS BOARD

RESPONDENT

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 4th day of October, 2011.

*For the applicant: Mr. M. Mundashi, SC, with L. Kasonde (Ms.) and M. Chiteba of
Messrs Mulenga Mundashi and Company.*

For the respondent: M.K. Bwalya (Ms) Legal Counsel for the Energy Regulations Board.

JUDGMENT

Cases referred to:

English cases

1. *Packard v Sears* [1837] 6 A and E 469.
2. *Hadley v Baxendale* [1854] 9 EX 341.
3. *Swan v North British Australian Company* [1863] 2 H and C 175.
4. *Stroms Aktie Bolag v Hutchinson* [1905] A.C. 515.
5. *Parochial Church Council of St Magnus – the Mary v Chancellor of London* [1923] P 38.
6. *The Susquehanna* [1926] A.C. 655.
7. *Thomson v Palmer* [1933] 49 C.L.R. 507.
8. *Monarch S.S. Co. V Karlshamns Oljefabriker* [1949] A. C. 196.
9. *Governors of Queen's Anne's Bounty v Pett-Rivers* [1936] 2 K.B. 419.
10. *Wilmore v South Eastern Electricity Board* [1957] 2 Lloyd's Rep 375.
11. *Central Newbury Car Auctions Limited v Unity Finance Limited* [1957] 1 Q.B. 371.
12. *Ridge v Baldwin* [1964] A.C. 40.
13. *Anismic Limited v Foreign Compensation Commission* [1969] A.C. 147.
14. *Schmidt v Secretary of State of Home Affairs* [1969] 2 Ch 149.
15. *R v Liverpool, Ex parte Liverpool Taxi Operators Association* [1972] 2 Q.B. 299.
16. *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses* [1981] 2 ALL E.R. 93.
17. *Chief Constable of North Wales Police v Evans* [1982] 3 ALL E.R. 141.
18. *Council of Civil Service Union and Others v Minister for Civil Service* [1985] A.C. 374.
19. *Preston v Inland Revenue Commissioner* [1985] A.C. 835.
20. *R v Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] C.O.D. 107.
21. *Ex P. MFK Underwriters* [1990] 1 W.L.R. 1545.
22. *R v Jouley Club Exparte Ram Race Courses Limited* [1993] 2 ALL E.R. 225.

23. *Mercury Energy Limited v Electricity Corporation Newzealand* [1994] 1 W.L.R. 521.
24. *Norwe v Dixon* [1995] 1 W.L.R. 636.
25. *R v Ministry of Defence ex parte Smith* [1996] Q.B. 517.
26. *A. E. Becket and Suns Lyndons Limited and Others v Midland Electricity Plc* [2001] 1 W.L.R. 281.
27. *South Buekingham Shire DC v Flanagan* [2002] 1 W.L.R. 2601.
28. *R (on the application of Bloggs 61) v Secretary of State for the Home Department* [2003] 1 W.L.R. 2724.

Zambian cases

1. *Sithole v State Lotteries Board* (1975) Z.R. 182.
2. *Musakanya v Attorney General* (1981) Z.R. 188.
3. *Attorney General v Mpundu* (1984) Z.R. 6.
4. *Zimba v Registrar of Societies and Another* (1981) Z.R. 335.
5. *Miyanda v Handahu* (1993-1994) Z.R. 187.
6. *Chitala v Attorney General* (1995-1997) Z.R. 91.
7. *Chiluba v Attorney General* (2003) Z.R. 153.
8. *Mungomba and Others v Machungwa and Others* (2003) Z.R. 17.

Legislation referred to:

1. *Electricity Act, cap 433.*
2. *Energy Regulations Act, cap 436.*
3. *Energy Regulations (Licensing) Regulations, Statutory Instrument Number 2 of 1998.*
4. *Rules of the Supreme Court (White Book) Orders 18, Rule 12, 53 rule 3; 53/14/55; and 53, rule 7.*
5. *Harvey Mc Gregor, Mc Gregor on Damages, Eighteenth Edition, (Thomson Reuters (Legal) Limited, 2009.*

Works referred to:

1. *Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, De Smith's Judicial Review, Sixth Edition, (London Sweet, and Maxwell, 2007).*
2. *H. M. Malek, Phipson on Evidence, seventeenth Edition, (Thomson Reuters Legal Limited, 2010).*
3. *Harvey Mc Gregor, Mc Gregor on Damages, Eighteenth Edition, (Thomson Reuters (Legal) Limited, 2009).*

BACKGROUND

I was approached in this matter by way of Notice of Motion for judicial review. The notice was supported by a statement filed pursuant to Order 53, rule 3 of the Rules of the Supreme Court (White Book). According to the statement, the decisions which are subject of this application are as follows:

- (1) The decision of the respondent to reduce the tariff charged by the applicant to its customers from 9.5 cents/kwh, to 6 cents/kwh, ostensibly for the reason that the tariff charge of 9.5 cents/kwh, was a tariff increase without: approval from the respondent; due regard to procedure; and contrary to the provisions of the licence issued by the respondent to the applicant; and the Electricity Act, as read with the Energy Regulation Act;
- (2) The decision of the respondent that the tariff of 9.5 cents/kwh was the initial tariff that had been implemented by the applicant without approval from the respondent;
- (3) The respondent's decision to fine the applicant K 2, 700, 000=00, for charging the alleged unauthorised tariff to residential consumers; and
- (4) The respondent's decision that the applicant refunds all residential customers that were charged the alleged "*unauthorised*" difference between the approved rate, and the disallowed rate from the date they started charging the unauthorised US 9.5 cents/kwh up to 30th April, 2010.

In view of the foregoing, the applicant seeks the following orders:

- (a) An order of certiorari to remove into the High Court for the purposes of quashing the following decisions made by the respondent:
 - (i) to reduce the tariff charged by the applicant from 9.5 cents/kwh, to 6 cents/kwh without regard to the provisions of the licence, and allegedly in contravention of the Electricity Act, as read together with the Energy Regulation Act;

- (ii) to fine the respondent the sum of K 2, 700, 000, for charging an unauthorised tariff to residential consumers; and
- (iii) to order that the applicant refunds all residential consumers that were charged unauthorised tariff, the difference between the approved rate, and the disallowed rate from the date they started charging the unauthorised US 9.5 cents/kwh, up to 30th April, 2010.
- (b) a declaration that the decisions referred to above were made *mala fide*, and are illegal. And an order that the applicant has been lawfully charging a tariff of US 9.5 cents/kwh, and should continue to do so;
- (c) damages resulting from the decisions by the respondent;
- (d) If leave is granted, a decree that the order should operate as a stay of the decision to which this application relates pursuant to Order 53, Rule (3) (10) (a) of the Rules of the Supreme Court;
- (e) If leave is granted a direction that the hearing of the application for judicial review be expedited; and
- (f) An order for costs.

In seeking the reliefs and orders outlined above, the applicant relies on the following grounds: illegality; unreasonableness; procedural impropriety; and bad faith. These grounds are adumbrated below.

Bad faith and unreasonableness.

The applicant contends that the decision of the respondent to unilaterally reduce its applicable tariff from US 9.5 cents/kwh to US 6 cents/kwh was done in bad faith because the respondent had at the time of approving the applicant's licence considered the applicant's business proposal which included the tariff of US 9.5 cents/kwh and had to that extent, whether tacitly, impliedly, and or expressly approved the tariff of 9.5 cents/kwh as an initial tariff applicable to the applicant's project. Thus, having confirmed the initial tariff to be charged, the applicant contends that the respondent should be

estopped from reneging on its approval of the proposed tariff of US 9.5 cents/kwh relied on by the applicant.

Illegality

The applicant contends that the decision by the respondent to reduce its tariff is illegal because it is without legal basis. The applicant further contends that the respondent does not have any legal authority under any statute to vary an already existing and approved tariff.

Procedural Impropriety

The applicant contends that the respondent issued an enforcement notice against it on 5th October, 2009, alleging the contravention of the conditions of the licence by the applicant, without following the procedure laid down by the respondent concerning complaints against utilities.

On 23rd July, 2010, Ms Kasonde, and Mr. M. Chiteba, appeared before me and argued *ex parte*, the application for leave for judicial review, pursuant to Order 53, Rule 3, of the Rules of the Supreme Court. In arguing the application, the duo relied on the Notice of Motion for judicial review; the statement in support of the application for leave to apply for judicial review; and the affidavit support of the notice containing a statement in support of the application for leave to apply for judicial review.

During the *ex parte* hearing, the duo argued that the main basis upon which the application is made, is that the tariff in issue was approved by the respondent prior to the issuance of the licence. Further, the duo submitted that the law which the respondent seeks to rely on in varying the tariff is not compatible with the facts of this case, and is therefore misconceived.

LEAVE FOR JUDICIAL REVIEW

After perusing the affidavit in support of the application, and hearing arguments and submissions by the duo, I formed the opinion that the matter before me was neither frivolous, nor vexatious. I was therefore satisfied that this was a matter fit for further investigation at a full *inter partes* hearing. I therefore decided to grant leave for judicial review. My decision to grant leave, was informed by Order 53/14/55 of the Rules of the Supreme Court. The Order is in the following terms;

“The purpose of the requirement of leave is:

- (a) To eliminate at an early stage any applications which are either frivolous, vexatious, or hopeless; and*
- (b) To ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation.”*

Order 53/14/55 goes on to stipulate that the requirement that leave must be obtained 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. (*See R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses [1981] 2 ALL E.R. 93, at 105 per Lord Diplock*). It is also stated in Order 53/14/55, that leave 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.

Further, in *R v Secretary of State for the Home Department, ex parte Bukshanda Begum* [1990] C.O.D, 107, the Court of Appeal in England held that the test to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full *inter partes* hearing of a substantive application for judicial review. It was further held that if on considering the papers, the judge cannot tell whether there is or not, an arguable case, he should invite the putative respondent to attend the hearing of the leave application, and make representations on the question whether leave should be granted. The preceding passage was cited with approval by the Supreme Court in the case of *Chitala v Attorney General* (1995-1997) Z.R. 91, at page 95.

AFFIDAVIT IN SUPPORT

As pointed out earlier on, the application for judicial review is supported by an affidavit dated 23rd July, 2010. The affidavit is sworn by Mr. Andrew Ndanga Kamanga, the Managing Director of the applicant company. Mr. Kamanga deposed as follows: that the applicant company is the holder of a licence number ES/NWE/007/2008, which, I will continue to refer to as “*the licence*.” The effective date for the licence is 24th June, 2008. It is valid for a period of five years. The purpose of the licence is to supply electricity to Lumwana Mine Township. The Township comprises a housing estate, a commercial area, and a light industrial area. A copy of the licence is attached to the affidavit and is marked as “*ANK1*.”

Before the applicant applied for the licence, it had through its consultant, Enfin Solutions Limited (*“Enfin”*) conducted a feasibility study to ascertain the viability of acquiring electricity in bulk from Zambia Electricity Supply Corporation Limited (ZESCO), and distributing and re-supplying it to Lumwana Township, a town that was being built by Lumwana Property Development; (*“LPDC”*), a subsidiary of Lumwana Mining Company (*“LMC”*) to house employees of the newly established Lumwana mine. The study involved extensive consultations with ZESCO, and the owners of the mine; LMC. There was produced before me series of correspondence that passed between Enfin, the applicant, and ZESCO.

The essence of the applicant’s project is a private Connection Agreement entered into with LMC and LPDC. The nub of the Agreement is that the applicant, subject to the terms of the agreement, undertook to finance, build, and commission the requisite facilities for the transmission, and distribution of power from ZESCO, to connect both the residential and commercial properties within the Lumwana Mine Township, to the national grid.

Among the principle objectives of the Agreement was for LMC to encourage empowerment of local of Zambian businesses that have the ability to deliver services of an international standard. The Connection Agreement in clause 3, takes into account the fact that the applicant should be able to charge a reasonable power tariff to its consumers that would enable it recover its capital costs within a period of 15 years. The applicant produced before me a copy of the Agreement between the applicant, LMC, and LPDC.

The feasibility study referred to above had *inter alia*, taken into account that the tariff to be charged which formed the revenue stream of the applicant had

to be sufficient to the extent that the applicant had to repay a loan for the project acquired from *Nedalandse Financiering- Moatschaippi) Voor out wikkelinglandeve, Nivi ("FMO")*, a Dutch based development Bank. The loan from FMO was equally predicted on the basis that the respondent would issue the applicant a licence to enable it conduct business. In line with the foregoing, the respondent gave a letter of comfort to FMO, to assure them that the issuance of the licence to the applicant was underway.

After completion of the feasibility study referred to above, and upon ZESCO confirming that it would supply electricity in bulk, the applicant entered into a Bulk Supply Agreement (BSA) with ZESCO, which *inter alia*, provided that the applicant would acquire electricity in bulk from ZESCO at a minimum demand of ZMVA.

Further, the applicant entered into a Maintenance Fee Agreement (MFA) with LPDC, the basis of which was that LPDC would subsidize the cost of electricity payable by the residents of Lumwana Mine Township, who are the applicant's customers, and are employees of LMC. The employees were obliged to pay a maintenance fee to the applicant, in order to sustain its initial operations.

The basis on which the applicable tariff was to be calculated is found at Appendix A of the MFA, and takes into account the cost of the applicant purchasing power from ZESCO. Under part F of Appendix A, the tariff charge to be applied by the applicant is indicated and the charge is fixed for a period of 10 years. The initial tariff was US 9.5 cents/kwh. And the initial tariff was approved by LMC and LPDC after extensive consultations with the applicant.

Initially the applicable economic tariff for the project based on the project finance from FMO and available equity. However, LMC raised concerns on the ability of its employees, who would be the eventual customers of the applicant to pay the tariff. Following the concerns raised by LMC, the applicant after extensive consultations with LMC and LPDC, took measures to mitigate and reduce the initial tariff for the project. This was done by LPDC providing a subsidy on the cost of electricity through payment of a maintenance fee to the applicant. And by LMC paying a utility allowance to its employees towards the cost of all utilities in Lumwana Township, including electricity. The applicant for its part revised its return on equity from 25% to 10% with a cap on the return of US 70, 000 per annum. Thus based on the subsidies provided by the mines and concessions on return on equity made by the applicant, the proposed tariff reduced to US 9.5 cents/kwh.

Before the respondent granted the applicant a licence, the respondent had directed that the applicant should provide the respondent with a brief regarding, among other things, the technical and economic justification for the project, details of the loans and agreements with the third parties financing the project, and the estimate of the proposed tariff to be charged to the consumer. This request was communicated to the applicant by the respondent in a letter dated 29th January, 2007.

On 14th January, 2008, the applicant wrote to the respondent indicating that its project was predicated on a Power Purchase Agreement (PPA) with ZESCO, and that it would seek financing from FMO. In addition, the applicant provided a business plan and supporting financial model to the respondent clearly outlining the principles of calculation of the applicable start up or initial tariff for the project. Thus the initial tariff of US 9.5 cents/kwh to be charged by the applicant to its customers was predicated on the PPA between ZESCO, and the

applicant. And on the MFA between the applicant, and LPDC. The tariff also took into account the applicant's financial obligations to FMO. Further, the MFA included a maintenance fee sheet which clearly outlines the start up tariff applicable to the project and how the tariff was arrived at. Based on the MFA between the applicant and LPDC, the initial tariff of US 9.5 cents/kwh is supposed to be charged by the applicant for period of ten years, and until after the applicant has finished servicing its loan obligations to FMO.

When the respondent received the applicant's supporting documents in connection with the 9.5 cents/kwh tariff, it sought clarification from the applicant on various aspects of the application for the licence, including the applicable tariff. The applicant promptly complied and provided the detailed clarifications sought by the respondent. Following the clarification on the initial tariff computation provided by the applicant, the respondent confirmed the proposed tariff on 8th April, 2008. The applicant produced a copy of the electronic mail from the respondent to the applicant confirming the respondent's satisfaction with the applicant's licence application, and the proposed tariff. The copy of the electronic mail is marked as "ANK 11."

Following the confirmation on the applicable start up to be charged by the applicant, the respondent represented by its Executive Director, and its Director of Infrastructure, Mr. Sylvester Hibajene, and Mr. Lukande Mfula, respectively, visited Lumwana Mine to appraise themselves how LMC and LPDC would support the project through the tariff subsidy. Thereafter, the respondent formally issued the Licence to the applicant on 7th August, 2008, to take effect from 24th June, 2008. There was produced before me a copy of the letter confirming issuance of the licence. The letter is marked "ANK 12" and the licence itself is as already stated is marked "ANK1."

That inspite of the foregoing facts, on 14th September, 2009, the respondent issued an Enforcement Notice against the applicant alleging that the applicant was charging the tariff of US 9.5 cents/kwh without authority. A copy of the Enforcement Notice was produced before me, and is marked "ANK 13." The applicant contends that the Enforcement Notice issued by the respondent is premised on the basis that the applicant had revised its tariffs in contravention of the licence and the law. The applicant also contends that in the course of its dealings with the respondent as a regulator, the applicant has come to know that the respondent has pursuant to its mandate, put in place rules on how to invoke Enforcement Notices arising from tariff charges. The laid down procedure with regard to issuance of Enforcement Notices is that a complaint should first be made to the utility by the consumer, and if a complaint is not resolved by the utility, the matter is then reported to the respondent. The respondent thereafter forwards the complaint to the utility, which must respond to the complaint within seven days.

In the event of default, the respondent takes the necessary action. There was produced before me a copy of the respondent's complaint procedure published on its website. The copy is marked "ANK 14." Thus with regard to the alleged complaint against the applicant, it is contended that the applicant did not follow the due process in administering the Enforcement Notice for two reasons. First, there was no complaint received by the applicant. And second, the respondent did not forward any complaint to the applicant to which it was expected to respond before the Enforcement Notice was issued.

Be that as it may, the applicant responded to the Enforcement Notice issued to it in a letter dated 5th October, 2009. Following the applicant's response to the

Enforcement Notice, on 14th December, 2009, the respondent issued a Notice of Hearing to the applicant. The applicant was requested to appear before the respondent on 21st December, 2009, in connection with the Enforcement Notice issued by the respondent.

During the hearing held on 21st December, 2009, the position of the respondent was that the applicant was charging a tariff which it had not approved. In response, the applicant maintained its position that the tariff that it had been charging its customers was an initial tariff for a new project, and was tacitly, expressly, and or implicitly approved by the respondent prior to the issuance of the licence.

Following the hearing, the respondent wrote to the applicant on 23rd December, 2009, directing the applicant to apply to the respondent for the provisional approval of the existing tariff of US 9.5 cents/kwh. On 14th January, 2010, the respondent wrote to the applicant acknowledging receipt of the application for provisional approval of the existing tariff, and strangely made reference to section 8 of the Electricity Act, for a utility that wishes to alter existing charges to notify its customers of such an intention. The applicant contends that it had not made any alteration to existing tariff. The tariff was to be static for a period of eight years as set out in the MFA. Furthermore, on 16th February, 2010, the respondent wrote to the applicant advising it of the requirement for the applicant to advertise its intention to alter its electricity tariff in line with section 8 (2) of the Electricity Act.

The applicant was also aware that the respondent wrote the Managing Director for LMC on 25th February, 2010, stating that the applicant had applied to the respondent to charge electricity tariffs of K475/kwh. And also that the law

requires that consumers affected by a proposed tariff charge, are supposed to be given an opportunity to comment on the proposed charges. In the same letter of 25th February, 2010, the respondent went on to bemoan the low public response to its public advertisement requesting submissions on the applicant's tariff and stated that as a result, the respondent would send a member of its staff to be stationed at LMC from 1st to 5th March, 2010, in order to collect submissions.

The respondent went further, and sponsored a quarter page advertisement in the *Zambia Daily Mail*, of 14th April 2010, under the heading, "*LUMWANA RESIDENT SPEAK OUT ON POWER TARIFF.*" The advertisement in question was published prior to the respondent making a final decision regarding the tariff charged by the applicant to its customers. Ultimately, on 27th May, 2010, the respondent issued a press release stating its decision to unilaterally reduce the applicable tariff in Lumwana Township from 9.5/ cents/kwh to 6 cents/kwh.

The applicant maintains that it did not at any point apply to alter or vary its existing tariff of US cents 9.5 cents/kwh. It merely applied at the direction of the respondent for the provisional approval of the existing tariff. The applicant was already charging 9.5 cents/kwh as an initial tariff from the inception of the project. The applicant contends that the respondent after having asked the applicant to apply for the provisional approval of the initial tariff, twisted, and foisted on the applicant an application for tariff variation.

The applicant maintains that the decision by the respondent to reduce the applicant's tariff from 9.5 cents/kwh to 6 cents/kwh undermines the very foundation of the applicant's project and threatens to place the applicant in default of the obligations to its project financiers, and ultimately bankrupt it,

because the appellants revenues will not be adequate for it to service its loan repayments. Further, that the unilateral tariff reduction by the respondent effectively reduces the applicant's revenue by 40%. The decision also threatens to undermine the spirit in which LMC and LPDC entered into the Connection Agreement with the applicant. Namely, to promote and encourage the public policy of economic empowerment of local businesses.

AFFIDAVIT IN OPPOSITION

On 4th August, 2010, the respondent filed an affidavit in opposition. The affidavit was sworn by Mr. Mushiba Nyamazana. Mr. Nyamazana is the Acting Executive Director of the respondent. Mr. Nyamazana deposed as follows: the respondent is the sole licencing authority in the energy sector and is authorised to issue licences in the sub-sector pursuant to the provisions of the Energy Regulations Act. In this regard, the respondent receives, considers, and determines tariff applications made by undertakings licensed in the electricity subsector pursuant to the provisions of the Electricity Act.

On 22nd January, 2007, the applicant notified the respondent of its intention to undertake distribution of power to the housing and business consumers in the Lumwana Township. And had discussions with LMC and ZESCO. In light of those discussions, the applicant sought guidance from the respondent on the regulatory requirements, and the relevant fees to be paid by the applicant for the proposed project. The enquiry is contained in a letter dated 22nd January, 2007, and is marked as "MN1".

In response, in a letter dated 29th January, 2007, the respondent requested for more information on the proposed project before any advice could be rendered

on the matter. At that point, no formal application had been received from the applicant.

In a letter dated 14th January, 2008, the applicant indicated to the respondent that the tariff to be charged for the project would be *pari passu* with the ZESCO retail tariffs. The applicant further stated that this would be predicted on subsidies that would be met by LMC. Accompanying the letter of 14th January, 2008, was an application for the distribution of electricity to the Lumwana Township, together with a business plan.

The business plan submitted by the applicant was in compliance with the licensing procedure for the determination of the financial viability of the applicant, and assessment of the application fee for the activity applied for. The application was subject to approval by the respondent. The review of the documents by the respondent neither impliedly, nor expressly presupposed the consideration and approval of a tariff to be charged by the applicant for the project.

The applicant in its business plan stated that though it would be required to sell power purchased from ZESCO at the domestic tariff fixed across the country, the project would suffer a deficit requirement. Thus, the applicant would need to enter into a MFA, or subsidy to be paid by LMC to supplement the sales revenue.

One of the tariff scenarios presented and recommended by the applicant in the business plan, was the payment of a maintenance tariff by LMC which would enable the applicant meet its financial obligations, and receive a reasonable

rate of return on its investment; this meant that LMC would pay the connection fee, and the attendant costs for electricity supplied to the residents of Lumwana housing area.

Upon receipt of the application, the respondent sought a number of clarifications from the applicant. One such clarification related to the initial tariff, which was dependant on the MFA between LMC, LPDC, and the applicant. In response to the respondent's queries, the applicant re-submitted a revised business plan and financial model.

Contrary to the allegations made by the applicant, the respondent contends that the electronic mail marked as "ANK 11", was and is not confirmation of the proposed tariff. The electronic mail neither impliedly, or expressly referred to an approval of the proposed tariff. The respondent merely acknowledged receipt of the information requested for, and notified the applicant of the progress made in processing its licence application. Further, the respondent contends that the allegations that the respondent conducted a visit of the Lumwana Mine to understand how LMC and LPDC would support the tariff subsidy are unfounded and baseless. The respondent contends that it was at all material times aware of the fact that the maintenance fee tariff proposed by the applicant for the supply of electricity to Lumwana property development area would be paid by LMC and not the consumers. This was based on the fact that LMC had the capacity to contract and the financial muscle to enter into such a contractual arrangement with the applicant. At no point did the document made available to the respondent by the applicant, refer to a charge of US 9.5 cents/kwh. The consumers are entitled to notification of any proposed tariff to be imposed by an operator of an undertaking.

After being satisfied with the applicant's technical and financial capabilities to carry out the licensed activities applied for, the respondent issued the applicant with licences to distribute and supply electricity to the Lumwana Property development area, on 7th August 2008. The licence was effective on 24th June, 2008, when the respondent approved the issuance of the licences. After the licences were issued to the applicant, the respondent received a consumer complaint from the residents of the Lumwana housing Township about the high electricity charges imposed by the applicant.

Following receipt of the complaint the respondent proceeded to investigate the complaint in accordance with its mandate to receive and investigate consumer complaints on price adjustments by an undertaking as provided for in the Energy Regulations Act. The investigations revealed that the applicant who had began the supply of electricity to Lumwana Township in October, 2008, had been billing LPDC in line with the MFA between LPDC and the applicant. However, in June, 2009, the applicant was requested by LMC, to install pre-paid meters to 198 housing units, and to start billing directly, individual housing units from 1st July, 2009.

The respondent contends that the applicant arbitrarily proceeded to effect a tariff of US cents 9.5/kwh directly on to the residents of the individual housing units of the Lumwana Mine Township without notifying them of the decision, contrary to the provisions of the Electricity Act. Further, as indicated earlier, the respondent contends that the agreed maintenance fee was to be paid by LMC, and not the residents of the individual Lumwana Township households. The investigations further revealed that the customers that were being billed directly were neither issued with conditions of supply, nor supply agreements, contrary to the applicant's licence conditions. The respondent maintains that the basis of supplying electricity was a list that was given to the applicant by

LMC specifying the details of the occupants of the houses, which was contrary to the conditions of its licence to supply electricity issued to the applicant.

The respondent contends that it regulates tariffs that are paid by members of the public. And further under the provisions of the Electricity Act, and the licence conditions, the respondent determines tariffs that are charged by an operator that supplies electricity to the public. Thus the residents of Lumwana housing township are members of the public, and therefore are entitled to be notified of any proposed tariffs in accordance with the provisions of the Electricity Act.

During the investigations, both LMC and the applicant were notified of the complaint received by the consumers in the Lumwana Township by the respondent. Based on the findings of the investigations, which revealed that the applicant breached its licence conditions, the respondent issued an Enforcement Notice. After receipt of a formal response to the Enforcement Notice from the applicant, the respondent issued a Notice of Hearing to the applicant, thus according to the applicant the right to be heard on the issues raised in the Enforcement Notice.

On 21st December, 2009, the applicant appeared before the respondent and argued that the tariff that was being charged was an approved tariff that was embedded in the Maintenance Agreement. The Agreement in issue, and the appendices reflecting a tariff of US cents 9.5/kwh were concluded after the licences were issued. Further, the tariff referred to as the approved tariff was only brought to the attention of the respondent, after a complaint was received from the residents of the Lumwana housing township.

Upon hearing the applicant, and considering the implication of charging a tariff that was not approved by the respondent, the applicant was requested to apply for provisional approval of the existing tariff of US cent 9.5/kwh. The order issued was provisional to allow the unauthorised tariff to operate, whilst the respondent considered the tariff application to the applicant.

Following the issuance of the provisional order, the applicant submitted a formal application for the approval of US 9.5 cents/kwh to be applied in the Lumwana housing Township. By a letter dated 14th January, 2010, the respondent acknowledged receipt of the tariff application, and advised the applicant of its requirement to notify its consumers, the residents of the Lumwana Mine Township of the intention to effect the proposed tariff in respect of the supply of electricity as prescribed by section 8 of the Electricity Act. And further, in the absence of a formal notification of the proposed application to vary tariffs by the applicant, the respondent by letter dated 16th February, 2010, reminded the applicant of its responsibility to formally notify its consumers of the proposed tariff variation in accordance with the provisions of the Electricity Act. The respondent maintains that on account of Lumwana being remotely located and in order to facilitate the process of receipt of submissions, the respondent decided to send a member of staff to receive submissions within the notice period of thirty (30) days from the date of advertisement placed in the print media. LMC facilitated the process by the provision of space to the respondent solely for the purpose of receipt of submissions relating to the application.

Later, the respondent convened a public hearing in Lumwana on 11th March, 2010, where both the applicant and the consumers; that is the residents of

Lumwana Mine Township were accorded the right to be heard on the proposals that were made by the applicant in accordance with the provisions of the Electricity Act.

The respondent contends that the article referred to in the applicant's affidavit in support entitled: "*LUMWANA RESIDENTS SPEAK OUT ON POWER TARIFF*," published in the *Zambia Daily Mail*, on Wednesday 14th April, 2010, was not authorised by the respondent. As a result, upon a formal complaint to the *Zambia Daily Mail*, and a subsequent receipt of an apology from the *Zambia Daily Mail*, Marketing and Advertising Manager, the apology was forwarded to LMC, and the applicant, under a cover letter dated 21st April, 2010.

On 27th May, 2010, the respondent announced its tariff decision at a public hearing held in Lumwana, Solwezi. The applicant was awarded a tariff of US 6 cents/kwh with effect from 1st May, 2010. In addition, the applicant was fined for charging an unauthorised tariff. The applicant was further ordered to refund the consumers the difference between the approved tariff and the unauthorised tariff of US cents 9.5/kwh. The respondent maintains that the tariff of US cents 6/kwh awarded by the respondent to the applicant took into consideration the financial obligations of the utility, the continued viability of the applicant and the submissions received from the consumers.

AFFIDAVIT IN REPLY

On 9th August, 2010, the applicant filed an affidavit in reply. The affidavit in reply was again deposed to by Mr. Kamanga as follows: the letter dated 14th January, 2008, in which the applicant wrote to the respondent indicating that its project was predicated on a PPA with ZESCO, was intended by the applicant to give an outline, or concept of the applicant's project which was contingent upon certain conditions being satisfied in terms of financing, as well as the

price at which the applicant was to purchase power from ZESCO. The applicant contends that the letter of 14th January, 2008, should be read together with the other conditions for the project. The applicant maintains that contrary to the assertion by the respondent that the tariff to be charged by the applicant would be *pari passu* with the ZESCO tariff, there was in any event no subsidy granted by the government. Consequently, LMC could not take the full cost of the subsidy.

The applicant maintains that after submitting the letter of 14th January, 2010, the applicant submitted its business plan and financial model to the respondent. The business plan depicted different possible scenarios that could be used in arriving at a tariff to charge its consumers, including charging existing ZESCO tariff, full cost recovery, and maintenance tariff scenario with ZESCO purchase costs discount. The applicant contends that the business plan clearly showed that it would not be profitable to charge the existing ZESCO tariff, and the applicant therefore settled for the payment of a maintenance fee by LMC as the most favourable tariff pricing scenario.

Further, the applicant maintains that the initial tariff US of 9.5 cents/kwh was agreed with LPDC in the MFA. Furthermore, LMC in a letter dated 6th April, 2010, clarified the subsidy approach adopted by LMC, which included payment of a utility allowance to its employees set at 10% of their monthly salary, and payment of a maintenance fee to the applicant. LMC stated further in its submission to the respondent that it has taken measures to pay its employees higher remuneration in consideration of the employees having to live in a remote and undeveloped location where there may be limited amenities and higher costs. In addition, LMC stated that the possible outcome of a reduced tariff would be that the applicant would become unviable and ultimately bankrupt, thereby leading to LMC having to reduce salaries in order to manage

and maintain its own electricity supply and distribution network, a situation that would lead to industrial unrest. The applicant reiterated that after the applicant submitted its business plan and financial model, the respondent sought clarifications regarding the documents submitted, and the applicant promptly responded to the clarification.

The applicant contends that arising from the clarifications sought, the respondent is aware that the success of the applicant's project was contingent upon:

- (a) the company securing 90% financing from FMO;
- (b) the company signing a PPA with ZESCO to guarantee firm power supply; and
- (c) the finalization of the modalities of the tariff subsidy between Equinox and the applicant. And the subsequent signing of a mutually agreeable and binding contract.

The applicant maintains that following the clarifications, the respondent issued a licence to the applicant subject to the finalisation of the tariff subsidy between the applicant, and LMC. Thus, the applicant proceeded to finalise the modalities of the tariff subsidy with LMC in the MFA, and the initial tariff of US 9.5 cents/kwh was arrived at. Therefore, the applicant contends that the respondent cannot state that the initial tariff charged by the applicant to its consumers was not approved. Further, the applicant contends that when it initially prepared its financial model and business plan, the supporting documents were prepared on the premises that the applicant would be offered a 40% discount by ZESCO Limited on the purchase of power in bulk.

However, ZESCO insisted on charging the applicant a tariff of US 4.5 cents/kwh which at the time was even higher than the prevailing average

ZESCO retail tariff of US 3 cents/kwh. Furthermore, the applicant contends that the BSA entered between the applicant, and ZESCO for a fixed period of 15 years was on 22nd September, 2008, approved by the respondent. Thus, having approved the purchase of power by the applicant from ZESCO, at a cost higher than initially projected__ 40% discount__, the respondent whether tacitly, impliedly, and or expressly, was aware that by approving a higher cost of power in the BSA, this cost would be incurred by the applicant. And the applicant would in turn pass on the cost to its customers in the initial tariff.

The applicant maintains that the respondent was at all material times aware that the basis of the applicant's project was a private Connection Agreement that it had entered into with LMC, whereby LMC through its subsidiary LPDC was to develop a Mine Township to house its employees. And that the applicant would supply and distribute electricity to the Mine Township after buying the power in bulk from ZESCO. In addition, the applicant contends that the engagement of the applicant by LMC was a strategic decision made by LMC, after discussions with the applicant, to enable LMC concentrate on its core business of mining, and to forestall extra costs being incurred by LMC in setting up its own electricity network to service its remotely located rural Mine Township.

The applicant also contends that the respondent was aware that the applicant's project was a Greenfield, and that the applicant would have to seek external financing to establish the investment. And thereafter meet its financing obligations and recover its cost of investment. The applicant further contends that based on the business plan, the respondent was also aware that the nature of the applicant's project was such that the applicant's principal client is LMC and that on the basis of the MFA, and the payment of a utility allowance by LMC to its employees, LMC would protect the interest of its

employees by taking measures to mitigate higher electricity tariffs payable by the employees. The applicant also contends that the respondent was at all material times aware that the applicant's initial electricity tariff was dependant on the finalization of a MFA with the mines through LPDC.

Thus based on the project concept, LMC agreed to enter into a MFA, paying a maintenance fee to the applicant in order to sustain its initial operations. It is on the basis of this maintenance fee scenario, which was approved by the respondent and that the applicant arrived at a tariff of US cents 9.5/kwh; a tariff which takes into account the cost to the applicant of purchasing power from ZESCO; its loan repayments to FMO, and the maintenance fee to be paid by LMC to the applicant.

The applicant pointed out that before the respondent issued a licence to the applicant, the respondent had in line with the provisions of the Energy Regulations Act, published in the Government Gazette of 9th May, 2008, a 30 day notice of intention to issue licence to, amongst other undertakings, the applicant. After the applicant was granted its licence in 2008, it began to supply power to Lumwana Mine Township in line with the Connection Agreement it had with LMC, because the houses in the Mine Township were still under construction. Once construction of the first 200 houses was completed in, or around June, 2009, in line with the MFA between the applicant and LPDC, the applicant started charging LMC employees directly at the agreed initial tariff of US 9.5 cents/kwh as provided for in the MFA. The tariff of US 9.5 cents/kwh charged by the applicant to the residents of Lumwana Mine Township was the initial tariff that the applicant charged, after construction of their houses was completed by LPDC. The applicant had never previously supplied electricity to LMC employees at a different tariff other than the agreed initial tariff of US 9.5 cents/kwh indicated in the MFA.

Therefore, contrary what is contained in the Enforcement Notice issued by the respondent, the applicant did not at any point alter, or vary its initial tariff. Thus the respondent has not demonstrated how and when the respondent varied its initial tariff of US 9.5/kwh without following the laid down procedure provided in the Electricity Act. The applicant maintains that the respondent did not follow the due process in issuing the Enforcement Notice. First, the respondent did not forward any consumer complaint to it before issuing the Enforcement Notice. Second, the applicant should have been given an opportunity to respond to any alleged complaint within seven days before the respondent issued the Enforcement Notice.

Furthermore, the respondent has not in its affidavit in opposition, produced any evidence of consumer complaint(s) that it received before it issued the Enforcement Notice against the applicant. It is therefore the applicant's contention that in fact there was no complaint received by the respondent against it. And therefore the allegation by the respondent that there was a consumer complaint is baseless. The applicant maintains that the quarter page advertisement sponsored by the respondent under the heading "*LUMWANA RESIDENTS SPEAK OUT ON POWER TARIFF*," appeared in the *Zambia Daily Mail* dated 14th April, 2010. On the same day, 14th April, 2010, the Managing Director of LMC wrote a letter to the Minister of Energy and copied to the Chairman of the respondent expressing disappointment at the fact that the respondent which was in the process of reviewing the tariff charged by the applicant, had sponsored the advertisement. And thereby raised the expectations of its employees, and politicized the issue, with the likely result that it may engender industrial unrest at LMC.

The applicant maintains that it did not at any time apply for a variation of its initial tariff. However, after the respondent asked the applicant to apply for the

provisional approval of the initial tariff, the respondent twisted and foisted on the applicant, an application for tariff variation. Thus in the absence of a variation in the initial tariff by the applicant, the decision by the respondent to reduce the applicant's initial tariff was unreasonable and unjustified. Further, the applicant contends that the respondent does not have the mandate under any statutory provision to request a utility company to seek the provisional approval of its already existing tariff.

Be that as it may, the applicant was requested to seek provisional approval of its already existing tariff. And in response, the applicant submitted its tariff justification and budget for the financial year 2010-2011, which clearly shows the justification for the tariff taking into account the 15 year BSA with ZESCO; the 15 year MFA with LMC; the applicant's loan repayment obligations to FMO, as well as the applicant's operating costs.

The applicant maintains that the project would not be viable at the tariff of US 6 cents/kwh, which represents a 40% reduction in the applicant's revenues. The applicant contends that at the reduced tariff, the applicant will not be able to meet its financial obligations to its project financiers and it would therefore be wound up on account of insolvency. The applicant estimates that the annual revenue short fall arising from the respondents decision to reduce the tariff is US 294, 000 per year, and which translates to US 2, 352, 000 (United States dollars two million three hundred and fifty two) over the life of the loan of eight years. The applicant contends that it has not capacity to invest an additional US 2.3 million into the project given that it is only getting a fixed annual return on investment of US 70 246 per year which translates to US 561 968, over a period of eight years.

The applicant further contends that the respondent did not act within the law in dealing with this matter for the following reasons. First, the respondent acted outside the law in directing the applicant to apply for the provisional approval of its already existing tariff; and second, the respondent in dealing with the application for provisional approval foisted an application for tariff variation on the applicant. And thereafter effectively reduced the applicant's initial tariff contrary to the law. It is therefore the contention of the applicant that the entire process leading to the reduction of the applicant's initial tariff was instigated by the respondent contrary to the law and in breach of the due process and the rules of natural justice.

APPLICANT'S SUBMISSIONS

25th August, 2010, Mr. Mundashi SC, filed the applicant's submissions. Mr. Mundashi, SC observed that this is an application for judicial review in which the applicant is challenging the respondent's decision to do the following:

- (a) Reduce the tariff charged by the applicant from US 9.5 cents/kwh to US 6 cents/kwh;
- (b) To fine the applicant K 2, 700, 000=00, for charging the alleged "*unauthorised*" tariff to residential consumers;
- (c) That the applicant refunds all residential consumers that were charged the alleged "*unauthorised*" tariff being the difference between the approved rate, and the disallowed rate from the date they started charging the unauthorised US 9.5 cents/kwh up to 30th April, 2010; and
- (d) The decision by the respondent that the applicant should work out and furnish the respondent with a mechanism by which it will compensate consumers for the unauthorised tariff within 60 days, and the compensation must be made in full to all affected consumers within 12 months.

Mr. Mundashi, SC, submitted as follows: that prior to the respondent issuing the applicant with the licence there was correspondence that passed between the applicant and the respondent. The net effect of the correspondence was that the applicant was to acquire and or purchase electricity in bulk from ZESCO. And with the use of its own transformers and technology, it would re-supply and or sell electricity to Lumwana Mine Township. The financial model and how it intended to charge for the electricity to be supplied was explained to the respondent. The project is a Greenfield. And the licence was issued on that basis.

It would appear from the facts that the respondent's position is rather convoluted. First, it maintains that the applicant in changing US 9.5 cent/kwh had effected a "*tariff increase*" over and above an initial tariff it had approved (which is allegedly tied to the ZESCO tariff). Second, if the US 9.5 cents/kwh was the initial tariff, then the applicant had not obtained approval for this tariff. It is implicit in this position that as far as the respondent was concerned, it considered the ZESCO domestic tariff as the initial tariff that the applicant should have charged. To reinforce the preceding assertion, reference was made to paragraph 9 of the respondent's affidavit in opposition which was expressed in the following terms:

"That on 14th January, 2008, the applicant indicated in a letter dated 14th January, 2008, that the tariff to be charged for the project would be pari passu with the ZESCO retail tariffs..."

As proof this assertion, the respondent referred to the exhibit marked "MN2". This is the letter dated 14th January, 2010. Thus the respondent's position that the tariff that the applicant was supposed to charge is the ZESCO tariff is anchored on this letter.

I have been invited to examine carefully paragraph 3 of that letter which reads as follows:

“Our approach to the tariff to be applied on this project is that we will buy the power in bulk from ZESCO, and add on the cost of the investment in the distribution which will be charged to the final consumers. Should our proposed tariff be above the current retail tariff, we will explore the use of subsidies (as revenue enhancement measures), which can be met by the Mine (Lumwana Mining Company have already agreed in principle) and GRZ since this should be looked at in the context of rural electrification at distribution level.”

It is urged that in considering this application in the context of the grounds for judicial review, it is imperative to consider the following questions:

- (a) What was the legal rationale cited by the respondent for issuing the Enforcement Notice under the Electricity Act, as read with the Energy Regulations Act, and the subsequent decision made after a public hearing? The following specific question is posed: was it because the applicant had been charging a tariff from inception of the project which ought to have been approved, or it had revised its approved initial tariff to another tariff without approval?
- (b) Had the applicant revised its tariff to US 9.5 cents/kwh from that supposedly approved at the date of the grant of the licence in contravention of the licence, the Electricity Act, and the Energy Regulation Act? And
- (c) Did the respondent follow the procedure?

Mr. Mundashi, SC, further submitted as follows: the respondent is a statutory body performing its functions in accordance with the Electricity Act, and the Energy Regulations Act. It derives its legitimacy and mandate from those two Acts; its actions with regard to the decisions it took against the applicant as contained in the Enforcement Notice dated 14th September, 2009, and the

subsequent actions after a public hearing must be examined in the context of those statutes.

Mr. Mundashi, SC also pointed out that after the Enforcement Notice was issued, there was a public hearing which was convened by the respondent. My attention was drawn to exhibit “MN 14”, which comprises verbatim proceedings of the respondent’s public hearing on the applicant’s proposed tariff. (Albeit exhibit 14 was erroneously referred to as “MN 11” in the applicant’s submissions.) At page 5 of the verbatim proceedings the following is recorded:

“This is the first formal application from North Western Energy Corporation that ERB is considering according to its supply licence conditions. North Western Energy was expected to formally apply to ERB before it began charging its customers...”

Mr. Mundashi, SC, submitted that this was a public hearing that was conducted after issuance of the Enforcement Notice at which the respondent sought to legitimise the action contained in the Enforcement Notice. According to the Enforcement Notice, the applicant had been in breach of the provisions of the licence. The particulars of the contravention were given as follows in the Enforcement Notice:

- (a) That North Western Energy Corporation (NWECC) holds a licence to supply electricity issued by the Energy Regulation Board (ERB);
- (b) That prior to the issuance of the licence, ZESCO limited and North Western Energy Corporation entered into a BSA for the supply of electricity to NWECC, at a maximum demand of ZMVA. It was agreed that NWECC would then supply the power to residential, commercial, and light industrial customers in Lumwana Housing Complex at an agreed tariff of US cents 4.4/kwh. After the public hearing, the applicant maintains that the respondent took the decision to reduce the applicant’s tariff. This was

also after the respondent had requested the applicant to make a provisional application for the approval of the tariff it was charging.

Mr. Mundashi, SC, went on to submit that the application has been brought pursuant to Order 53 of the Rules of the Supreme Court; 1999 edition. In so doing, reference was made to Order 53/14/19 where it stated that:

“The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given a fair treatment by the authority to which he has been subjected.”

(See Chief Constable of North Wales Police v Evans [1982] 3 ALL E.R. 141).

Thus Mr. Mundashi, SC, submitted that a decision of an inferior Court or a public authority may be quashed by an order of *certiorari* made on application for judicial review where that Court, or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice, where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable. Mr. Mundashi, SC, pointed out that the respondent issued an Enforcement Notice on the basis that after ZESCO and the applicant had entered into a BSA, the applicant had also agreed to charge US 4.4 cents/kwh to its customers.

Mr. Mundashi, SC, submitted that he has examined the BSA in the context of the preceding statement, which was put forward by the respondent as constituting the contravention of the licence conditions. Whilst it is correct that the BSA had commercial provisions with respect to the price for the supply of electricity in bulk by ZESCO to the applicant, Mr. Mundashi, SC, contends that the BSA did not in any way address the issue of pricing, or tariff that the applicant would charge with the approval of the respondent to its customers.

The BSA governed the agreement between the applicant and ZESCO. There is nothing, Mr. Mundashi, SC, maintained, in the BSA that expressly or implicitly suggests that the applicant would charge its customers, with the approval of the respondent, US 4.4 cents/kwh.

Mr. Mundashi, SC, also submitted that this position taken by the respondent that the applicant agreed to charge its customer's US 4.4 cents/kwh, flies in the teeth of the position it took at the public hearing. The position of the respondent at the hearing was that the applicant had never applied for any tariff approval. If that position is accepted, then it is inconceivable that there would have been an agreed rate of US 4.4 cents/kwh, which rate had allegedly been varied without approval as alleged.

My attention was also drawn to what Mr. Mundashi SC, considered to be a perplexing and inconsistent position taken in paragraph 9 of the respondent's affidavit. It is the position that the applicant had agreed that it would supply power to its customers at the normal regulated tariff levels, while the difference would be met by LMC. To recapitulate, paragraph 9 in question states:

"That on 14th January, 2008, the applicant indicated in a letter dated 14th January, 2008, that the tariff to be charged for the project would be pari passu with the ZESCO retail tariffs..."

Mr. Mundashi, SC, submitted that the statement in paragraph 3 of the Enforcement Notice appears to be inconsistent with paragraph 2 of the same Enforcement Notice. In paragraph 2, there is an allegation that on the basis of the BSA, there was an agreement that the applicant would charge customers at an agreed tariff of US 4.4 cents/kwh. Mr. Mundashi, SC, contends that there is no evidence of this alleged agreement with either ZESCO (this would be

inconceivable because the contract was just between ZESCO and the applicant; the respondent was not privy), or with the respondent on this aspect.

Further, Mr. Mundashi, SC, argued that under paragraph 3 of the Enforcement Notice, the respondent as confirmed in paragraph 9 of its affidavit, appear to take a different position. And rely on the letter dated 14th January, 2008, or exhibit “MN2,” in the respondent’s affidavit, as the basis of an agreement that the applicant would charge normal regulated tariffs. Mr. Mundashi, SC, submitted that reliance and that letter is “*clutching at straws*.” Mr. Mundashi, SC, reiterated that in the letter of 14th January, 2008, and in paragraph 3, referred to above, the applicant made proposals on how it intended to approach the issue of the tariff. Mr. Mundashi, SC, contends that there was a definite position which was accepted by the respondent as a basis for either charging US 4.4 cents/Kwh as stated in paragraph (2) of the Enforcement Notice, or at “*normal regulated ZESCO tariff levels*,” as stated in paragraph 3 of the Enforcement Notice

Mr. Mundashi, SC, also pointed out that before the applicant lodged the application for a licence, it explained to the respondent how it intended to approach the tariff issue. In so doing, it was not the applicant’s position that it would charge on the basis of the ZESCO retail tariff. The applicant made it very clear that upon purchase of power from ZESCO, it would add on the cost of the investment and explore other means of making the tariff reasonable. Mr. Mundashi, SC, pressed that there is no evidence to suggest that upon receipt of the letter of 14th January, 2008, the respondent took the position that it would deem the domestic ZESCO retail tariff as the agreed rate, and therefore to be the basis of issuing the licence to the applicant.

Mr. Mundashi, SC, pointed out that exhibit “ANK 11” attached to the applicant’s affidavit in support, comprises e-mails dated 8th April, 2008. The e-mails demonstrate that at the material time; four months after the letter of 14th January, 2008, the applicant and the respondent were still engaged in discussions over the applicant’s application for a licence. That state of affairs Mr. Mundashi, SC, argued, is inconsistent with the position taken by the respondent that on the basis of the letter of 14th January, 2008, the agreed rate or tariff was the ZESCO retail tariff of US 4.4 cents/kwh.

Further, Mr. Mundashi, SC, drew my attention to the fact that the exchange of e-mails and other correspondence took place after the formal application was made in October, 2007, and submission of the Business plan marked as MN4. Thus, Mr. Mundashi, SC, argued that there is no evidence to suggest that by virtue of the application and business plan submitted in October, 2007, there was an agreement between the applicant and the respondent to the effect that the initial tariff was agreed and approved on the basis of the ZESCO retail tariff of US 4.4 cents/kwh.

Mr. Mundashi, SC, submitted that curiously the respondent appears to backtrack as shown in paragraph 10 of the position it took in paragraph 9 of the affidavit in opposition; that there was an agreement on the tariff based on the ZESCO retail tariff of US 4.4 cents/kwh. Paragraph 10 is expressed as follows:

“That the business plan submitted by the applicant was in compliance with the licensing procedure for the determination of the financial viability of the applicant and assessment of the application fee for the activity applied for. The review of the documents by the respondent neither impliedly nor expressly presupposed the consideration and approval of a tariff to be charged by the applicant for the project.”

Mr. Mundashi, SC, submitted that it is the applicant's position that the application which it submitted in October, 2007, was on the premises that the project was a Greenfield project, or new project. Mr. Mundashi, SC, noted that the licence itself is silent on the actual initial tariff.

In view of the foregoing, Mr. Mundashi, SC pressed that it is imperative to examine the provisions of the Electricity Act, which govern a business when it is licensed for the first time. The relevant provision is contained in section 4 of the Electricity Act. Section 4 enacts as follows:

"Any person who wishes to erect and establish any generating station works___

(a) The plant of which will be rated at the site where it is to be installed at a capacity of one hundred or more kilowatts. For generating, transmitting, transforming, converging or distributing electricity shall do so in accordance with regulations made under the Act. And shall comply with any requirement of the Board for the purpose of facilitating co-ordination with existing or future undertakings."

Mr. Mundashi, SC, submitted that the "Board" being referred to in section 4 of the Electricity Act is the respondent, which is established in accordance with the provisions of the Energy Regulations Act.

Further, Mr. Mundashi, SC, submitted that section 6 of the Electricity Act enacts as follows:

"Subject to the terms and conditions of a licence issued in accordance with the Energy Regulation Act, every operator of an undertaking shall supply electricity to every consumer who is in a position to make satisfactory arrangements for payment under a contract of supply with that operator."

With respect to the charge for supplying electricity upon being licensed, Mr. Mundashi, SC, submitted that section 7 of the Electricity Act provides that:

“Subject to section eight, the charges made by an operator of an undertaking that supplies electricity to the public shall be determined in accordance with the licence governing the undertaking.”

In light of the preceding provisions, Mr. Mundashi, SC, argued that it is the position of the applicant that it made an application in accordance with the provisions of section 4 (i) of the Electricity Act. After making an application for a licence which was duly granted, the applicant started charging tariffs on the basis of an arrangement made with LMC and PLDC, a position which is consistent with the provisions of section 6 (1) of the Electricity Act. The applicant contends that the respondent was aware at all material times that the initial tariff to be charged by the applicant was subject to finalisation of modalities on payment of subsidies by LMC and LPDC.

Mr. Mundahsi, SC, submitted that whilst it is accepted that the licence did not specify a specific tariff, it is demonstrably clear that after the application was made, the applicant and the respondent engaged in correspondence on the issue of tariff which culminated in the grant of the licence, whose effective date was 24th June, 2008. Mr. Mundashi, SC argued that this state of affairs is consistent with the applicant’s proposition that the applicant was allowed to operate on basis of the tariff of US 9.5 cents/kwh which according to the applicant was the level of tariff that would enable it recoup its investment, taking into account the subsidy from LMC.

Mr. Mundashi, SC, also drew my attention to exhibit “ANK3”, in the applicant’s affidavit in reply dated 10th August, 2010. “ANK3” is a copy of the Gazettee

Notice which was issued by the respondent advising the members of the public that it was proceeding to issue a licence to the applicant, and was therefore inviting members of the public to file objections, if any. Mr. Mundashi, SC, argued that the issuance of the Gazettee Notice further underscores the position taken by the applicant that it was authorised to conduct business. And therefore in the absence of the respondent providing proof that the tariff it approved was the ZESCO retail tariff of US 4.4 cents/kwh, as alleged, then the only inference that can be drawn in the circumstances is that the tariff that was assumed to be charged would be the US 9.5 cents/kwh, which was the level of tariff that was commercially viable in accordance with its business plan.

Mr. Mundashi, SC, submitted that the respondent in its dealing with the applicant has taken contradictory and confused positions regarding the regulatory breach. To illustrate, Mr. Mundashi, SC, pointed out that in paragraph 4 of the Enforcement Notice, the respondent maintained that by charging US 9.5 cents/kwh, the applicant had purported to revise or alter the initial tariff without approval. However, according to section 8 (1) of the Electricity Act, an operator supplying electricity can only increase tariffs with the approval of the respondent. Mr. Mundashi, SC, submitted that it is implicit in section 8 (1) that for an operator to increase a tariff, there must be in existence another tariff which is proposed to be varied. Mr. Mundashi, SC, stressed that it is the applicant's position that it only imposed the initial tariff of US 9.5 cents/kwh to new houses that had to be metered. Thus there is no evidence that before the applicant imposed the tariff rate of the US 9.5 cents/kwh, it had applied any other tariff.

Mr. Mundashi, SC, reiterated that as explained in paragraph 19 of the affidavit in reply, when the applicant was granted the licence in July, 2008, it began to

supply power to Lumwana Mine Township, in line with the Connection Agreement, it had with Lumwana Mine. The supply was initially restricted to the mine. At the material time, the residential houses could not be supplied because they were under construction. Once the construction was completed around June, 2009, the applicant started charging the employees in line with the MFA. Mr. Mundashi, SC, went on to submit that as explained in paragraph 20 of its affidavit in reply, the tariff of US 9.5 cents/kwh charged by the applicant to the residents of Lumwana Mine Township was the initial tariff that the applicant charged after construction of the houses completed.

Thus the applicant had never previously supplied electricity to LMC at a different tariff, other than the US 9.5 cents/kwh. Mr. Mundashi, SC, submitted that there is evidence that when the applicant received the Enforcement Notice, it wrote to the respondent remonstrating about the Enforcement Notice. As observed earlier on, a public hearing was convened on 21st December, 2009. At that hearing, Mr. Mundashi, SC, submitted, it appeared that the issue was that the applicant had been charging an initial, or first tariff that had not been approved. Mr. Mundashi, SC, argued that the hearing never proceeded on the basis that the applicant had now started charging a tariff different from the initial by way of revision without approval.

Mr. Mundashi, SC, pointed out that following the public hearing of 21st December, 2009, the respondent wrote to the applicant on 23rd December, 2009. The relevant portion of the letter referred to above, was expressed in the following terms:

“We acknowledge receipt of your letter dated 21st December, 2009, and take note of the contents. Following the hearing held on 21st December, 2009, and UPON HEARING North Western Energy Corporation, and its representatives, you are HEREBY REQUESTED to apply to the Energy Regulation Board for provisional

approval of the current tariff of K 475/kwh (which is US 9.5 cents prior to your filing a formal tariff application. You are further REQUESTED to provide a detailed justification for the current tariff being paid by the residents of Lumwana Mine Township, vis-a-vis the arrangements between Lumwana mining company and its employees and your contractual obligations with Lumwana Mining Company.”

On the basis of the preceding letter, Mr. Mundashi, SC, argued that it is demonstrably clear that from this letter, the respondent had shifted its position as to why the Enforcement Notice had been issued. Mr. Mundashi, SC, recalled that according to the letter of 14th January, 2010, the applicant was advised that what it had in fact applied for was a tariff variation. Yet subsequently it was advised that it should apply for formalisation of a tariff. Mr. Mundashi, SC, argued that the respondent was in effect forcing upon the applicant a tariff variation application to legitimise the actions it had taken against the applicant. Furthermore, Mr. Mundashi, SC, argued that a review of evidence shows that the Enforcement Notice was issued on the basis that the applicant had effected a tariff increase without following the law. Mr. Mundashi, SC, went on to argue that when the applicant pointed out that it was not effecting any tariff increase, but was merely implementing an initial tariff which had been approved, the respondent took the position that it did not approve the initial tariff, and that the applicant should therefore apply to have it approved as a *“provisional approval.”* And on receipt of the documents in relation to the alleged *“provisional approval,”* it shifted position that the applicant was applying for a tariff variation.

Mr. Mundashi, SC, reiterated his submission earlier on, that the position taken by the respondent is contradictory, and suggests a determined attempt to review the applicant’s tariff for reasons that are not consistent with the law. Thus Mr. Mundashi, SC, argued that this smacks of unreasonableness, bad faith, and illegality. Mr. Mundashi, SC, pressed that the respondent as a public

institution should in the exercise of its statutory functions act reasonably. Mr. Mundashi, SC, drew my attention to the case of *Chitala v Attorney General* (1995 – 1997) Z.R. 91, where the Supreme Court made reference to Lord Diplock’s celebrated statement in *Council of Civil Service Union and Others v Minister for Civil Service* [1985] A.C. 374, that classified and elaborated the three heads, or grounds upon which administrative action are subject to control by judicial review. Namely, “illegality,” “irrationality,” and a “procedural impropriety.” I will address these grounds in more detail later.

After referring to Lord Diplock statement in *Council of Civil Service Union case*, referred to above, Mr. Mundashi, SC, submitted that the decision of the respondent to reduce the tariff of US 9.5 cents/kwh, to US 6 cents/kwh and other orders based on that decision should be quashed on the basis of the three heads or grounds referred to by the Supreme Court in the *Chitala case*. In this regard Mr. Mundashi, SC, argued as follows. First, there was an illegality committed in the manner that the respondent dealt with the respondent. Initially the respondent issued an Enforcement Notice; “ANK 13”. The Enforcement Notice was based on the tariff of US 9.5 cents/kwh and section 8 of the Electricity Act. Mr. Mundashi, SC, argued that section 8 of the Electricity Act, deals with the procedure to be followed when a licensed operator applies for a tariff variation over and above the initial tariff. Yet there is no evidence that points to the fact that there was any initial tariff other than the US 9.5 cents/kwh which the applicant can be said to have revised upwards without approval.

Second, it was submitted in the alternative that the respondent dealt with the issue irrationally. Mr. Mundashi, SC, maintains that the respondent has demonstrated how the respondent has throughout shifted positions. In one breath, the respondent suggests that there is a ZESCO tariff of 4.4 cents/kwh

which it approved as the initial tariff. And that the tariff of US 9.5 cents/kwh should be considered as a variation, subject to approval as set out in section 8 of the Electricity Act. In another breath, the respondent takes the position that there had never been any tariff approval. And as such, it was treating the public hearing it had convened on the basis of section 8___ as approval of the initial tariff of US 9.5 cents/kwh.

Mr. Mundashi, SC, maintains that section 8 of the Electricity Act, cannot be used to deal with the determination of the initial tariff of a new project, that has just been licensed under section 4 (1) of the Electricity Act. Yet the position of the respondent appear to be that section 8 is a “*catch all*” provision for any action it intends to take to ensure that an undertaking charges a tariff which the respondent prefers. Mr. Mundashi, SC, reiterated that section 8 cannot be the basis for dealing with an initial tariff application as decided by the respondent at the public hearing. Mr. Mundashi, SC, submitted that the respondent is reading into, and, or importing words in the statute. The case of *Miyanda v Handahu (1993 – 1994) Z.R. 187.* was called in aid when it states that:

“When the language is plain and there is nothing to suggest that any words are used in the technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice, or political exigency, motive of the framers, and the like...”

Thirdly, the applicant contends that by the respondent foisting on the applicant, an application for variation of an existing tariff, when it initially disposed of it as an initial application for a new project, was a procedurally improper. The applicant also countered the suggestion by the respondent that there was evidence of complaint(s) against the appellant. The applicant

contends that there is no evidence that any such complaint was ever forwarded to the applicant. The applicant further contends that if there was such complaint received by the respondent, it should have been forwarded to the applicant. The applicant maintains that the fact that the complaint was neither recorded, nor forwarded to the applicant, only confirms that the alleged complaint is in all probability a fiction.

Further, Mr. Mundashi, SC, argued that the canvassing of public submissions and placement of the advertisement in the *Zambia Daily Mail* of 14th April, 2010, by the respondent, suggests that the respondent was not acting impartially in the review of the tariff. Mr. Mundashi, SC, submitted that all the actions referred to above suggest, or reflect that the respondent was determined to revise the applicant's tariff, even in the absence of any legal backing. Ultimately, I was urged to quash the decisions by the respondent, and award the applicant damages on account of the decisions taken by the respondent.

RESPONDENT'S SUBMISSIONS

On 10th September, 2010, the respondent filed its written submissions. In the submissions, Ms. Bwalya contextualised the concept of energy regulation; described the history of energy regulation in Zambia; regulatory governance; regulatory substance; duties and powers of the respondent; and coverage of the Energy Regulation Act; and the Electricity Act. All these matters referred to above, running into seven pages, took the form of a lecture on "*Energy Regulation*," will not be addressed because they are too germane to the resolution of the dispute at hand.

In so far as is relevant, Ms. Bwalya submitted at the outset that the respondent is empowered by sections 3 of the Electricity Act, and 12 of the Energy Regulation Act, to issue a licence to an undertaking that complies with the licensing requirements. The conditions are set out in the licence. And the respondent may, subject to section 12 (3) of the Electricity Act, vary the conditions of the licence under specified circumstances as provided for in section 12 (3) of the Energy Regulation Act. Section 12 (1) and (3) of the Energy Regulation Act is expressed in the following terms:

“12 (1) A licence is subject to such conditions as may be imposed by the Board and specified in the licence when it is granted, or when it is varied in accordance with subsection (3)

(2) not relevant

(3) where a licensee has on repeated occasions contravened the conditions of the licence, or has been the subject of such complaints by the consumers of any commodity or service provided by the licensee in the course of its undertaking as in the opinion of the Board, to warrant action under this section, the Board by notice in writing to the licensee, may vary the conditions of the licence or attach new conditions to the licence.”

Section 7 of the Electricity Act, Ms. Bwalya submitted, goes on to enact that:

“Subject to section eight, the charges made by an operator of an undertaking that supplies electricity to the public shall be determined in accordance with the licence governing the undertaking.”

Ms. Bwalya went on to submit that the respondent has in terms of section 12 (2) (b) of the Energy Regulation Act, the power to set, vary, or disallow tariffs applied for in a licence application. Thus section 12 (2) (b) provides that:

“2 The conditions of a licence may include conditions_____.

(b) making provision with respect to the fees and charges imposed in respect of energy, fuel, or any service to be proved in the course of the licensed undertaking, and the adjustment of such fees and charges.”

Furthermore, Ms. Bwalya submitted that the respondent enjoys under section 12 (2), (j), the power to fine an undertaking such as the applicant. Section 12 (2) (j) enacts that:

“(2) The conditions of licence may include conditions_____

“J requiring and regulating the payment of fines and penalties by the licensee for breaches of any or any specified terms and conditions of the licence.”

Ms. Bwalya also pointed that sections 12, 17, and 18 of the Energy Regulation Act gives the respondent the powers to issue orders to any undertaking. First, section 12 provides generally for the conditions of the licence. Second, in terms of section 17, the respondent may where an undertaking is being operated in contravention of the Act, serve notice on the operators directing them to take steps to cease operations and to dismantle any plant and equipment used for the undertaking. Third, in terms of section 18, an inspector is empowered to enter any area, place, or premises, where he believes the premises are used only for the storage of equipment or for keeping documents or records relating to such an undertaking. Clearly, sections 17 and 18 are not relevant to the resolution of the problem at hand.

Ms. Bwalya in her submission referred to sections 6, 7, 8, 9, 10, 11, and 12 of the Electricity Act. Apart from section 8, the various sections outlined above are not relevant to the determination of the controversy at hand. Counsel are therefore urged to bring to the attention of the Court only matters that are relevant and useful to resolution of the controversy(ies) at hand.

In light of the preceding discussion, Mrs. Bwalya argued that section 4 (1) of the Electricity Act, as read with section 6 (1) of the same Act, provides the basis upon which the applicant was licensed. Ms. Bwalya further observed that the respondent argued that the provisions of section 7 of the Electricity Act were not applicable at the time the applicant made the application for licensing because of the submission contained in the business plan and the terms of the MFA signed between the applicant and LPDC. Ms. Bwalya argued that upon the issuance of the licence, the applicant was subject not only to the Electricity Act, and the Energy Regulation Act, but also to the two licences issued to it. Namely, the licence to Engage in the Supply of Electricity and the licence for the Right to Engage in the Distribution of Electricity. Thus Ms. Bwalya argued that all duties, obligations, and rights of the applicant stem from the licences, and the relevant legislation.

In light of the various provisions of the Electricity Act, and the Energy Regulation Act, Ms. Bwalya argued that the respondent is obliged to exercise its oversight function within the framework of the legislation and the licences it granted to the applicant. Granted that the applicant is a licensee, Ms. Bwalya argued that the onus is on the applicant to prove that it had obtained all the necessary consents, and approvals for the tariffs it charged pursuant to the licences held by the applicant.

Ms. Bwalya observed that the applicant does acknowledge and accept in its submissions that the licence did not stipulate a specific tariff. The respondent's contention however is that where there is any doubt, that doubt ought to be decided against the license because all approvals are given pursuant to a licence. Ms. Bwalya pressed that a licensee cannot assume, or usurp the powers of the giver of the licence; the respondent, and determine its own tariff.

Ms. Bwalya further drew my attention to the case of *Mercury Energy Limited v Electricity Corporation of New Zealand* [1994] 1 W.L.R. 521, where it was held that:

“Since judicial review involved interference by the Court with a decision made by a person or body empowered by law to reach that decision in the public interest, a litigant could only invoke judicial review if he pleaded plausible allegations which if proved at trial would show that the decision had not been reached in accordance with the law.”

Further, Ms. Bwalya drew my attention to the dicta of Lord Greene M.R. in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 K.B. 233, that the Courts:

“Can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition___ It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the Court, wherever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good.”

As regards the MFA, Ms. Bwalya, submitted that the respondent was aware that arising from the power supply agreement between ZESCO, and the applicant, the applicant would supply electricity to staff at Lumwana under contract with LPDC___ and not staff of LMC. In this regard, my attention was drawn to the affidavit in opposition sworn by Dr. Mushiba Nyamazana. The following paragraphs were highlighted:

“20 That the respondent was at all material times aware of the fact that the tariff scenario proposed by the applicant for the supply of electricity to Lumwana Property Development would be paid by LMC and not the consumers. This was based on the fact that LMC had the capacity to contract and the financial muscle to enter into such a contractual arrangement with the applicant. At no point in

time did the documents availed to the respondent by the applicant refer to a charge of US 9.5 cents/kwh on the consumers who are residents of Lumwana Township. And are members of the public, and thus entitled to notification of any proposed tariff to be imposed by an operator of an undertaking.”

“21 That after being satisfied with the applicant’s technical and financial capabilities to carry out the licensed activities applied for, the respondent issued the applicant with licences to distribute and supply electricity to the Lumwana property development area on 7th August, 2008, effective on the 24th June, 2008, when the respondent approved the issuance of the licences”.

I was further invited to look at the MFA between the applicant and LPDC under the heading *“Construction and Supply”*. The respondent argues that the MFA was in effect a contract for the supply of electricity, subject *inter alia*, to the licence for the Right to Engage in the Distribution of Electricity issued to the applicant. Thus Ms. Bwalya argued that the MFA was for all intent and purposes an agreement upon which the applicant and LPDC made provision for the supply of electricity on conditions set out in the contract. In the premises, Ms. Bwalya submitted that the respondent was therefore on firm ground in concluding that although the ultimate beneficiaries would be the staff of LMC, the actual contract for the supply of the electricity was between the applicant and LDC. Ms. Bwalya pointed out that clause 3.2 of the MFA gave the applicant exclusive right to supply domestic, industrial and commercial consumers within Lumwana Township with all their energy requirements. And to collect and receive payments for the service.

Ms. Bwalya argued further that the applicant’s business plan marked *“MN4”* and *“MN6”* in the affidavit in opposition clearly states at page 3 under the heading *“2.0 Background to the Electricity Sector,”* that the tariff applicable to domestic consumers would be the ZESCO tariff, referred to as the *“fixed domestic price”*, in the business plan. In this regard, my attention was drawn to the following paragraph:

“Whereas the bulk supply tariff may be negotiable, domestic tariffs are fixed across the whole country. Therefore, ENFIN will have to sale purchased power at the fixed domestic price. At State bulk purchases, prices the project would be faced with a deficit in revenue requirements to meet operational and future investment needs. A secondary objective of this business plan is therefore to facilitate discussion as to the appropriate bulk purchase tariff subsidy and or/ maintenance to supplement sales revenue.”

Furthermore, Ms. Bwalya submitted that the applicant’s business plan marked “MN6” in the affidavit in opposition states at page 10 under the heading “Scenario 3___ Maintenance Fee.” That:

“The mine’s responsibility for this tariff arises from the fact that had this contract (the Maintenance Fee Agreement) not been outsourced, it would have been necessary for the mine to undertake the activity as part of its mine operations.”

Ms. Bwalya argued that whilst the Licence to Engage in the Supply of Electricity and the licence for the Right to Engage in the Distribution of Electricity were granted by the respondent, effective 24th June, 2008, the MFA met the short fall between the fixed domestic tariff – national ZESCO tariff – and that charged by the applicant to LMC, which payment was made by LMC. Ms. Bwalya submitted that the staff and residents of Lumwana Township only noticed the actual tariff applied by the applicant when the electricity bills were now been paid directly by staff and residents, after the applicant at Lumwana Mine’s direction fitted pre-paid meters to the residential houses. This, Ms. Bwalya submitted, raised the public complaints from the consumers to the respondent regarding the tariff imposed.

Ms. Bwalya argued that it is evident from an examination and interpretation of the MFA that the only parties to that Agreement were the applicant and LPDC. Ms. Bwalya went on to argue that there was a variation with the implementation of the MFA conditions. Namely, LMC ceased to pay directly the

electricity tariff for its employees. The employees were instead required to pay for the tariff from their utility allowance, that was subsequently approved as part of their conditions of service. The installation of meters in the respective households, Ms. Bwalya noted, was a pre-requisite for this change in the mode of payment of the tariff. In order to augment her submissions, Ms. Bwalya reiterated the contents of paragraphs 21, 22, 23, 24, 25, and 26 of the affidavit in opposition. The averments contained in the preceding paragraphs have already been addressed, elsewhere in this judgment.

Ms. Bwalya argued that in furtherance of the administration of the Energy Regulations Act, the respondent is required to approve and licence any utility that seeks to provide its services directly to the general public. Further, Ms. Bwalya submitted that the respondent regulates tariffs that are paid by members of the public, and not private entities. Ms. Bwalya went on to submit that under the provisions of the Electricity Act, and the licence conditions, the respondent determines tariffs that are charged by an operator that supplies electricity to the public. Thus, Ms. Bwalya argued, that the residents of Lumwana Township are members of the public. And therefore the application of a tariff directly to members of the public requires the prior approval of the respondent, as provided for in sections 7 and 8 of the Electricity Act, referred to above. Ms. Bwalya further argued strenuously that whilst the licences were issued by the respondent on the understanding that the parties to the MFA would meet the shortfall between the ZESCO domestic tariff, and that charged by the applicant, the general public was not envisioned in the licences as being party to the MFA. Hence, the provisions of section 7 of the Electricity Act, do not apply to this supply, which does not affect the general public. The supply relates to LMC.

Furthermore, Ms. Bwalya submitted that the MFA in effect incorporated a contract for the supply of electricity duly signed between the applicant, and LPDC. I was invited in this regard to pay particular attention in the opening statement of the recitals which stipulates the salient features of the agreement between the applicant and LPDC.

Ms. Bwalya argued that the Electricity Act charges the respondent with the responsibility of regulating the supply of electricity to the public. In this respect Ms. Bwalya drew my attention to the case of *Norweb v Dixon* [1995] 1 W.L.R. 636, where it was held *inter alia*, that where there was general agreement for the supply of electricity between a tariff consumer, and a public electricity supplier under section 16 (1) of the Electricity Act of 1989, the legal compulsion as to both the creation of the relationship and the fixing of its terms was inconsistent with the existence of a contract. And supplies to tariff customers were governed by statute, and not contract.

Ms. Bwalya further drew my attention to the case of *Wilmore v South Eastern Electricity Board* [1957] 2 Lloyd's Rep. 375. In the *Wilmore* case, Ms. Bwalya submitted that the electricity was supplied by the defendant electricity board to the plaintiffs. It was alleged by the plaintiffs that the defendant was in breach of its contract to supply adequate current. The claim was put on the footing of breach of a term of the supply agreement, and in the alternative, breach of a collateral warranty.

The next authority that was brought to my attention was the case of *A.E. Becket and Sons (Lynodons) Limited and Other Midland, Electricity Plc* [2001] 1 W.L.R. 281. Ms. Bwalya submitted that the facts of the case were as follows: the second and third claimants operated poultry and egg businesses, and

leased premises on a farm owned by the first claimant. The farm premises were badly damaged by a fire which originated in electrical equipment installed, and under the control of the defendant; a public electricity supplier, against whom the claimants brought an action for damages in negligence. The largest part of the damages claimed by the second and third claimants, resulted from the interruption of their business. The defendant denied negligence and relied on a clause, in its conditions of supply excluding liability for economic loss. Ms. Bwalya submitted that on the trial of preliminary issues, the judge found that although the fire had been caused by the defendant's negligence for which it was liable in damages to each of the claimants, its liability for economic loss had been excluded by a term of its conditions of supply to the claimants.

Ms. Bwalya went on to submit that on appeal by the second and third claimants, the appeal was allowed. And it was held that the relationship between an electricity supplier and a customer was not contractual; it was governed by the Electricity Act of 1989. It was further held that the relevant exclusion clause in the defendant's conditions of supply to its customers, was co-extensive with the provisions of section 21 of 1989 Act, which on true construction permitted terms restricting liability for economic loss only in relation to loss resulting from the interruption, or variation of the supply of electricity. Thus the exclusion clause did not extend to the negligent installation of the electrical equipment.

Ms. Bwalya, in her submissions addressed the effect of the judicial review on the decisions of the respondent. In so doing, Ms. Bwalya referred to the case of *Chiluba v The Attorney General (2003) Z.R. 153*. And submitted that the *Chiluba* case affirmed the following principles:

- (a) The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself;
- (b) The purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which the has been subjected, and that it is not part of that purpose to substitute the opinion of the judiciary, or of individual judges for the authority constituted by law to decide the matters in question;
- (c) The Court will not on judicial review application act as “*a Court of appeal*,” from the body concerned, nor will the Court interfere in any way with the exercise of any power, or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is *Wednesbury unreasonable*; and
- (d) When the High Court is reviewing a decision of a public body it will not admit evidence which is relevant as to whether the decision is a reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body has power to make, or whether it was made in circumstances, in which a reasonable body could have made it.

Ms. Bwalya, also drew my attention to the case of *Mungomba and others v Machungwa and others* (2003) Z.R. 17. And pointed out that in the *Mungomba case*, in a judgment delivered by Chirwa, J.S., the Supreme Court observed at page 21 that: “*Judicial review process is not concerned with the merits of the decision, and authorities are abound on this and we may only refer to our recent decision in the case of Chiluba v Attorney General, and the authorities cited therein.*”

Ms. Bwalya submitted that the applicant has argued that the decisions by the respondent are actuated by *mala fides*, and therefore are illegal. She argued that the applicant has not substantiated the allegation with the necessary

proof. And as such, no evidence has been adduced to prove that the respondent's actions were prompted by malice. In advancing this argument, Ms. Bwalya drew my attention to the case of *Musakanya v The Attorney General* (1981) Z.R. 188. In the *Musakanya* case, it was held in part that the onus of proving *mala fides* is on the applicant.

Ms. Bwalya went on to draw my attention to the case of *Zimba v Registrar of Societies and Another* (1981) Z.R. 335. The *Zimba* case reiterated the position that it is settled law that any litigant alleging *mala fide* on the part of his opponent has the onus of proving that allegation. Ms. Bwalya maintains that the respondent followed the Energy Regulation Act throughout its dealings with the applicant. She argued further that the process through which the applicant was invited to submit an application for the approval of the tariff to be levied on members of the general public as opposed to LMC, was clear and transparent. It was also maintained that the process afforded the applicant an opportunity to argue its case within the provisions of the Energy Regulations Act.

As regards, the contention relating to want or excess of jurisdiction, Ms. Bwalya submitted that if an inferior Court or tribunal or a public authority charged with a public duty acts without jurisdiction, or exceeds its jurisdiction, judicial review will lie. In aid of this submission, she relied on the case of *Anisminic Limited v Foreign Compensation Commission* [1969] 2 A.C. 147; [1969] 1 ALL E.R. 208. In the *Anisminic* case, Ms. Bwalya submitted that it was held that where the decision of an administrative authority, or tribunal is founded wholly or partly, on an error of law, the authority or tribunal has acted outside its jurisdiction, its decision is liable to be quashed.

In relation to procedural fairness, Ms. Bwalya submitted that apart from the obligation of the respondent to act within the limits of its powers, the respondent is also required to arrive at decisions in a procedurally “fair” way. Without “fairness,” Ms. Bwalya went on, even if the respondent were not acting, *ultra vires*, its actions would, still be unlawful. She stressed that the common law recognises procedural fairness as an important principle of just decision making. Quoting from De Smith’s Judicial Review of Administrative Action, 5th edition, 1995, in paragraph 8 – 038, at p 417, she submitted that fairness as a concept is drawn from the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government’s dealings with the public. She further submitted that the failure to comply with the rules of natural justice also falls under the rubric of procedural fairness. And where a decision has been arrived at in breach of the rules of natural justice, judicial review will lie. In aid of this submission, Ms. Bwalya drew my attention to the case of *Ridge v Baldwin* [1964] A.C. 40.

Ms. Bwalya also submitted that the rules of natural justice apply where the applicant for judicial review does not have a right. For instance, where he is applying for a statutory licence. In such cases, although he has no right to a licence, there is a duty to comply with the rules of natural justice. And to act fairly because a legal power which affects his interests is being exercised. In support of these propositions. Ms. Bwalya referred me to the case of *R v Liverpool, ex parte Liverpool Taxi Operators Association* [1972] 2 Q.B. 299.

Ms. Bwalya submitted further that it is the contention of the respondent that throughout its exercise of regulatory power it afforded not only the applicant, but also the tariff consumers who are members of the public, an opportunity to be heard and their submissions taken into consideration, she therefore argued that procedural fairness as a ground for judicial review cannot be sustained by

the applicant in light of the extensive opportunities it was given to make submissions, and respond to any objections that the general public, tariff consumers, and even the respondent may have raised with regard to the supply of electricity.

In so far as the ground of unreasonableness is concerned, ___ the *Wednesbury* principle___ Ms. Bwalya submitted that the Courts can only interfere with a decision, if the decision, is so perverse that it can only have been arrived at by the improper exercise of power. She pointed out that in *Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374*, Lord Diplock said at page 410, that this ground for judicial review applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Ms. Bwalya therefore observed that the Courts are slow and careful to review a decision on the basis of the *Wednesbury principle* because of the apprehension of substituting the decision of a decision-maker, with that of the Courts. Thus she submitted that the threshold for unreasonableness is a high one. On the authority of *R v Ministry of Defence, ex parte Smith [1996] Q.B. 517*, Ms. Bwalya submitted that the Courts can only interfere with the exercise of an administrative discretion on substantive grounds, when the decision is beyond the range of responses open to a reasonable decision maker.

Ms. Bwalya observed that the applicant has claimed several forms of reliefs. These include *certiorari*, prohibition, and damages. She addressed each of these reliefs. First, she submitted that *certiorari*, is an order that calls a decision of a public authority into the High Court to be quashed. Thus where in judicial

review proceedings the Court concludes that a decision which has been made by an inferior Court, tribunal, or public authority should be set aside, *certiorari* would be an appropriate form of order. In this case, Ms. Bwalya argued that the applicant has not adduced any evidence to show that the respondent has passed a decision that is unlawful, or in excess of its statutory powers and duties. She reiterated that the respondent has throughout its dealings with the applicant endeavoured to observe its mandate as stipulated both by the Energy Regulation Act, and the Electricity Act.

Second, she submitted that prohibition is an order restraining an inferior Court, tribunal, or a public authority from acting outside its jurisdiction. Thus where a tribunal is proposing to adjudicate upon some matter which is not within its jurisdiction, judicial review will lie. And the Court can issue an order of prohibition. She pointed out that in terms of Order 53, Rule 7 (1) of the Rules of the Supreme Court, the grant of an order of prohibition is discretionary. And on the authority of *Governors of Queen's Bounty v Pitt Rivers* [1936] 2 K.B. 419, although a prohibition will normally be issued to prevent excess jurisdiction, it ought not to be issued lightly. Again, Ms. Bwalya submitted that on the authority of *Parochial Church Council of St Magnus the Marty v Chancellor of London* [1923] 38, the remedy of prohibition may be refused in case of misconduct on the part of an applicant.

Third, she submitted that on an application for judicial review, the Court has power to award damages to an applicant provided that he has included in the statement in support for leave a claim for damages, and the Court is satisfied that if the claim had been in an action begun by the applicant, he could have been awarded damages. These propositions are founded on Order 53, rule 7 (1) of the Rules of the Supreme Court. Where special damages are claimed, she went on to submit that Order 18, Rule 12, of the Rules of the Supreme Court

require an applicant to supply all necessary particulars. In this case, the respondent contends that the claim for damages by the applicant has not been substantiated by evidence. Therefore, this claim should not be entertained at all.

In conclusion, Ms. Bwalya, argued that the applicant has failed to prove the grounds for which relief is sought. It is therefore the contention of the respondent that the decision to award the applicant a tariff of US 6 cents/kwh was reasonable and was made in the interest of both the applicant and the residents of Lumwana Mining Township. Further, she argued that the respondent acted within the confines of the enabling legislation. That is, the Electricity Act. She went on to argue that in fact, the respondent took a step further to correct the illegality that was being perpetuated by the applicant, and accorded the process legitimacy by requesting the applicant to apply for the provisional approval of the unauthorised tariff. She pointed out that this was done inspite of the respondent's legal right in terms of section 12 (2) of the Electricity Act, to order the applicant to desist from charging an unauthorised tariff.

Further, Ms. Bwalya argued that the tariff of US 9.5 cents/kwh was neither impliedly nor expressly approved by the respondent. She maintained that the purpose of considering the business plan, financial model, and the clarifications received was to determine the viability of the applicant's project and the application fee to be paid by the applicant. Thus the scrutiny was conducted in terms of section 32 (2) (c) of the Energy Regulations (Licensing). Regulations____ statutory instrument number 2 of 1998.

As regards the allegation of procedural impropriety, Ms. Bwalya submitted that the applicant has failed to prove that the actions of the respondent in issuing

the Enforcement Notice contravened the laid down procedures of the respondent. She argued that in terms of section 6(1) (c) of the Energy Regulations Act, the respondent has the legal mandate to investigate complaints received from consumers on price adjustments made by a licensed entity. And to regulate such adjustments by the attachment of appropriate conditions or such other measures as the respondent may deem fit. She maintained that the respondent conducted an investigation into the complaint received and issued an Enforcement Notice. She pressed that the applicant was duly accorded an opportunity to respondent to the issues raised in the Enforcement Notice.

Furthermore, Ms. Bwalya argued that the decision to investigate the complaint; the issuance of the Enforcement Notice, and the order requiring the applicant to apply for the provisional approval of the tariff of US 9.5 cents/kwh, was done in accordance with the Electricity Act. She reiterated that the principles of natural justice were complied with in determining the tariff. And an any rate, the tariff was determined after giving the applicant an opportunity to be heard. Ultimately, Mrs. Bwalya submitted that the failure by the applicant to prove the grounds upon which the various reliefs are sought should result in the application being dismissed. And conversely the decisions by the respondent should be upheld.

I am indebted to counsel for their spirited arguments, and well researched submissions. In order to appreciate the legal issues that are imported into this case, it is necessary to discuss the relevant law, or principles. The law will be discussed under the following heads: illegality; procedural impropriety; unreasonableness; legitimate expectation; estoppel, and bad faith.

GROUNDINGS FOR JUDICIAL REVIEW

It is trite knowledge, following the celebrated statement of Lord Diplock in *Council of Civil Service Unions, and Others v Minister for the Civil Service* [1985] A.C. 374, that judicial review has developed to a stage today where administrative actions are conveniently reviewed under three heads, or grounds. Namely, “*illegality*,” “*procedural impropriety*,” “*unreasonableness*” or “*irrationality*”. I will briefly consider the import of these three heads, or grounds of judicial review below.

ILLEGALITY.

Under the ground of “*illegality*” the Court seeks to establish whether a decision-maker has acted within the purview of the law that regulates his decision making power, and has consequently given proper effect to it. Thus an administrative decision, or action is flawed and illegal, if it falls outside the parameters of the law that regulates the exercise of the power. According to Harry Woolf, Jeffrey Jowell, and Andrew Le Seur, De Smith’s Judicial Review, sixth edition, (London Sweet, and Maxwell, 2007), in paragraph 5 – 002, at page 225, a decision is illegal if it:

- a) Contravenes, or exceeds the terms of the power which authorises the making of the decision;
- b) Pursues an objective other than for which the power to make the decision was conferred;
- c) Is not authorised by any power; and
- d) Contravenes, or fails to implement a public duty.

The learned authors of De Smith’s Judicial Review, further state in paragraph 5 – 003, at page 226, as follows: that the task of the Court in evaluating whether a decision is illegal is essentially one of construing the content, and

scope of the instrument conferring the duty, or power upon the decision maker. The instrument will normally be a statute, or statutory instrument.

The Courts when exercising this power of construction enforce the rule of law by requiring administrative bodies to act within the “*four corners*” of their powers, or duties. They also act as guardians of parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope, and purpose of parliament’s enactments. The learned authors of De Smith’s Judicial Review, go on to state in paragraph 5 – 004, at page 226, that: this task is made easier where the purpose is clearly defined, or where the considerations which the body must take into account in arriving at its decision are clearly spelled out. In such cases, the Courts require the decision – maker to take into account the specified considerations, and ignore the irrelevant. I will now turn to consider the second head, or ground; procedural impropriety.

PROCEDURAL IMPROPRIETY

Under “*procedural impropriety*” the goal of achieving or securing procedural fairness towards the person who will be affected by the administrative decision is underscored. In keeping with this aim, the Courts ensure that administrative decisions, or actions conform with the procedural rules that are expressly laid down in the statute, or instrument by which the jurisdiction of the administrative body, or public official is conferred. The learned authors of De Smith’s Judicial Review, observe in paragraph 6 – 001, at page 317, as follows: an important concern of procedural justice is to provide the opportunity for individuals to participate in decisions by public authorities that affect them. Another is to promote the quality, accuracy, and rationality of the decision making process. Both concerns aim at enhancing the legitimacy of the process, whilst at the same time improving the quality of decisions made by public authorities.

The learned authors of De Smith's Judicial Review, go on to state in paragraph 6 – 002, at page 317, that: procedural fairness has to be contrasted with substantive justice. The general objective of substantive justice is to ensure that the decisions of public authorities are within the scope of the powers conferred on those authorities. Thus, substantive justice ensures that these powers are not exceeded. Conversely, procedural justice aims to provide individuals with a fair opportunity to influence the outcome of a decision, and so ensure the decision's integrity. Procedure justice deals with issues such as the requirement to consult, to hear representations, to hold hearings, and to give reasons. Thus procedure justice addresses the nature of those consultations, representations, and hearings, so as to ensure that they are appropriate in the circumstances, meaningful, and that they assist, and do not hinder the administrative process. I will now proceed to consider the third head, or ground; unreasonableness.

UNREASONABLENESS

Under the rubric “*unreasonableness*”, or “*irrationality*”, is meant, and conveniently so, what is succinctly referred to as “*Wednesbury unreasonableness*”; following the famous dictum in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 K.B. 223. That is, it refers to a decision which is so outrageous in its defiance of logic, or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it. It is instructive to notice that the learned authors of De Smith's Judicial Review, in paragraph 11 – 002, at page 543 now refer to this ground as “*substantive review and justification*,” for a number of reasons, as stated in paragraph 11 – 002, at page 544. First, they argue that both the terms “*unreasonableness*”, and “*irrationality*”, are notoriously imprecise. Second, the tautological formula of “*unreasonableness*”

set by the *Wednesbury* case, (“so unreasonable that no reasonable decision maker could come to it”), has been substantially reformulated in recent years. Third, the concept of “*proportionality*” has been adopted as the appropriate test for review of European Community Law and convention rights under the Human Rights Act of 1998. Fourth, there is overlap between proportionality, and unreasonableness. Thus the deeper justification under the test of proportionality has infiltrated all public decision making.

Be that as it may, the learned authors of De Smith’s Judicial Review, state in paragraph 11 – 003, at page 544, that under this ground of review, the issue is not whether the decision-maker strayed outside the terms, or authorised statute___ the test of legality. But rather, it is whether the power under which the decision-maker acts, a power normally conferring a broad discretion has been improperly exercised, or is insufficiently justified. Thus the Courts engage in the review of the substance of the decision, or its justification. In our case however, the purpose of judicial review is epitomised by the case of *Chiluba v Attorney General* (2003) Z.R. 153. In the *Chiluba* case, it was held that judicial review is not concerned with reviewing the merits of the decision, but rather the decision-making process itself. Thus the object of judicial review is to ensure that an individual is given a fair treatment by the authority to which he has been subjected. In this regard, it is stressed that it is not the function of the judges to substitute their opinion with that of the authority, or person constituted by law to exercise the discretion, or decide the matters in question.

LEGITIMATE EXPECTATION

In addition, to the three grounds upon which judicial review may be anchored, an applicant for judicial review may invoke the doctrine of “*legitimate*

expectation.” The term “*legitimate expectation*” first made an appearance in the context of the case of *Schmidt v Secretary of State of Home Affairs* [1969] 2 Ch 149. The facts of the case were that a foreign student sought review of the Home Secretary’s decision to refuse an extension of his temporary permit to stay in the United Kingdom. In rejecting the student’s contention that he ought to have been afforded a hearing, Lord Denning, M.R., said *obiter* that the question of a hearing “*all depends on whether he has some right, or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.*”

The learned authors of De Smiths Judicial Review, observe in paragraph 12 – 001, at page 609, that since the early 1970’s one of the principles justifying the imposition of both procedural, and substantive protection has been “*legitimate expectation*”. Such an expectation arises where a decision-maker has led someone affected by the decision to believe that he will receive, or retain a benefit, or advantage___ including that a hearing will be held before a decision is taken. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government’s dealings with the public. The learned authors of De Smith’s Judicial Review, go on to state in paragraph 12 – 004, at page 610, that the doctrine of legitimate expectation derives its justification from the principle of allowing the individual to rely on assurances given, and to promote certainty, and consistent administration. To illustrate, in *R v Liverpool, Corporation Ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 Q. B. 299, it was held that the corporation’s decision to increase the number of taxi licences without consulting the Operator’s Association was unfair because the decision was in breach of an assurance to the contrary.

The first attempt at a comprehensive definition of the principle of legitimate expectation was provided by the House of Lords in *Council of Civil Service Union v Minister for the Civil Service* [1985] A.C. 374. A bare majority of their lordships rested their conclusion on the fact that, but for national security, there would have been a duty on the minister to consult within the union on the ground that the civil servants had a legitimate expectation that they would be consulted before their trade union rights were taken away. Lord Diplock stated that for a legitimate expectation to arise, the decision:

“Must affect [the] other person... by depriving him of the some benefit, or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy, and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received an assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

The representations which induce a legitimate expectation can either be express or implied. An example of an express representation is the case of *Preston v Inland Revenue Commissioner* [1985] A.C. 835. The facts of the case were that the applicant tax payer claimed that the Revenue should honor an agreement with him not to pursue certain tax claims. It was held on the facts that the agreement did not bind the Revenue. But Lord Templeman made it clear that in principle, conduct equivalent to a breach of contract, or breach of representation could amount to an “*abuse of power*” on the part of the tax authorities. Later, the House of Lords unanimously accepted that it may be an abuse of power for the Revenue to seek to extract tax contrary to an advance clearance given to the taxpayer by the Revenue.

The learned authors of De Smith’s Judicial Review, state in paragraph 12 – 019, at page 617, that the promise, or representation on which the expectation

is based may be implied. For example, it may be based on past conduct, or a practice which the claimant may reasonably expect will be continued. Not all past practice however may justify a legitimate expectation that the practice will continue. The learned authors of De Smith's Judicial Review, state in paragraph 12 – 029, at page 621, that to qualify as legitimate, the expectation must possess the following qualities:

- a) The representation must be clear, unambiguous, and devoid of relevant qualification. Whether or not the representation fulfils these qualities is a matter of construction. The context of the representation is important. (see *Ex. P. MFK Underwriters [1990] 1 W.L.R. 1545*).
- b) A legitimate expectation must be induced by the conduct of the decision-maker. A representation by a different person, or authority will therefore not found the expectation (see *R (on the application of Bloggs 61) v Secretary of the State for the Home Department [2003] 1 W.L.R. 2724*).
- c) The representation must be made by a person with actual, or ostensible authority to make the representation. The authority will not be bound if the promisee knew, or ought to have known that the person making the representation had no power to bind the authority. (See *South Buckinghamshire DC v Flanagan [2002] 1 W.L.R. 2601*).
- d) A person who seeks to rely upon a representation must be one of the class to whom it may reasonably be expected to apply. (See *R v Jockey Club Ex parte Ram Race Courses Limited [1993] 2 ALL E. R. 225*).
- e) The representation must be preceded by full disclosure. (see *Ex. P. MFK Underwriters [1990] 1 W.L.R. 1545*).

ESTOPPEL

The doctrine of estoppel has been canvassed in this matter. According to H. M. Malek, Phipson on Evidence, seventeenth edition, (Thomson

Reuters Legal Limited, 2010), in paragraph 5 – 01, at page 100, in modern law, the term “*estoppel*” is used to describe a variety of devices, some of which merely have the effect of precluding a party from denying a particular fact, or assumption. The traditional classification of legal estoppels is that they fall into one of three classes; first, estoppel by record; second, estoppel by deed, and third, estoppel in *pais* or by conduct. The focus in this judgment is on estoppel in *pais* or by conduct.

ESTOPPEL IN PAIS

The learned author of Phipson of Evidence, states in paragraph 5 – 18, at page 118, that estoppel, in *pais* or by conduct applies in any situation in which because of a party’s previous behaviour it would be unconscionable to permit him to deny a fact. The rule has been authoritatively stated as follows in *Pickard v Sears* [1837] 6 A and E 469 at 474:

“Where one by his words, or conduct wilfully causes another to believe the existence of a certain state of things, and induce him to act on that belief so as to alter his own previous position is concluded from averring against the latter a different state of things as existing at the same time.”

In another case between *Swan v North British Australian Company* [1863] 2 H and C 175, the rule was stated by Blackburn J in the following terms:

“He omits to qualify it [the rule he has stated] by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or what comes to the same things to the general public of which the person is one and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppels are not privy.”

In yet another case between *Central Newbury Car Auctions Limited v Unity Finance Limited* [1957] 1 Q.B. 371, Lord Denning explained the doctrine of estoppel in very lucid terms at page 379 as follows:

“Seeing that here we are considering the doctrine of estoppel by conduct, I would like to state the basis of it is this: you start with an innocent person who has been led to believe in a state of affairs which he takes to be correct (in this case the purchaser has been led to believe that the rogue was the owner of the car), and has acted on it. Then you ask yourself how has this innocent person been led into this belief. If it has been brought about by the conduct of another (in this case by the conduct of the original owner), who though not solely responsible, nevertheless has contributed so large a part to it that it would be unfair or unjust to allow him to depart from it, then he is not allowed to go back on it so as to prejudice the innocent person who has acted on it.”

Lord Denning went on to observe that:

*“In so stating the basis of estoppel by conduct, I am relying on the well considered view by the Chief Justice of Australia, Sir Owen Dixon (then Dixon J), in *Thompson v Palmer* [1933] 49 C.L.R. 507, 547. This formulation of the principle is the most satisfactory I know. As he points out, the basis of estoppel is that it would be unfair to allow a party to depart from a particular state of affairs which another has taken to be correct. But the law does not leave the question of fairness, or justice at large. It has defined with more, or less completeness the kind of participation by a party which will suffice to work an estoppel against him. There are to be found in the decided cases. Often it is a representation made by him which he is not allowed to controvert. But a representation is not the only basis of estoppel. Conduct too is a recognised head.”*

BAD FAITH AND IMPROPER MOTIVES

I will now turn to consider the concepts of bad faith, and improper motives. The learned authors of De Smith’s Judicial Review, state in paragraph 5 – 080, at page 266, that fundamental to the legitimacy of public decision-making is the principle that official decisions should not

be infected with improper motives such as fraud, or dishonesty, malice, or personal self-interest. These motives which have the effect of distorting or unfairly biasing the decision makers approach to the subject of the decision automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

The learned authors of De Smith's Judicial Review, observe in paragraph 5 – 81, at page 266, that, a power is exercised fraudulently if it's repository intends for an improper purpose, for example, dishonesty to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest, or private interests. The learned authors conclude in paragraph 5 – 082, at page 266, that bad faith is a serious allegation which attracts a heavy burden of proof (see also *Sithole v State Lotteries Board (1975) Z.R. 182*.

COMMON GROUND

With the backcloth of the relevant law firmly in mind, I will now proceed to consider the parties affidavit evidence, and submissions. It is common ground that the applicant is an operator empowered to supply electricity. The respondent is the sole licensing authority in the energy sector. And is authorised in particular to issue licences pursuant to the provisions of the Electricity Act. On 22nd January, 2007, the applicant notified the respondent of its intention to undertake distribution of power to housing, and business consumers in the Lumwana Township. After communicating its intentions to the respondent, the applicant conducted extensive discussions with LMC, and ZESCO regarding the proposed distribution of the power to the housing, and business consumers. Thus

in a letter dated 14th January, 2008, (marked as “ANK 8” in the affidavit in support), the applicant informed the respondent that it was on the verge of finalising a PPA with ZESCO, to enable it to be granted the distribution licence. Further, the respondent was advised in the same letter that the project lenders; FMO, urgently required the applicant to provide them with the distribution licence, and the PPA, as pre-conditions to the disbursement of the funds.

In the letter of 14th January, 2008, the applicant indicated to the respondent that:

“Our approach to the tariff to be applied on the project is that we will buy the power in bulk from ZESCO, and add on the cost of the investment in the distribution which will be charged to the final consumers. Should our proposed tariff be above the current retail tariff, we will explore use of subsidies (as revenue enhancement measures) which can be met by the Mine (Lumwana Mining Company have already agreed in principle) and GRZ since this should be looked at in the context of rural electrification at distribution level.”

Accompanying the letter of 14th January, 2008, was an application for the distribution of electricity to Lumwana Township together with a business plan. The business plan submitted by the applicant was in compliance with the licensing procedure for the determination of the financial viability of the applicant, and assessment of the application fees of the activity applied for. Upon receipt of the application, the respondent sought a number of clarifications from the applicant. In response to the respondent’s queries, the applicant re-submitted the revised business plan, and financial model. After being satisfied with the applicant’s technical and financial capabilities to carry out the licensed activities to distribute, and supply electricity to the Lumwana property development areas, the respondent issued a licence to the applicant on 7th August,

2008. The licence was effective from 24th June, 2008. Sometime in June, 2007, the applicant was requested by LMC to install pre-paid meters, and start billing the individual housing units directly with effect from 1st July, 2009.

On 14th September, 2009, the respondent issued an Enforcement Notice to the applicant. The essence of the Enforcement Notice is that the applicant was required to apply to the respondent for any change in tariffs or other charges in accordance with the procedures prescribed by the respondent.

On 21st December, 2009, the applicant was requested by the respondent to attend a hearing. At the hearing, it was contended by the respondent, that the applicant was charging a tariff which it had not approved.

On 23rd December, 2009, the applicant was after the hearing requested to apply for provisional approval of the existing tariff of US 9.5 cents/kwh.

On 14th January, 2010, the respondent wrote to the applicant acknowledging receipt of the application for provisional approval of the existing tariff, and advised the applicant of its requirement to notify its consumers___ the residents of Lumwana Township___ of the intention to effect the proposed tariff, in accordance with section 8 of the Electricity Act.

Furthermore, on 16th February, 2010, the respondent wrote to the applicant advising it of the requirement to advertise its intention to alter its electricity tariff in line with the Electricity Act. The order issued was provisional to allow the unauthorised tariff to operate, whilst the respondent considered the tariff to apply following the issuance of the provisional orders. The applicant submitted a formal application for the approval of US 9.5 cents/kwh.

On 11th March, 2010, the respondent convened a hearing where both the applicant and consumers were accorded an opportunity to be heard. Following the hearing on 27th May, 2010, the respondent announced its decision to award the applicant a tariff of US 6 cents/kwh with effect from 1st May, 2010.

FINDINGS OF FACTS.

The following findings of fact have been arrived at on the basis of the affidavits in support, opposition, and reply. The applicant submitted to the respondent an application to be granted a licence to supply electricity to Lumwana Township. The application was made in a letter dated 14th January, 2008. In that letter the applicant disclosed that the application was predicted on a PPA with ZESCO, and financing by FMO. The application was supported by a business plan, and a financial model. Both the business plan and financial model indicated that the tariff was to be based on Appendix A of the MFA, as evidenced by “ANK 6” in the affidavit in support. The tariff – US 9.5 cents/kwh – took into account the cost of the applicant purchasing power from ZESCO. The initial tariff was to be applied over a period of 10 years.

Both the business plan, and financial model were submitted to the respondent for scrutiny. In the course of the scrutiny, the respondent sought clarifications from the applicant. Following the clarifications, the respondent notified the applicant vide electronic mail dated 8th April, 2008, that since the outstanding issues had been clarified, the respondent would proceed to table the Notice of Intention to issue licence before the board of directors of the respondent on Thursday 10th April, 2011, as evidenced by “ANK11”, in the affidavit in support. Thereafter, the respondent formally issued the licence to the applicant on 7th August, 2008, and the licence took effect from 24th June, 2008.

Be that as it may, on 14th September, 2009, the respondent issued an Enforcement Notice to the applicant stating that the applicant is charging a tariff of US 9.5 cents/kwh without authority of the respondent. Furthermore, the Enforcement Notice was premised on the basis that the applicant had revised its tariff in contravention of the law and the licence. Eventually, the respondent reduced the tariff from US 9.5 cents/kwh to US 6 cents/kwh.

QUESTIONS THAT FALL TO BE CONSIDERED.

The principal questions that fall to be considered, and determined in this application are essentially twofold. First, whether, or not the decision by the applicant to levy the tariff of US 9.5 cents/kwh was without the approval of the respondent. Second, is whether, or not the reduction of the tariff of US 9.5 cents/kwh to US 6 cents/kwh is lawful.

WAS THE DECISION BY THE APPLICANT TO LEVY US 9.5 CENTS/KWH WITHOUT THE APPROVAL OF THE RESPONDENT?

In order to answer the captioned question, it is necessary to outline the legal framework relating to the grant of licence in the first place. Section 4 (1) of the Electricity Act Provides that:

“4 (1) Any person who wishes to erect, and establish any generating station works_____

(a) The plant of which will be rated as the site where it is to be installed at a capacity of hundred, or more kilowatts for generating, transmitting, transforming, converting, or distributing electricity; or

(b) the plant of which is rated at the site where it is installed at a capacity of less than one hundred kilowatts, and which is transmission, distribution, or supply of electricity for the use of any other person, whether, or not it is for an operator’s own use;

Shall do so in accordance with regulations made under this Act, and shall comply with any requirement of the Minister, or the Board for the purpose of facilitating co-ordination with existing, or future undertakings.

The primary contention of the applicant in this matter is that before the applicant lodged the application for a licence, it explained to the respondent how it intended to approach the tariff issue. In so doing, the applicant disclosed that it would purchase the power from ZESCO; it would add on the cost of the investment, and explore other means of making the tariff reasonable. It was argued strenuously on behalf of the applicant that it never agreed to charge its customers US 4.4. cents/kwh. At any rate the applicant contends that the suggestion by the respondent that it agreed to charge US 4.4 cents/kwh contradicts the position the respondent took at the public hearing. Namely, that the applicant never applied for any tariff approval.

Conversely, it was argued on the behalf of the respondent that, first, the applicant cannot assume, or usurp the powers of the respondent, and

determine its own tariff. Second, the respondent contends that the applicant's business plan states that the tariff to apply would be the ZESCO tariff, referred to as the "*fixed domestic price*," in the business plan. To support this contention, the respondent relied on the succeeding passage in the business plan under the heading "*2.0 Background to the Electricity Sector*." For completeness sake I will reproduce it below:

"2.0 BACKGROUND TO THE ELECTRICITY SECTOR"

It is worth noting that the Zambia Electricity Sector is dominated by ZESCO which is an integrated power utility engaged in all aspect of electricity supply from generation to billing. There are two private sector players, one at the generation level, and the other at transmission. The latter provides 700 MV of contracted capacity to the mining operations. Any needs above this level, and all distribution to mining towns are done by ZESCO. A structure reform process was commenced in the mid – 1990's, but this has since stalled. However, the latest initiative by ZESCO to convert domestic customers to pre-paid metering, and to use third party vendors could be the beginning of far reaching sectoral reforms.

Electricity tariffs are set by ZESCO, but are subject to approval by the energy regulator, the Energy Regulations Board, (ERB). However, some flexibility is allowed for large loads, where the supply is then the subject of a power supply agreement, (PSA). Regulatory review is required, but the key driver is agreement between the parties. Equinox has entered into a PSA with ZESCO for the mining load estimated at 90 MW supply to the non__ mining facilities was left out of the PSA so as not to complicate the discussions.

Whereas bulk supply tariffs may be negotiable, domestic tariff are fixed across the whole country. Therefore, ENFIN will have to sale purchase power at the fixed domestic price. At state bulk prices, the project would be faced with a deficit in revenue requirements to meet operational and future investment needs. A secondary objective to the business plan is therefore to facilitate discussions as to the appropriate bulk purchase tariff subsidy, and, or a maintenance to supplement sales revenue.

However, in response to the position taken by the respondent above, the applicant contends that the business plan clearly showed that it would not be profitable to charge the existing ZESCO domestic tariff, and therefore the applicant settled for a maintenance fee by LMC as the most favourable tariff pricing scenario. It is therefore instructive to refer to the “pricing scenarios” referred to above. In 4.2.1. of the business plan styled as “pricing scenarios” at page 9 of the business plan, the following observations were made”:

“The key drivers of the repayment ability are the price at which the project purchases electricity from ZESCO, the performance parameters mentioned above, and the price at which the electricity is sold to consumers.”

The business plan then goes on to tabulate the following scenarios:

“Scenario 1 – Existing ZESCO tariffs.”

“The investment plan suggests that the project would be rated as MD3 facility under the current ZESCO retail structure. This translates into an average purchase price of Z MK 130. 12 per kwh over the 20 years. The total average sales tariff works over the same period is Z MK 177.89 per kwh. Operating at these prices is untenable as NWEK debt service requirements over the first ten years are themselves at ZMK 177.17 per kwh.”

“Scenario 2 – Full cost recovery”

“A calculation has been made (ref: maintenance fee spreadsheet) of the tariff that will be necessary to recover the full incremental cost of the project, and meet the investment criterion set by the investors. This price would be ZMK 379-13 per kwh on average. In an environment where domestic tariffs are differentiated, this would have been the price paid by the consumers directly. Currently, End User Tariffs are regulated at the ZESCO price so until ZESCO tariff are based on full cost reflectivity this tariff level will not be attainable.”

Scenario 3 – Maintenance Fee

“A maintenance fee is proposed that will enable the project bridge the gap between the non-cost reflective EUTs, and the purchase price. The fee is structured to automatically adjust to the level of tariffs (EUT and BST) and sales

volumes of the project. The calculations for each year's Maintenance fee income is shown in maintenance fee spreadsheet. The annual Maintenance fee is arrived at taking into account cost factors as would be allowed to be passed on to customers for under normal Revenue Requirements approach used by energy regulators. The actual contribution by customers is then deducted from this figure to arrive at the maintenance fee.

The passed through costs include the calculated return for the equity investor (promoter) in the project based on an ROE of 10%. An alternative would be to apply a cost plus factor on the allowed costs. The model has an inbuilt function to allow for this approach to be tested. Given that the return on equity approach is consistent with the approach used by FMO for evaluating its investment, and that at the end of the day both approaches shall be set to deliver the same results, no further reference is made to the cost plus approach.

The mine's responsibility for this tariff arises from the fact that had this contract not been out sourced it would have been necessary for the mine to undertake the activity as part of its mine operations. Some synergies may arise but it is possible that overloads, and the low priority ranking of this project may drive costs up.

The Maintenance fee shall first be applied to the repayment as debt financing through an ESCROW arrangement. Once the loans are repaid the maintenance fee can then be reduced progressively as sales volume, and ZESCO improve."

Scenario 4 – Purchase price discount.

"A discount on the purchase price will be obtained to achieve at viable sales margin. The financial projections include a discount on the purchase price of 40%."

5.2.3 Summary

"The preferred scenario is for North Western Corporation Limited, and the Mine to agree on annual maintenance fees as indicated in the financial model. On this basis the project is able to repay the loan and provide a reasonable rate of return on net assets 10% over the period."

It is clear from the preceding analysis that the last paragraph under the rubric "2.0 BACKGROUND, TO THE ELECTRICITY SECTOR," quoted above,

should not be read, and construed, in isolation. It should be read conjunctively or together with the various “pricing scenarios” referred to above. Consideration of “scenario 1 – Existing ZESCO tariffs” — for instance, clearly shows that the applicant took the position that the ZESCO fixed domestic price was not tenable. And this position was made known to the respondent. In view of the foregoing, I do not accept the argument by the respondent that the applicant committed itself to charging the ZESCO fixed domestic price, in the business plan. On the contrary, I am persuaded by the applicant’s argument that the business plan showed that it would not be profitable to charge the existing ZESCO fixed domestic price. Furthermore, I accept the submission by the applicant that after it submitted its business plan, and financial model, the respondent sought clarifications about the contents of the business plan. And following the clarifications the respondent issued the applicant the licence as evidenced by the letter dated 7th August, 2008, and marked “ANK 12” in the applicant’s affidavit in support.

In the circumstances, I hold that the respondent led the applicant to believe, and the applicant has a legitimate expectation, that it complied with the requirements for the grant of the licence by the respondent at tariff of US 9.5 cents/kwh. This belief has been brought about by the conduct of the respondent. And it would therefore be unfair to allow the respondent to depart from the state of affairs if induced, or go back on it, so as to prejudice the applicant. It is also a basis principle of fairness that legitimate expectations ought not to be awarded. Thus having complied with the licensing requirements, the respondent should be estopped from denying that fact. In sum, the decision by the applicant to levy the sum of US 9.5 cents/kwh was with the approval of the respondent.

IS THE DECISION BY THE RESPONDENT TO REDUCE THE TARIFF FROM US 9.5 CENTS/KWH TO US 6 CENTS/KWH LAWFUL.

The contention of the applicant in this application that the decision by respondent to reduce the tariff from US 9.5 cents/kwh to US is unlawful for the following reasons. First, that the project that was licenced is a Greenfield project, or a new project. Second, the licence issued on 7th August, 2008, was silent on the applicable tariff. Third, that there is no proof that the respondent approved a tariff of US 4.4 cents/kwh as alleged by the respondent. Fourth, the applicant contends that it did not at any time apply for a variation of its initial tariff. Therefore, in the absence of a variation in the initial tariff, the decision by the respondent to reduce the applicant's initial tariff is unreasonable, and unjustified. Lastly, the applicant contends that respondent issued the Enforcement Notice without following the procedure laid down by the respondent.

The respondent's contentions are as follows. First, that the respondent is empowered by the Electricity and Energy Regulations Acts to issue a licence to an undertaking that complies with the licensing requirements. And the conditions of the licence are set out in the licence. Second, that in terms section 12 (3) of the Energy Regulation Act, the respondent is empowered to vary the conditions of the licence. Third, that the respondent is in appropriate circumstances empowered to impose fines on undertakings such as the applicant. Lastly, the respondent contends that a licence cannot assume, or usurp the powers of the respondent to determine its own tariff. The arguments advanced by the applicant, and the respondent will be dealt with under the headings, "*illegality*," "*unreasonableness*", and "*procedural impropriety*".

ILLEGALITY

It is incontrovertible that the applicant submitted an application for a Greenfield project pursuant to section 4 of the Electricity Act. Following the submission of the application, the applicant was eventually issued a licence on 7th August, 2008. I also accept the contention by the applicant that the licence did not specify a tariff. The question that therefore arises for resolution is this: on what basis did the respondent reduce the tariff of US 9.5 cents/kwh to US 6 cents/kwh. The respondent contends that it has power in terms of section 12 of the Energy Regulation Act to vary conditions of a licence. To recapitulate, section 12 (3) of the Energy Regulation Act is in these words:

“(3) Where a licensee has on repeated occasions contravened the conditions of the licence, or has been the subject of such complaints by the consumers of any commodity, or service provided by the licensee in the course of its undertaking as in the opinion of the Board to warrant action under this section, the board by notice in writing to the licensee, may vary the conditions of the licence, or attach new conditions to the licence.”

Further, in terms of section 12 (1) of the Electricity Act, the respondent is empowered to issue a licence subject to such conditions as it may deem fit. In this case, the respondent issued a licence to the applicant dated 21st July, 2008, and is marked as “N7N7” in the respondent’s affidavit in opposition. The licence specifies in detail the terms, and conditions.

Furthermore, the respondent alleged in the Enforcement Notice dated 14th September, 2009, that the following terms of conditions were flouted by the applicant:

a) Clause 2.1.

“2.1 The licensee shall offer to supply, and sell electricity to any customer located within its licensed territory at tariffs, and other charges which have been approved by the ERB,”

b) Clause 2.2

“2.2 The licensee shall offer to supply such customers under the terms, and conditions of a supply agreement approved by the ERB.”

c) Clause 4.1

“4.1 if the licensee identifies any requirement with any of the obligations referred to in section 3.1 (e) which might otherwise be applicable to the licensee in accordance with the conditions of this licence, but which in the opinion of the licensee is either inappropriate, or inapplicable, the licensee may apply to the ERB, and present sufficient justification for relief from such requirement. Unless, and until ERB grants terms for such relief, all such regulations, rules, codes, and standards as established shall apply in full.”

Although the respondent referred to clause 4.4, of section 4 in the licence, there is in fact no such clause.

d) Clause 5.1

“The licensee shall ensure that none of the other business activities it engages in, will operate in such a manner, or commit to any liability that may materially affect the ability of the licensee to maintain adequate financial, technical, and managerial resources, and capabilities necessary to carry out its licensed activity in accordance with the Act, and conditions of this licence.”

The respondent also referred to clauses 5.2 (c) and (d). These clauses also are not contained in the licence in question.

e) Clause 6.1

“6.1 The licensee shall provide to the ERB on a regular basis, but not less than bi-annually, its load forecasts, and plans for the expansion of its system, and service.”

f) Clause 6.2

“6.2 The licensee shall meet its obligations under the Electricity Act by making prudent investments in the efficient development of its systems to meet the demand of its customers for secure, and reliable supplies of electricity.”

g) Clause 10.1

“10.1 The licensee shall adopt reasonable, and prudent risk management policies including self-assurance when appropriate, relative to risks associated with the licensed activity, and shall procure adequate insurance policies on plant, and equipment sufficient to protect consumers from any major eventuality on the system.”

The particulars of the contravention are set out in the Enforcement Notice. The gravamen of the particulars in so far as they are relevant to the question under discussion is that:

- a) it was agreed that the applicant would supply power to residential commercial, and light industrial customers in Lumwana Housing Complex at an agreed tariff of US 4.4 cents/kwh;
- b) that under chapter one, section 25 of the licence, the applicant is required to apply to the respondent for any change in tariffs, or other charges in accordance with the procedures, and rules prescribed by the respondent;
- a) that section 25 of the licence is based on section 8 of the Electricity Act, and requires an operator engaged in the supply of electricity to apply to the respondent for variation of any tariff; and
- b) that in the month of August, the respondent received a complaint from customers of Lumwana Mining Township to the effect that they were paying very high electricity tariffs.

I must state at once that, first, some of the clauses referred to the Enforcement Notice do not exist in the licence. Second, several of the clauses referred to in the Enforcement Notice are not relevant to the issues at hand. These include clauses 4.1; 5.1; 6.1; 6.2 and 6.3. it was therefore in my opinion an exercise in futility to refer to these clauses in the Enforcement Notice.

Third, I have already shown, and held that the applicant did not in the business plan agree to apply the ZESCO domestic tariff of US 4 cents/kwh as

alleged in the Enforcement Notice. Therefore, the tariff of US 9.5 cents/ kwh cannot be reduced on that basis. Lastly, although, the respondent may not have offered its customers a supply agreement stating the terms, and conditions of the supply of electricity as approved by the respondent, the respondent has also not adduced an evidence to show that the applicant has on repeated occasions contravened the conditions of the licence to warrant its variation. I therefore hold that section 12 (3) of the Energy Regulation Act cannot in the circumstances of this case be relied on to reduce the tariff of US 9.5 cents/kwh to US 6 cents/kwh.

UNREASONABLENESS

As earlier on, stated, the applicant contends that it did not at any time apply for a variation of its initial tariff. Thus in the absence of a variation to reduce the initial tariff, the applicant contends that the decision by the respondent to reduce the tariff from US 9.5 cents kwh to US 6 cents/kwh is unreasonable. The gist of the applicant's argument in this context is that whilst the respondent maintains that the applicant agreed to charge its consumer's US 4.4 cents/kwh, yet at the hearing the respondent maintained that the applicant had never applied for any tariff approval at all. The question that the applicant poses in the circumstances is how could the applicant have revised the tariff from US 9.5 cents/kwh, to US 6 cents/kwh. It is on this basis that the applicant has submitted that the decision to reduce that tariff from US 9.5 cents/kwh to US 6 cents/kwh is unreasonable.

Conversely, the respondent contends that the Courts will only interfere with a decision, if the decision is so perverse that it can only have been arrived at by the improper exercise of power. It is further contended that this ground of judicial review – unreasonableness – can only apply to a decision which is so

outrageous in its defiance of logic, or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The respondent pressed that the Courts are slow, and careful to review a decision on the basis of the *Wednesbury* principle because of the apprehension of substituting the decision of a decision-maker, with that of the Courts. In sum, the respondent contends that the threshold for the standard of unreasonableness is quite high.

I agree with the submission by the respondent that the threshold for the standard of unreasonableness is high. And as matter of principle, the Courts are generally reluctant to substitute, the discretion of the decision-makers, with that of the Courts. Be that as it may, I am satisfied on the facts of this case that granted that the applicant did not agree, or indeed the respondent did not approve the tariff of US 4.4 cents/kwh, there was no basis for the respondent to reduce the tariff from US 9.5 cents/kwh to US 6 cents/kwh.

PROCEDURAL IMPROPRIETY

Under this heading, the applicant has canvassed two issues. First, the applicant contends that it was procedurally improper for the respondent to foist on the applicant an application for variation of an existing tariff. Second, the applicant contends that the Enforcement Notice was not properly issued. It is incontrovertible that the applicant did not at any time submit an application for variation of the tariff ____ US 9.5 cents/kwh. I therefore accept the submission by the applicant that the application for variation was improperly imposed. Further, I also accept the submission by the applicant that not only is there no evidence of complaints having been forwarded to the respondent, but the respondent did not follow its own procedure for issuance of an Enforcement Notice as published on its own website.

The net result is that the applicant has succeeded to demonstrate first, that the tariff of US 9.5 cents/kwh was tacitly approved by the respondent. Second, that the decision by the respondent to reduce the tariff of US 9.5 cents/kwh to US 6 cents/kwh was unlawful.

Consequently, the applicant is entitled to an order of certiorari to quash the following decisions:

- a) reduction of the tariff from US 9.5 cents/kwh, to US 6 cents/kwh;
- b) to fine the respondent the sum of K 2 700, 000=00, for allegedly charging an unauthorised tariff – US 9.5 cents/kwh; and
- c) to order the refund to all residential consumers the difference between the so called approved rate, and the disallowed rate.

However, on the facts of this case, I am unable to hold that the decisions that have been successfully impeached were made in bad faith, and prompted by improper motives. There is simply no evidence to that effect. Lastly, the applicant claims it is entitled to an award of damages. It must be noticed that damages are classified into two categories. Namely, special, and general damages. Harvey Mc Gregor, in his work entitled Mc Gregor on Damages, Eighteenth Edition, (Thomson Reuters (Legal) Limited 2009), observes as follows in paragraph 1 – 029 at page 20:

“In the cases of damage, or damages are often said to be “general” or “special”, and these two terms are usually contrasted with each other, yet the terms are used in a variety of different meanings, and if these meanings are not kept separate, the indiscriminate use of the terms only spells confusion. Such a separation is not seen very often, and it is therefore wise to elucidate these terms at the very start.”

The learned author goes on to refer to Lord Macnaghten’s observation in paragraph 1 – 033 at page 22, *Bolag v Hatchison* [1905] A.C. 55 as follows:

“General damages... are such as the law will presume to be the direct natural, or probable consequence of the action complained of. Special damages on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and therefore, they must be claimed specially, and proved strictly.”

The learned author goes on to state in paragraph 1 – 030 at page 20 that:

“The first meaning of general, and special damages concerns liability: it relates principally to contract, coinciding with the distinction between the well-known first, and second rules in Hadley v Baxendale [1854] 9 Ex 341... it is best expressed by Lord Wright in Monach S.S. Co. V Karlshamns Oljefabriker [1949] A.C. 196 at 221, where he said:

“The distinction there drawn [in Hadley v Baxendale] is between damages arising naturally (which means in the normal course of things) and cases where there were special, and extraordinary circumstances beyond the reasonable prevision of the parties. In the latter event it is laid down that the special facts must be communicated by, and between the parties. The distinction between these types is usually described in English Law as that between general, and special damages.”

The learned author goes on to state in paragraph 1 – 031 at page 21 that:

“The second meaning of general, and special damage concerns proof: it has more connection with tort, but the clearest statement comes in a contract case Prehn v Royal Bank of Liverpool [1870] L.R. 5 Ex. 92, where Martin B put the distinction thus:

“General damages... are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion, and judgment of a reasonable man. Special damages are given in respect of consequences reasonably, and probably arising from the breach complained.”

General damages are therefore concerned with non-pecuniary losses which are difficult to estimate. Principal examples include, injury to reputation in defamation, and pain and suffering, in cases of personal injury. The learned

author goes on to state in paragraph 1 – 033, at page 22, that the third meaning of general, and special damages concerns pleadings. The distinction here is put thus by Lord Dunedin in *The Susquehanna* [1926] A.C. 655:

“If there be any special damages which is attributable to the wrongful act that special damage must be averred, and proved. If proved, will be awarded. if the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question.”

The various passages, that have been outlined above were considered, and approved by the Supreme Court in the case of *Attorney General v Mpundu* (1984) Z.R. 6. After considering the passages, the Supreme Court made the following observation at page 112:

“It is trite law that if the plaintiff has suffered damage of a kind which is not necessary, and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this damage, thereby showing the defendant the case he has to meet, and assisting him in computing a payment into Court. The obligation to particularise his claim arises not so much because the nature of the loss is necessarily unusual, but because a plaintiff who had the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which makes such calculation possible. Consequently, a mere statement that the plaintiff claims “damages” is not sufficient to let in evidence of a particular loss which is not a necessary consequence of the wrongful act, and of which the defendant is entitled to a warning.”

In this case, the applicant has first, not specified the type of damages it is claiming. Namely, whether it is general, or special damages. Second, it has not particularised the nature of the loss it has suffered, or indeed adduced any evidence to that effect. It has simply stated that it is claiming damages. A mere statement that it is claiming “damages” is not sufficient. In the circumstances, I refuse the plea for the award of damages.

Costs follow the event. And leave to appeal is granted.

Dr. P. Matibini, SC
HIGH COURT JUDGE