

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**CAZ/08/238/2021**

**IN THE MATTER OF:  
IN THE MATTER OF:**

**AN APPLICATION FOR JUDICIAL REVIEW  
ORDER 53 RULE 3 OF THE RULES OF THE  
SUPREME COURT OF ENGLAND, 1999**

**BETWEEN:**

**THE PEOPLE**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS  
Ex-parte RAJENDRA SOMBHAI PATEL**

**RESPONDENT**



**Coram: Kondolo, Chishimba and Ngulube JJAs**

**On the 27<sup>th</sup> July, 2021 and 22<sup>nd</sup> September, 2021**

For the Applicant : Mr. L. Mwamba of Messrs. Simeza Sangwa Associates

For the Respondent : Ms. D. M. Mwewa, Principal State Advocate, Attorney General's Chambers

---

## **R U L I N G**

---

**CHISHIMBA, JA, delivered the ruling of the Court.**

**CASE AUTHORITIES CITED:**

1. Derrick Chitala v Attorney General (1995 ZR 91)
2. Frederick Jacob Titus Chiluba v Attorney General (2003) ZR 153
3. North-Western Energy Company Limited v The Energy Regulation Board Vol 2 (2011) ZR 512

4. Kambarage Mpundu Kaunda v The People SCZ Judgment No. 1 of 1992
5. Rajan Mahtani v The Attorney General 2015/HP/942
6. R v Attorney General Exp Kigngeno Arap Ngeny Civil Application No. 406/2001
7. Guantai v Chief Magistrate (2007) 2 EA 170 (CAK)
8. Development Bank of Kenya v DPP & Attorney General Petition No 283/2018
9. Kenyan Commercial Bank Limited & Ors V The Commissioner of Police The Director of Criminal Investigations and the Attorney General eKLR Petition No. 218/2011
10. Wynter M Kabimba v The Attorney General (1996) S.J
11. Inland Revenue Comrs v National Federation of Self Employed and Small (1981) 2 ALL ER 93
12. C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General (2004) Z.R. 216
13. William Harrington v Dora Siliya & The Attorney General (2011) 2 Z.R - 253
14. Lieutenant Alick Bruce Nakondo v The Attorney General Appeal Number 56/2016
15. Tobias Haanyimbo Milambo, Nachi Musonda and Richard Lubemba v the Attorney Nom 87 of 2019
16. Rajan Lekhraj Mahtani and John Sangwa v the People SCZ No. 21/2019

### **LEGISLATION REFERRED TO:**

1. The Rules of the Supreme Court of England, 1999 Edition.
2. The Constitution of Zambia (Amendment) Act No. 2 of 2016.
3. The National Prosecution Authority Act No. 34 of 2010.
4. The Penal Code Chapter 87 of the Laws of Zambia.

### **INTRODUCTION**

This is a renewed application for leave to commence judicial review proceedings made pursuant to **Order 53 Rule 14(61) and (65) of the Rules of the Supreme Court of England, 1999 Edition** dated 8<sup>th</sup> June 2021. The court below refused to grant the applicant leave to commence judicial review proceedings in its ruling dated 1<sup>st</sup> June, 2021.

The leave sought is in respect of the decision made by the respondent on 1<sup>st</sup> December, 2020 to reopen the prosecution of the applicant on one count of alleged False Statements by Officials of a Company contrary to **Section 325 of the Penal Code Chapter 87 of the Laws of Zambia.**

### **BACKGROUND FACTS**

In 1996, a company called Amadeus International Limited was incorporated by the applicant (Rajendrak Kumar S. Patel) together with Morgan Naik, Simon Davis Burges and Trevor Watson as Shareholders/Directors. In 1998, a call on shares held by the founding shareholders was made. Morgan Naik failed to honor the said call, resulting in the forfeiture of shares and his removal as director of the company.

Arising from the above, Morgan Naik challenged the decision of forfeiture of shares and his removal as Director under cause No. 1999/HP/647 against the company and remaining Shareholders /Directors. The basis being the alleged fraudulent activities of the applicant Rajendra S. Patel in relation to the affairs of Amadeus International Limited.

Several similar court actions were instituted against the applicant and company by Morgan Naik, spanning a period of 20 years, culminating in the High Court winding up Rana Marketing Limited a company used by Mr Naik as a shield for the alleged frivolous actions. Undeterred, the said Morgan Naik resorted to lodging alleged frivolous criminal complaints against the applicant whom he blames for his loss of shares/ directorship in Amadeus International Limited as per chronology hereunder.

In 2017, the first criminal complaint was lodged. The applicant was summoned and interviewed by the Zambia Police Service in connection with the offences of fraudulent transfer of shares, forgery and false uttering of company documents. This was based on a complaint made by one Morgan Naik. Thereafter, the docket was

submitted to the respondent for an opinion on whether or not there was sufficient evidence to warrant prosecution

In a letter dated 23<sup>rd</sup> August, 2017, exhibited to the supporting affidavit marked **“RSP4”**, the Director of Public Prosecutions (hereinafter referred to as ‘the DPP’) rendered her opinion on the docket. With respect to the fraudulent transfer of shares, the DPP was of the view that the complainant was not specific on the facts on which the complaint was premised. She took the view that a company can remove a director through an ordinary resolution passed at a general meeting and that, if this was done in breach of contract, then the director was entitled to damages.

On the alleged forgery, the DPP was of the opinion that the available evidence did not confirm the alleged offence and that no statements had been recorded from the other directors who attended the meeting to confirm that the meeting took place.

With respect to allegations concerning the national registration cards, the DPP opined that investigators must make a follow-up with PACRA to find out if at all the directors had responded to a query raised by PACRA in a letter dated 6<sup>th</sup> February, 2017.

The Registrar of PACRA in a letter dated 5<sup>th</sup> April 2017 responded to the applicant raising various issues on the alleged fraudulent transfer of shares and false altering of company document despite ongoing investigation by the Police. This resulted in Judicial Review Proceedings instituted against PACRA which was resolved by way of Consent judgment in favour of the applicant.

On 1<sup>st</sup> February 2021, the applicant was again summoned and appeared at the Police Headquarters, Fraud Division. It was revealed to his shock that the earlier closed docket upon instructions from the Deputy Chief State Advocates Ms Bah-Matandela (as she then was) was reopened. Reference was made to the letter dated 1<sup>st</sup> December, 2020 exhibited and marked as “**RSP8**” addressed to the Zambia Police Service, from the said Deputy Chief State Advocate, on behalf of the DPP. She opined that there was evidence showing that the applicant made a false statement and proceeded to instruct that the applicant be arrested for the offence of False Statements by Officials of Companies contrary to **Section 325 of the Penal Code Chapter 87 of the Laws of Zambia**. The applicant was subsequently arrested

and charged for the offence and is appearing before the Subordinate Court.

This prompted the applicant to seek legal redress by way of leave to commence judicial review. The ground for judicial review being illegality which we shall revert back to when addressing the arguments advanced.

The application for leave to commence judicial review proceedings was opposed by the respondent in an affidavit dated 19<sup>th</sup> April, 2021, deposed by Sipholiano Phiri, a State Advocate under National Prosecution Authority. The deponent stated that the letters marked "RSP4" and "RSP8" exhibited in the affidavit verifying facts by the applicant are privileged documents which should be expunged from the record. The State further deposed that this is not a proper case in which leave to commence judicial review proceedings ought to be granted.

### **ARGUMENTS ADVANCED BY THE APPLICANT**

The applicant began by making reference to the definition enunciated by DE Smith Woolf and Jowell on Judicial Review of Administrative Action that:

*“A decision is illegal if it contravenes or exceeds the terms of power which authorizes the making of the decision or pursues an objective other than that for which the power to make the decision was conferred”.*

We were further referred to the Supreme Court decisions in the cases of **Derrick Chitala v Attorney General** <sup>(1)</sup>; **Frederick Jacob Titus Chiluba v Attorney General** <sup>(2)</sup> and **North-Western Energy Company Limited v The Energy Regulation Board** <sup>(3)</sup> which dealt with illegality as a ground in judicial review proceedings

The applicant contends that the DPP, having communicated its decision not to prosecute the applicant, cannot reopen the case on the same subject offences. This is because the right to prosecute the applicant by the DPP was lost three years ago when it decided not to prosecute the applicant and closed the docket. It was submitted that the decision to reopen the matter and prosecute the applicant is illegal and an abuse of court process. This is on account that there is no fresh evidence and that the offence charged is one of those initially considered by the DPP who made a decision not to prosecute the applicant.



As authority, the applicant placed reliance on the case of **Kambarage Mpundu Kaunda v The People** <sup>(4)</sup> where the court guided that:

*“We take the view that, the D.P.P. having said publicly, as in this case, that the appellant would not be prosecuted on the ground that he had acted in self-defence and was, therefore, not guilty of any offence, could not reopen the case without showing that there was fresh evidence which would have affected his earlier or first decision in the matter, otherwise reopening the prosecution would be an abuse of the process of the court, oppressive and vexatious. ...”*

The applicant submitted that once a decision is made by a public officer, the decision is binding on everyone, and no one can depart from that decision just because they hold a different view. It was contended that the decision by the DPP not to prosecute the applicant is for all intents and purposes a decision of the Republic and is binding on everyone especially those lesser in rank such as the Chief State Advocate.

We were drawn to the attention of the case of **Rajan Mahtani v The Attorney General** <sup>(5)</sup> a High Court decision in which the court stated that any decision made by the office of Attorney General which

is a public office is for all intents and purposes the decision of the Republic, the decisions are those of the office and not office holder.

The applicant further submits that the decision to reopen the prosecution is illegal, frivolous, vexatious and an abuse of court process. Therefore as a court we have an inherent duty to interfere and stop a prosecution that is an abuse of process of court. The Kenyan cases of **R v Attorney General Ex p. Kiggeno Arap Ngeny Civil** <sup>(6)</sup> and **Guantai v Chief Magistrate** <sup>(7)</sup> were cited as authority.

It was submitted that the issues raised which form the basis of the criminal prosecution are matters relating to transfer and forfeiture of shares and removal of Morgan Naik as director of Amadeus International Limited. These are civil issues relating to the internal affairs of a company which have been thrown out by the court.

The said Naik was using the prosecution for extraneous purposes to settle his personal differences and to achieve what he failed to in the several suits against the applicant. In a nutshell, that Naik is a complainant with an axe to grind now employing criminal process as a vehicle to drive his agenda. We were referred to the

Kenyan cases of **Development Bank of Kenya v DPP & Attorney General** <sup>(8)</sup> and **Kenyan Commercial Bank Limited & Ors V The Commissioner of Police, the Director of Criminal Investigations and the Attorney General** <sup>(9)</sup>.

The applicant further seeks an interim order to stay execution of the DPP's decision to prosecute the applicant pending determination of the application. The case of **Wynter M Kabimba v The Attorney General** <sup>(10)</sup> was cited as authority for the proposition that decisions of persons/bodies open to challenge by judicial review can be stayed pending final determination of the challenge. The applicant went on to refer to **Articles 180 (7) and 267 (4) of the Constitution of Zambia Act No 2 of 2016**.

As regards the threshold to be met for the grant of leave to commence judicial review proceedings, reliance was placed on the exposition by Lord Wilberforce in the case of **Inland Revenue Comrs v National Federation of Self Employed and Small Businesses Limited** <sup>(11)</sup> namely, that where there is disclosure on the material available of an arguable case fit for further consideration, the court

ought in the exercise of judicial discretion, grant the applicant leave to apply for that relief.

**RESPONDENTS SKELETON ARGUMENTS:**

In its skeleton arguments dated 27<sup>th</sup> July, 2021, the respondent contends that based on the material available before this court, and without going into the crux of the case, there is no arguable case that warrants the applicant being granted leave.

It was submitted that all the facts set out in the affidavit verifying facts are irrelevant for the purposes of this court considering whether or not to grant leave. The only relevant issues to consider from the documents exhibited by the applicant are:

- 1) That in 2017, there were criminal investigations against the applicant for the offences of fraudulent transfer of shares, forgery and false uttering of company documents;
- 2) That an ordinary statement from the applicant was recorded;
- 3) That the applicant was allegedly informed that there will be no prosecution; and
- 4) That the applicant was arrested, charged and arraigned for the offence of false statements by company officials.

It was contended that in terms of **Article 180(4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** as read with **section 8(1) and (2)(f) of the National Prosecution Authority Act No. 34 of 2010**, the DPP has power to undertake any criminal proceedings including the power to review a decision to prosecute or not to prosecute for any criminal offence.

In particular, **section 8(1) and (2)(f) of the National Prosecution Authority Act** provides as follows:

*8. (1) Subject to the Constitution, the Director of Public Prosecutions shall have authority over the exercising of all the powers and the performance of all the duties and functions conferred upon, imposed on or assigned to, prosecutors by this Act or under any other law.*

*(2) Notwithstanding the generality of subsection (1), the functions of the Director of Public Prosecutions are to—*

*(f) Review a decision to prosecute, or not to prosecute, any criminal offence;*

In distinguishing this case from the **Kambarage Mpundu Kaunda** case, it was submitted that the material placed by the applicant before this court shows that the applicant was investigated for alleged offences and a docket was opened with an ordinary statement being recorded. The applicant has now been arrested and

charged with an offence for which he is appearing before the Magistrate Court although trial is yet to commence.

Therefore, the circumstances in the **Kambarage Kaundu** case are different from the present as there has neither been any communication to the applicant that he would not be prosecuted nor was there a press statement made by the DPP or an Officer or Agent working under the authority of the office declaring so. In any event, it was contended that the DPP need not demonstrate to the applicant that there is fresh evidence or that this is not an abuse of court process.

With respect to the letters marked “**RSP4**” and “**RSP8**”, the respondent contends that the same are privileged internal correspondence which cannot be relied upon and ought to be expunged from the record. As authority, we were referred to **Order 53 Rule 8 of the RSC** which allows for the use of **Order 24/5/8 and 24/5/12 of the RSC** in judicial review proceedings which attaches legal professional privilege to communications with a solicitor in the whole-time service of a party provided that such communication relates to legal as distinct from administrative matters.

In response to the prayer by the applicant that the court interferes with and stays the criminal proceedings in the Magistrates Court, it was submitted that there being no abuse of the court process by the respondent and given the circumstances of the case, the court does not have the jurisdiction to interfere with, stop or stay a criminal prosecution legally commenced. The respondent relied on the case of **C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General** <sup>(12)</sup> which held that civil proceedings cannot be used to arrest criminal investigations.

Lastly, the respondent submitted that in terms of **Order 53/14/27 of the RSC**, the applicant must first exhaust all the remedies available to him before seeking judicial review. The applicant is merely an accused person who is protected by the Constitution as being innocent until proven guilty. That based on the above, this is not a proper case for judicial review. It was prayed that the application for leave be dismissed with costs to the State.

### **ARGUMENTS IN REPLY**

On 3<sup>rd</sup> August, 2021, the applicant filed skeleton arguments in reply. The applicant submits that the arguments advanced by the

respondent are a clear indication that there is an arguable case whether or not the DPP lost the right to prosecute the applicant which ought to be raised at the substantive hearing of the application.

In particular, the applicant submits that whether or not the DPP lost the right to prosecute the applicant is an issue for determination at the substantive hearing. Therefore, the application is neither frivolous nor vexatious as it is case fit for further investigation at the substantive hearing.

With respect to **Section 8 of the National Prosecution Authority Act**, it was contended that reliance on the provision is a misdirection as the same does not apply to this case. It was submitted that the provision deals with the powers of the DPP to review a decision made by prosecutors whether or not to prosecute a matter. In this case, the decision was made by the DPP herself, and not a prosecutor, as evidenced by the exhibited letter.

As regards whether or not the communication is privileged, the applicant submits that the argument is untenable for the reason that the DPP and the Zambia Police Service are basically one arm. The police investigates and the DPP prosecutes and as such, there is no lawyer-client relationship between the two departments. Therefore,



legal privilege only applies where there is a lawyer-client relationship such as that between the Government and an independent lawyer hired by Government.

Lastly, in response to the cited case of **C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General** <sup>(12)</sup>, and the arguments therein, the applicant contends that the case dealt with the issue of criminal investigations not arresting civil proceedings as opposed to criminal proceedings. We were urged to dismiss the respondents' argument that granting a stay will amount to interfering with criminal proceedings as similar arguments have in the past been made and dismissed by the lower courts on legally sound grounds.

### **DECISION OF THE COURT**

We have considered the application for leave to commence judicial review, the affidavits, authorities and the arguments advanced by the parties. In addressing our minds to the application, we are alive to the law, in particular, the provisions of **Order 53/3, 53/14/62** and **Order 53/14/63 of the RSC**. At this stage, we are called upon to determine whether there is an arguable case worthy

of further investigation. Before determining whether there is an arguable case fit for further investigation at substantive hearing, we shall address the argument raised by the respondent that the letters marked "RSP4" and "RSP8" exhibited and attached to the affidavit verifying facts dated 25<sup>th</sup> February 2021 are privileged internal correspondence which cannot be relied upon. In a nutshell that it falls under legal professional privileged communications. The said letters are from the Office of the Director of Public Prosecutions.

We are of the view that the letters in issue do not fall under legal professional privilege communications. This is on the basis that the relationship between the DPP and Zambia Police is not one of the client/lawyer. Legal professional privilege applies to confidential communications that passes between a client and the client's lawyer that has come into existence for the dominal purpose of giving or receiving legal advice. We shall not belabor this point.

The issues for determination at this stage is whether there is an arguable case fit for further investigation at substantive hearing. The purpose of leave requirement as enunciated by the Supreme Court in a plethora of decisions is to prevent waste of time of the court with frivolous and trivial complaints. Aside from an applicant satisfying

the court that he has sufficient interest in the matter, the applicant must demonstrate to the court that he has a case fit for further investigation at full inter parties hearing. See the cases of **William Harrington v Dora Siliya & The Attorney General** <sup>(13)</sup> and **Lieutenant Alick Bruce Nakondo v The Attorney General** <sup>(14)</sup>.

Therefore leave is granted where the material available shows an arguable case for granting the relief claimed.

The applicant seeks leave on the basis that the decision of the DPP to proceed with the prosecution of the applicant is illegal, an abuse of the court process, and frivolous and vexatious. According to the applicant, the DPP having initially formed the opinion that there was insufficient evidence to prosecute, cannot now proceed to prosecute the applicant on the alleged crime.

A perusal of the letter dated 23<sup>rd</sup> August, 2017 by the DPP to the Acting Assistant Director of Legal shows that the DPP considered the three allegations of fraudulent transfer of shares, suspected forgery and uttering of company documents. She concluded as follows:

*“As for the allegations relating to national registration cards, it is evident that the details captured on the returns were different from those appearing on copies of the identity documents submitted to PACRA. The investigators ought to now follow up with PACRA to find out if at all the Directors have responded to the query raised by PACRA in a letter dated 6<sup>th</sup> February, 2017 which is hereto attached for ease of reference.”*

Subsequently on 1<sup>st</sup> of December 2020, the Deputy Chief State Advocate, on behalf of the National Prosecution Authority, formed the opinion that there was now sufficient evidence to prosecute on the allegations of false statements. She accordingly directed that the applicant be arrested and charged with the offence of false statements by company officials contrary to **section 325 of the Penal Code.**

The applicant contends that the DPP having communicated its decision not to prosecute, the respondent cannot reopen the case on the same subject offences. It is trite that at this stage, we are not concerned with the merits of the substantive hearing of the actual judicial review or its determination. We are concerned with whether the applicant has demonstrated that it has an arguable issue to be resolved at full hearing. To do so we have perused the powers of the office of the Director of Public Prosecution set out in the National

Prosecutions Authority **Act No 34 of 2010** of the Laws of Zambia **Sections 8(1) and 2(F)**. We also refer to the Constitution of Zambia (Amendment) **Act No 2 of 2016 Article 180 clause 4**.

In our earlier decision in **Tobias Haanyimbo Milambo, Nachi Musonda and Richard Lubemba v the Attorney General** <sup>(15)</sup>, where the applicant questioned the decision of the respondent in charging them with various offence and sought leave to commence judicial review, we stated as follows;

*“Although it is possible to prosecute or not to prosecute, Judicial Review is a weapon of last resort and it cannot be used where there is an alternative remedy available. What the appellants want to avert or curtail is the abuse of the court processes by Police Officers who they alleged have brought several matters before the court, which in our view amounts to abuse of court process.... It is a common law intentional tort, for which the applicants can bring alternative action from judicial review. They are at liberty to move the courts before whom the earlier criminal proceedings are pending on the basis of abuse of court process.”*

In the latter case of **Rajan Lekhraj Mahtani and John Sangwa v the People** <sup>(16)</sup>, the Supreme Court stated that civil procedure should not be used to abort criminal investigations or prosecutions because the justice system has its own procedures. Equally in the earlier case of **C and S Investment Limited, Ace Car Hire and**

**Sunday Maluba v Attorney General** <sup>(12)</sup>, the apex court frowned upon the use of civil proceedings to curtail or derail criminal investigations. The applicant's bone of contention being that once a decision is made not to prosecute, the DPP cannot reopen the case on the same subject offences and further amounts to illegality and an abuse of court process. Without delving into the substantive debate on the power of the DPP to review an earlier decision on whether or not to prosecute, we are of the view that it is not in doubt that the DPP appears to have the requisite power to review her earlier decision.

As regards the contention that the DPP had communicated its intention not to prosecute the applicant, the subject correspondence does not, in our view, appear to state that they would not prosecute in future.

Having considered the material before us, we are not satisfied that the applicant has met the threshold and has not disclosed what might, on further consideration, be an arguable case in favour of granting him leave to commence judicial review proceedings.

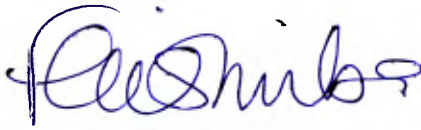
We accordingly find no merit in the application and refuse to grant the leave to commence Judicial Review proceedings. Equally,

the interim order to stay execution of the DPP's decision to prosecute is declined. Costs to the respondent, to be taxed in default of agreement.



---

**M. M. Kondolo, SC**  
**COURT OF APPEAL JUDGE**



---

**F. M. Chishimba**  
**COURT OF APPEAL JUDGE**



---

**P. C. M. Ngulube**  
**COURT OF APPEAL JUDGE**