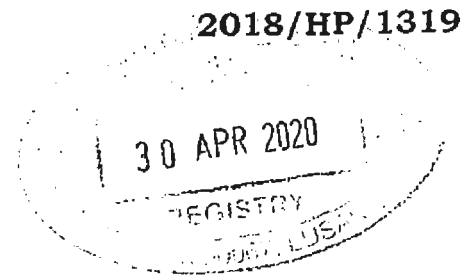


IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)



IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW  
IN THE MATTER OF: ORDER 53 RULE 3 OF THE RULES OF THE  
SUPREME COURT OF ENGLAND 1965

BETWEEN:

REUBEN MALINDI

1<sup>ST</sup> APPLICANT

MAZUBA MOOYA LUNGWE

2<sup>ND</sup> APPLICANT

V

ATTORNEY GENERAL

RESPONDENT

Before Hon. Justice Mr. M.D. Bowa in Chambers this 30<sup>th</sup> day of April 2020.

For the Applicants: Mr. L. Mwamba of Simeza Sangwa and Associates

For the Respondent: Mr. E. Tembo Senior State Advocate

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## JUDGMENT

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Cases referred to:

1. *Derrick Chitala vs. Attorney General* (1995) ZR. 91.
2. *Frederick Jacob Titus Chiluba vs. Attorney General* (2003) ZR. 153.
3. *North-Western Energy Company Limited vs. the Energy Regulation Board* Vol. 2 (2011) ZR. 512.
4. *Liversidge vs. Anderson* [1941] 3 All ER. 338.
5. *Inland Revenue Commissioners and Another vs. Rossminster Ltd. And related appeals* [1980] 1 All ER. 80.

6. *Khawaja vs. Secretary of State for the Home Department and Another appeal* [1983] 1 All ER. 765.
7. *Guantai vs. Chief Magistrate* [2007] 2 EA. 170 (CAK).
8. *Bank of Zambia vs. Jonas Tembo & Others* (2002) ZR. 103.
9. *BP Zambia Plc vs. Interland Motors Limited* (2001) ZR. 37.
10. *Kenya Commercial Bank Limited & Others vs. The Commissioner of Police, The Director of Criminal Investigations and The Attorney General* eKLR Petition No. 218 of 2011.
11. *Investments and Mortgages Bank Limited vs. The Commissioner of Police, The Director of Criminal Investigations, The Attorney General and the Director of Public Prosecutions* eKLR Petition No. 104 of 2012.
12. *Nyampala Safaris Zambia Limited and 4 Others vs. Zambia Wildlife Authority and 6 Others* (2004) ZR. 49 (SC).
13. *Anismic Limited vs. Foreign Compensation Commission* [1969] 2 AC. 147.
14. *C. & S. Investments Limited, ACE Car Hire Limited, Sunday Maluba vs. The Attorney General* (2004) ZR. 216 (SC).
15. *The Attorney General vs. Mutembo Nchito, Selected Judgment No. 1 of 2016.*
16. *The People vs. Zambia Police* (2010) ZR. 266.
17. *Associated Provincial Picture Houses Limited vs. Wednesbury Corporation* [1948] 1 KB. 233.
18. *Musakanya vs. The Attorney General* (1981) ZR. 188.
19. *Zimba vs. Registrar of Societies and Another* (1981) ZR 335.
20. *The People vs. Austin Liato Appeal No. 291 of 2014.*
21. *Chief Constable of North Wales Police vs. Evans* [1982] 3 All ER, 141, HL.
22. *Bank of Zambia vs. Access Leasing Limited and Another* (2008) ZR. 159 Vol 1 (SC).
23. *Council of Civil Service Unions vs. the Minister for the Civil Service* [1984] 3 All ER. 935.
24. *Attorney General vs. Roy Clarke* (2008) ZR. Vol. 1 38.
25. *Eunice Khalwali Milima vs. Director of Public Prosecutions & 2 Others* [2017] eKLR (HC).
26. *vs. Attorney General ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001.*

27. *Kuria & 3 Others vs. Attorney General [2002] 2 KLR. 69.*

28 *Republic vs. Chief Magistrate Court at Mombasa ex parte Ganigee & another (2002)2 KLR 703*

29 *Republic vs. Commissioner of Police & Another ex parte Michael Monari & Another [2012] eKLR.*

Legislation referred to:

1. *The Zambia Police Act, Chapter 107 of the Laws of Zambia. S. 15 (1).*
2. *Order 53 rule 14/19 of the Rules of the Supreme Court, 1999 Edition.*

Works referred to:

1. *De Smith's Judicial Review of Administrative Actions (1980), 4<sup>th</sup> Edition, Stephens & Sons Limited.*
2. *Andrew L.-T. Choo, (1993), 'Abuse of Process and Judicial Stays of Criminal Proceedings', Oxford University Press, New York, United States.*
3. *William Wade and Christopher Forsyth on Administrative Law 10<sup>th</sup> Edition (2009),*

On 3<sup>rd</sup> August, 2018, Reuben Malindi and Mazuba Mooya Lungwe, the Applicants herein, filed an application seeking leave to commence judicial review proceedings.

The facts leading to this application are that Savenda Management Services Limited (hereinafter referred to as "Savenda") took out a writ in the High Court dated 13<sup>th</sup> February 2014 against Stanbic Bank Zambia Limited seeking amongst other remedies, damages for wrongful reference to the Credit Reference Bureau. The Applicants in their capacity as senior employees of Stanbic Bank were

witnesses in the matter that proceeded to trial before the High Court. The court found in favour of Savenda and granted it all the reliefs prayed for.

Dissatisfied with the decision, Stanbic Bank appealed to the Court of Appeal. The Court of Appeal overruled the High Court decision and also reduced the award of damages from K192, 500, 000 to K5, 000. A subsequent appeal by Savenda to the Supreme Court was dismissed with costs.

Between June and July of 2018, the Applicants were arrested and jointly charged on allegations of false swearing in the evidence they gave before the High Court matter subsequently disposed of by the Supreme Court on appeal. They appeared before the Subordinate Court on 30<sup>th</sup> July, 2018. The matter did not materialize on that date and was adjourned to 14<sup>th</sup> August, 2018. The criminal proceedings instituted by the police prompted the Applicants to commence judicial review proceedings in which they seek the following reliefs:

- (i) *A declaration that the decision of the Respondent to arrest, charge and prosecute the Applicants is an abuse of court process;*

- (ii) *An order of certiorari to remove into the High Court for the purpose of quashing the said decision;*
- (iii) *An order of prohibition prohibiting the Respondent from taking any action against the Applicants arising out of court matters that have hitherto been determined between Stanbic Bank and Savenda Management Services Limited ("Savenda") by the Court of Appeal in Appeal No. 16/2017 and the Supreme Court in Appeal No. 37/2017;*
- (iv) *If leave to apply is granted, a direction that grant should operate as a stay of the decision or further proceedings to which this application relates until the determination of the application or until the court orders otherwise pursuant to Order 53 rule 3(10) (a) of the Rules of the Supreme Court of England 1965;*
- (v) *The Applicant requests for an oral application pursuant to rule 3(3) of Order 53 of the Rules of the Supreme Court of England 1965;*
- (vi) *If leave to apply is granted, a direction that the hearing of the application for judicial review be expedited;*
- (vii) *An order for costs;*
- (viii) *AND that all necessary and consequential directions be given.*

I granted leave for judicial review in a ruling dated 23<sup>rd</sup> August, 2018 and stayed the criminal proceedings in the Subordinate Court. The originating process was subsequently amended on 26<sup>th</sup>

June 2019 following a ruling of this Court dated 10<sup>th</sup> June 2019 ordering the correct citation of parties.

The affidavit in support of the application was jointly sworn by the Applicants. They gave a brief background of events culminating into this application. The Applicants exhibited documents which included the warrant to inspect Bankers Books marked "RMMML1", copies of the police bond and writ of summons for the High Court Cause No. 2014/HP/0076 as well as the defence marked "RMMML2", "RMMML3" and "RMMML4" respectively.

Also exhibited were respective witness statements collectively marked as "RMMML5". The judgments of the Court of Appeal and Supreme Court were exhibited as "RMMML6" and "RMMML7" respectively.

The Applicants' contention as laid out in the notice of application for judicial review and verified in the affidavit is that, the Respondent's decision to prosecute them is illegal. This, the Applicants argued, is premised on the action by Savenda of turning to the Zambia Police Service to pursue its agenda after the Supreme Court dismissed its claim.

It was the Applicants' further contention that there were no reasonable grounds on which the Police based its suspicion that the Applicants falsely swore an affidavit in the High Court Cause No. 2014/HPC/0076 as there is no such affidavit except witness statements. That in any case, the witness statements have been a subject of adjudication before the Court of Appeal and Supreme Court and the said Courts found the witness statements to be true. Therefore, the prosecution of the Applicants is illegal as it pursues an objective other than that for which the power to make the decision was conferred on the Police by the law.

In support of this argument, I was referred to **De Smith Woolf and Jowell on Judicial Review of Administrative Action (1995) Sweet and Maxwell, London p. 295** and the decisions in *Derrick Chitala vs. Attorney General*<sup>1</sup>; *Frederick Jacob Titus Chiluba vs. Attorney General*<sup>2</sup>; and *North-Western Energy Company Limited vs. The Energy Regulation Board*<sup>3</sup>.

It was the Applicants' further contention that the Respondent ought to have used an objective test in determining whether or not there were reasonable grounds as held by Lord Atkin in *Liversidge vs.*

Anderson<sup>4</sup> which opinion has been adopted in amongst other cases, Inland Revenue Commissioners and Another vs. Rosminster Limited and related appeals<sup>5</sup> and Khawaja vs. Secretary of State for the Home Department and another<sup>6</sup>.

The Applicants argued further that the intended prosecution is an abuse of court process warranting the court's intervention. Reliance was placed on the East African case of Guantai vs. Chief Magistrate<sup>7</sup> for justification on when courts must intervene in such circumstances. It was submitted further that the Respondent's action was an attempt to re-adjudicate issues which is conduct frowned upon as held in Bank of Zambia vs. Jonas Tembo and Others<sup>8</sup> wherein the Supreme Court stressed that it is in the public interest that there should be an end to litigation.

It was further contended that the Respondent had opportunity to pursue criminal proceedings at the time when the witness statements were availed and not wait until the decision of the Supreme Court which was unfavourable to it before doing so. Thus, the Applicants argued that the criminal proceedings translate to deploying grievances piecemeal which the courts also frown upon as



held in *BP Zambia Plc vs. Interland Motors Limited*<sup>9</sup>. I was also referred to two Kenyan cases of *Kenya Commercial Bank Limited & Others vs. Commissioner of Police, The Director Criminal Investigations & The Attorney General*<sup>10</sup> and *Investments & another vs. The Commissioner of Police, The Director of Criminal Investigations, The Attorney General and the Director of Public Prosecutions*<sup>11</sup> in support of this proposition.

In addition to the above, the Applicants argued that the Police acted ultra vires Articles 190 and 193 (2) of the Constitution of Zambia Act No. 2 of 2016 as the Service did not exercise its powers for the preservation of law and order. Instead, the Police has used its power for the purpose of prying into issues which have already been adjudicated upon.

The Respondent filed an affidavit in opposition deposed to by Kelvin Munyinda a police officer employed by the Zambia Police Service in the fraud and Financial Investigations Unit. It was his evidence that in or about the first week of June 2018, the Fraud and Financial Investigations Unit of the Zambia Police received a report of false swearing against the Applicants from a member of the public.

Following the receipt of the report the Fraud and Financial Investigations Unit instituted investigations which after visiting several places ended up at Stanbic Bank.

That after a thorough investigation the Applicants were warned and cautioned on the 25<sup>th</sup> June 2018 and a decision was later made on the 16<sup>th</sup> July 2018 to arrest, charge and prosecute them. The deponent believed as advised by counsel that the Zambia Police has a duty and is empowered by law to conduct investigations. Further that he believed that the investigations and subsequent arrest and prosecution of the Applicants was not an abuse of court process as there was reasonable suspicion that an offence was committed.

Mr. Muchinda believed as further advised by counsel that the order granting leave to commence judicial review proceedings and the substantive proceedings have the effect of arresting criminal proceedings. He further believed based on advice given by his lawyers that civil proceedings should not be used to arrest or forestall criminal prosecutions.

In its skeleton arguments in support of the affidavit in opposition to judicial review proceedings dated 29<sup>th</sup> August, 2019 the Respondent

argued that its decision to arrest, charge and prosecute the Applicants was not to pursue an objective other than that for which its power to prosecute was conferred. In support of this argument, reference was made to section 15 (1) of the Zambia Police Act Chapter 107 of the Laws of Zambia which according to the Respondent, mandated the Zambia Police to carry out investigations on reasonable grounds.

The Respondent argued further that the Zambia police acted within the purview of the regulating law and did not exceed the power conferred on it. Reliance was placed on the cases of North-Western Energy Company Limited v. Energy Regulations Board and Frederick Chiluba v. Attorney General (supra) also referred to by the Applicants above in defining what amounts to illegality in Judicial review proceedings. I was invited to consider whether as held in the cited cases the Respondent acted within or outside the purview of the law. It was the Respondents position that the decision of the police was within the parameters of the law, arrived at after carefully and correctly understanding the law that regulates it and hence not illegal.

It was the Respondent's further submission that the decision to prosecute the Applicants was in line with public policy and that any attempt to hinder such decisions through the use of civil proceedings as a shield from criminal prosecution must be frowned upon by the Court.

The Respondent disputed the Applicants' contention that the highest courts had already adjudicated on the witness statements which are the subject of the criminal prosecution. It was argued that the decision to investigate and subsequently prosecute the Applicants arose out of a report that was made to it by a member of the public which was not adjudicated.

Relying on the case of *Nyampala Safaris Zambia Limited & 2 Others vs. Zambia Wildlife Authority & 7 Others*<sup>12</sup> it was argued that Judicial review is concerned with the decision making process and not the merits of the decision itself. That in this case the process was followed and no act done by the police exceeded the authority conferred on its officers in making the decision to prosecute the Applicants. Further that if there was an error made, the Applicants will be acquitted and justice would have been served.

**Anismic Limited vs. Foreign Compensation Commission**<sup>13</sup> was called in aid for the proposition that decisions made in error of the law or outside the jurisdiction of the law is liable to be quashed.

The Respondent further argued, relying on **William Wade and Christopher Forsyth on Administrative Law 10<sup>th</sup> Edition (2009)**, that the responsibility of deciding whether the police shall arrest a particular person or investigate a particular offence rests with the police. Therefore, it was not illegal to have investigated and commenced prosecution of the Applicants.

It was the Respondent's further argument that the reliefs sought by the Applicants are an attempt to use judicial review to hinder the work of the police in spite of the settled position of the law. In essence, that position being that civil proceedings cannot be used to arrest criminal investigations. The cases of **C & S Investments Limited and Others vs. The Attorney General**<sup>14</sup> and **Attorney General vs. Mutembo Nchito**<sup>15</sup> were cited in aid. I was also referred to Justice Chishimba's decision in the **People vs. Zambia Police**<sup>16</sup> in which the court refused to grant an application for leave

to issue judicial review proceedings against the decision of the police to arrest and prosecute the applicants.

The Respondent further contended that the argument that the criminal prosecution is a roundabout way of re litigating a matter already determined before another forum is misplaced as the issue being the subject of the prosecution was not adjudicated upon by either the Court of Appeal or the Supreme Court. It was further contended that a witness who lies before court should not be given immunity for the lies simply on account of the fact that the matter in which they lied has been concluded.

Relying on De Smith's Judicial Review 6<sup>th</sup> Edition Woolf, Jowell, Le Sueur (2007), it was the Respondent's further argument that courts will only interfere in a prosecuting authority's decision to prosecute, continue or discontinue such criminal prosecutions where there is a grave abuse of power or a clear breach of the prosecuting authority's settled policy. The Respondent concluded by arguing that the onus lies with the Applicants to prove that there is illegality or malafides on the Part of the police in exercising its power. I was referred to the dicta by Lord Greene in **Associated Provincial**

*Picture Houses Limited vs. Wednesbury Corporation*<sup>17</sup> and the cases of *Musakanya vs. The Attorney General*<sup>18</sup> and *Zimba vs. Registrar of Societies and Another*<sup>19</sup> in aid.

In their skeleton arguments in reply filed on 13<sup>th</sup> September, 2019, the Applicants argued that whilst the Zambia Police Service has power to conduct investigations, their contention was that the decision to arrest and prosecute is illegal because the police is perusing an objective contrary to what the power was conferred for.

That the power must be exercised correctly and fairly for the intended purpose and the courts should intervene where the power is used to achieve an ulterior motive. In this case that the Applicants believed the police were pursuing an agenda on behalf of Savenda against Stanbic Bank and its officers.

It was submitted that the absence of a factual basis for reasonable suspicion confirms this agenda. I was referred to the case of *The People vs. Austin Liato*<sup>20</sup> in which the Supreme Court commented that:

*“We have examined the definition of reasonable suspicion in Blacks law Dictionary as already quoted by the learned counsel for the Respondent.*

*In our considered view the definition of reasonable suspicion as given by the case cited to us by the learned counsel for the appellant and that as given in Black's Law Dictionary are not at variance. They seem to state or imply the same position that reasonable suspicion is not arbitrary; there ought to be a factual basis upon which it is anchored. As explained by the New South Wales of Criminal Appeal in R v John Rondo Reasonable suspicion involves less than mere belief but more than a mere possibility. There must be some factual basis for suspicion; reasonable suspicion is not arbitrary"*

The Applicants reiterated that the highest courts in the land established the facts which form the basis of the charges to be true. The facts cannot therefore form a reasonable basis that the alleged false swearing was committed

In response to the assertion that the Court has no jurisdiction to arrest criminal investigations and prosecutions, the Applicants submitted that this Court has already ruled on that issue raised by the Respondent in an earlier application to discharge leave. That the Respondent should have appealed if aggrieved by the decision of the court which was essentially that it could grant a stay for the graduated position of a prosecution as opposed to an investigation.



The Applicants concluded by submitting that the Respondent's arguments are devoid of merit and that the Court should grant the reliefs prayed and costs be for the Respondent.

At the hearing counsel for the Applicants, Mr. Mwamba relied on the amended notice of application for leave to apply for judicial review and affidavit verifying facts filed on the 26<sup>th</sup> June, 2019. Reliance was also placed on the skeleton arguments in reply filed on 13<sup>th</sup> September 2019. Counsel more or less augmented the arguments contained in the skeleton arguments. He stressed that the Police is using its power to pursue Savenda's private agenda against Stanbic Bank and its officers who are the Applicants in this matter.

He argued that exhibit "**RMMML1**" and "**RMMML1b**" of the Affidavit in Support shows Savenda's involvement. Further that the failure to disclose the "member of the public" that reported the matter is testimony that it is Savenda that is involved and the Respondent had not denied the Applicant's contention that it was indeed Savenda who complained.

It was submitted further that even assuming Savenda was not involved, there is still an abuse of power disclosed as the Respondent were in a roundabout sort of way, trying to get a different result through the Subordinate court on a matter that was already deliberated by the Superior courts. That the prosecution was nothing but a collateral attack of the decisions of both the Court of Appeal and the Supreme Court. I was invited to consider the consequences and undesirability of the Subordinate Court arriving at a different finding from the superior courts.

In opposing the application, the learned Senior State Advocate Mr. Tembo placed reliance on the affidavit in opposition filed into court on 29<sup>th</sup> August 2019 and skeleton arguments of even date. Counsel disagreed that there was no factual basis of suspicion on which the police acted. That the two Appellate courts agreed and found to be true the fact that there was an error in the Stanbic Bank system. That the courts emphasized that this fact was acknowledged by the bank through the letter dated 23<sup>rd</sup> April 2009. He submitted that both courts found that the trial court had ignored the letter which confirmed this system error. In spite of this, the exhibited

statements "**RMMML5a**" and "**RMMML5b**" both expressly state that no evidence of such an error was found in the system which was contrary to the finding of the Court of Appeal and Supreme Court. This, he argues then formed the basis of the action the Respondent had taken.

It was submitted further that the fact that exhibit "**RMMML6**" referred to by the Applicants contains the names Savenda Management does not in itself entail that they are the ones who had reported the Applicants to the Zambia Police. Further that it was common practice in our jurisdiction and others that the identity of a whistleblower should be treated with care and extra caution least they are exposed to danger. Counsel submitted that it was for this reason that the affidavit did not disclose the identity of the person who reported the matter to the police.

It was argued further that the Applicants in their filed arguments in reply had acknowledged the police have power to investigate, arrest and ultimately prosecute criminal matters. That what they had not demonstrated to the court is how the exercise of that duty is illegal. That the test for illegality is whether the decision maker strayed

outside the terms authorized by the governing statute. However, that section 15(1) of the Zambia Police Act confers powers on the police to perform their statutory duties and the Applicants have not demonstrated how that Act has been breached. He prayed that the application for Judicial Review be dismissed with costs accordingly.

Counsel Mwamba in response argued that the submission for the reasons for non-disclosure of the complainant's identity should be dismissed as it amounted to giving evidence from the bar. He reiterated his argument that the illegality in this case lies in the fact that power by the Respondent was not exercised bonafide as there was no factual basis for the suspicion of wrongdoing. That therefore the police were exercising the power for purposes other than what it was conferred.

He maintained that opposing counsel had misunderstood both the charge and what was being considered by the courts. The issue in his view was not whether or not there was an error but whether the error caused Savenda to go into default. That the Supreme Court had made a finding on all the issues therefore there cannot be a basis for the charge preferred by the Respondent. He reiterated his

prayer that this was a proper case in which the court can intervene and quash the decision to prosecute innocent citizens.

These were the parties' arguments and submissions.

I have carefully considered the application before me and the parties' respective submissions. The law and purpose of Judicial Review is well settled and is aptly summed up by the learned authors of the Rules of the Supreme Court Practice, 1999 edition, under Order 53/14/19 wherein they state:

*"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 fair treatment by the authority to which he has been subject and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.'... Thus, a decision of an inferior court or a public authority may be quashed (by an order of certiorari made on an 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 in a case where those rules are applicable, or where there is an*

*error of law on the face of the record, or the decision is unreasonable in the Wednesbury sense... The court will not, however, on a 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. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty itself of usurping power...."*

In the case of Chief Constable of North-Wales Police vs. Evans<sup>21</sup>

Lord Hailsham L.C. formulated the functions of Judicial Review in the following terms:

*"It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that an individual is given a fair treatment by the authority to which he has been subjected and that it is not part of the purpose to substitute the opinion of the Judicial officer or individual judges for that of the authority constituted by the law to decide the matters in question".*

In *Bank of Zambia vs. Access Leasing Limited and Another*<sup>22</sup> the Supreme Court adopted with approval the formulation by Lord Diplock, in the case of *Council of Civil Service Union vs. The Minister of Civil Service*<sup>23</sup> on the question of when a Court will subject decisions of inferior tribunals to judicial review wherein he stated:

*"One can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case may not in due course of time add further grounds."*

In *Chiluba vs. Attorney General* (supra), the Supreme Court had this to say;

*"Thus a decision of an inferior court or public authority may be quashed (by an order of certiorari made on an 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 in a case where all those rules are applicable or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense."*

It is further beyond question as stated by the Supreme Court in the case of Attorney General vs. Roy Clarke<sup>24</sup> that;

*"There is nothing like unfettered discretion immune from judicial review...that in a government under law like ours, there can be no such thing as unreviewable discretion"*

On illegality in particular as a ground for judicial review, the Supreme Court in the case of Fredrick Jacob Chiluba vs. Attorney General (supra) observed that:

*"We begin with illegality. To succeed under this ground the appellant has to prove that the decision of the National Assembly contravened or exceeded the terms of the law which authorised the making of the decision or that the decision pursues an objective other than that for which the power to make the decision was conferred. By looking at the wording of the power and the context in which the power is to be exercised, the courts ultimate function is to ensure that the exercise of power is within or intra vires the statute"*

The law has been restated in a number of cases over the years and therefore presents no debate on precisely what the purpose of judicial review is and importantly when the courts will come in to interfere with decisions made by public authorities.



The Applicants allege illegality in the decision by the Respondent to arrest and prosecute them. That in as much as it was recognized the police had power to make decisions on investigations and arrest, the exercise in this instance was illegal as it was done to pursue an objective other than that for which it was intended. In particular, that is was apparent there was a pursuit of a private agenda for and on behalf of Savenda who were dissatisfied with the outcome of litigation in a matter presented before the High Court right through to the Supreme Court. Further that the illegality was also inherent in the abuse of court process perpetrated by the Respondent in trying to obtain a different outcome than what was decided in the Supreme Court through the criminal prosecution.

The Respondent on the other hand insists that the Police have the power to make decisions regarding crimes to investigate and who to arrest and prosecute as a consequence of its findings. Further that it is not true that there is no factual basis justifying the suspicion on which the decision was made as the issue being the subject of the charge was not the question of consideration by the courts.

Another point raised is that the Applicant cannot through a civil process arrest criminal investigations and resultant prosecutions.

I propose to firstly deal with the last point raised by the Respondent. This issue of whether or not civil proceedings can be used to arrest criminal proceedings was raised before by the Respondent in its application to discharge leave. In my ruling dated 23<sup>rd</sup> August, 2018, I held then as I do now, that the C.& S. case that was heavily relied upon by the Respondent dealt with the issue of the effect of civil proceedings on a criminal investigation. In distinguishing the holding in the C.& S. case with the present matter, I stated that what I am now faced with is the graduated position of a criminal prosecution.

A careful read of the C.& S. case and others referred to by the Respondent will show that no pronouncement on the question of the effect of civil proceedings on a prosecution in the context under consideration was made by the Supreme Court. Indeed, none has since been made by the Court of Appeal or the Supreme Court that I am aware of. To that extent, I would agree with the Applicant that

the Respondent's submission on what was held in the C. & S. case was misleading.

That said, I repeat what I stated before, there is persuasive authority from the East African jurisdiction where the courts have been faced with such matters and have readily held that where there is abuse, established in the manner the power or decision was made, the court can intervene and in essence arrest a prosecution.

These include the case of *Eunice Khalwali Milima vs. Director of Public Prosecutions & 2 others*<sup>25</sup>, wherein the Court was called upon to decide on whether or not the decision by the Director of Public Prosecutions to prosecute the applicant was an abuse of the court. In deciding the matter before him, Judge George Vincent Odunga made reference to among others the case of *R. vs. Attorney General exp Kipngeno Arap Ngeny*<sup>26</sup> in which the High Court opined that much as the statutory powers to prosecute are recognized, the Attorney General should ensure that the criminal prosecution is not oppressive and vexatious thereby being an abuse of the court. The court held that:

*"...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition, halting the prosecution. It is an abuse of the process of the court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all: whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the*

*individual is a valued individual right and freedom, which should not be tested on flimsy grounds.”*

In Joram Mwenda Guantai vs. the Chief Resident Magistrate (*supra*), also referenced by the Applicants, the Court of Appeal stated as follows:

*“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”*

In the cases of *Kuria & 3 Others vs. Attorney General*<sup>27</sup> and *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another*<sup>28</sup>, the High Court held that the court has power to stay criminal proceedings if the prosecution is guided by extraneous and other ulterior motives.

Andrew L.-T. Choo, in his book titled *Abuse of Process and Judicial Stays of Criminal Proceedings*, pages 1 -9 also provides some interesting discourse on how the courts have inherent jurisdiction to stay criminal proceedings where the proceedings are considered frivolous and vexatious.

It is further noted from authorities referred to me by the Respondents that the court has the power to interfere where abuse is established. I was referred to the learned authors of *De Smith's Judicial review 6<sup>th</sup> edition, Woolf, Jowell, Le Seur (2007) Sweet & Maxwell at page 113 paragraph 3 -006* (supra) which states that:

*"Some decisions made by HM Attorney General in relation to instituting and stopping prosecutions may fall outside the courts supervisory jurisdiction altogether, within the court's jurisdiction there in a marked reluctance to exercise that supervisory jurisdiction over police decisions to investigate, charge, and decisions of the DPP to prosecute, continue or*

**discontinue criminal prosecutions. The court will general do so only if there is a grave abuse of power or a clear breach of police or prosecution authority's settled policy.** (Emphasis mine)

I was also referred to the case of *Attorney General vs. Mutembo Nchito* (supra) in which the court observed that:

***"In the absence of malice, bad faith and unreasonableness, this honourable court has no jurisdiction to challenge the discretion of the investigating authority."***

Based on the above, it is my considered view that where grave abuse and bad faith is established the court can intervene by way of judicial review to quash a decision to prosecute an Applicant. It is of course unquestionable, that the burden of proving such abuse lies with an Applicants. I was aptly referred to the dicta by lord Greene MR in *Associated Picture Houses Limited vs. Wednesbury Corporation* (1948) IK13 233 (supra) in which he 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 assured prima facie that responsible bodies like the police in this case will exceed their powers. But the court***

*wherever it is alleged that the police contravened the law, must not substitute itself for that authority.”*

In Musakanya vs. the People (supra) the court held that:

*“The onus of proving malicious (with or in bad faith) is on the Applicant.”*

This brings me to the arguments advanced by the Applicants. Their main contention as I have highlighted above, is that Savenda was at the center of the Police decision to prosecute purely for purposes of settling scores. This if established would squarely qualify as an abuse of power warranting the courts intervention.

However, I have to say that the Applicants’ assertions in this case are mere speculation. The affidavit in opposition does not disclose who the whistle blower was. I take judicial notice that it is practice in law enforcement to conceal the identity of an informer or whistleblower to protect them from exposure and possible harm. In as much as there was no deposition to this effect and the Respondent’s arguments in this regard were taken issue with, I would accept the non-disclosure for the stated reasons.



I would further agree that the mere appearance of Savenda in the document exhibited in the affidavit verifying facts marked "**RMMML1**" and "**RMMML1b**" does not in itself show that Savenda was the complainant. There is further no evidence that the police were being used by the named company in the manner suggested.

Both parties took me on a journey arguing what from their respective points of view, was considered and or undetermined by the Court of Appeal and the Supreme Court in the matter between Savenda and Stanbic Bank. I find that the charge frowned upon alleges false swearing apparent in the witness statements used in the courts. In particular, the averment made regarding the none existence of evidence of a system error as stated by the Applicants in their statements.

I note and agree with the Respondent that the falsity or otherwise of the said statements or whether there was a deliberate attempt to mislead the court in this regard was not the subject of determination. I would further agree that a party found to lie in court after a judgment is delivered cannot be shielded against subsequent prosecution irrespective of the outcome of the

judgment. If a lie was told on oath and thus in breach of the law in terms of section 109 of the Penal Code Cap 87 of the Laws of Zambia, an investigating authority such as the police in this case are legally empowered to investigate, arrest and prosecute such claim. The court can only interfere if, as I have stated, grave abuse in the decision to prosecute can be established which the Applicants in this case have not proved.

In arguing its case and advancing the legal basis of the police decision, the Respondent referred to section 15 (1) of the Zambia Police Act Chapter 107 of the Laws of Zambia. The section reads as follows:

***15. (1) Whenever a police officer, of or above the rank of Inspector, has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence which he is authorized to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, that police officer may, after recording in writing the grounds of his belief and specifying therein so far as possible, the thing for which search is to be made, search or cause search to be made for such thing in any place within the limits of such station.***

A careful read of this section will reveal that the section grants an officer within the defined ranks the powers of search and seizure and not necessarily general powers of investigations as seemed to be advanced by the Respondent. This notwithstanding Part 1V of the Zambia Police Act<sup>f</sup> grant<sup>s</sup> the police wide powers to investigate matters which would include the cited section 15 on search.

In the Kenyan decision of *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another*<sup>29</sup>, it was held:

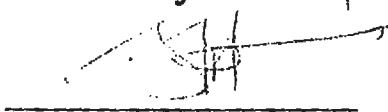
*“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court.... As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.*

The above holding aptly represents the role of the police and I find in this case in particular that the police acted within the preview of the enabling law to investigate a complaint received from a member of the public and having investigated the matter made a decision to arrest and prosecute the Applicants. For this reason, I do not

agree that the Police acted ultra vires Articles 190 and 193 (2) of the Constitution of Zambia Act No. 2 of 2016 as argued by the Applicants. I would accordingly dismiss the application for judicial review and discharge the stay granted on the 23<sup>rd</sup> of August 2018 with costs to the Respondent to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Lusaka this <sup>30<sup>th</sup></sup>..... Day of <sup>April</sup>..... 2020.



**JUDGE.**