

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

APPEAL Nº 190 OF 2019

IN THE MATTER OF:

AN APPLICATION FOR JUDICIAL REVIEW
PURSUANT TO ORDER 53, RULE 3 OF THE
RULES OF THE SUPREME COURT, 1999
EDITION

IN THE MATTER OF:

THE CONSTITUTION OF ZAMBIA ACT Nº 2 OF
2016, ARTICLE 134 (c)

IN THE MATTER OF:

SECTION 10(3) OF THE INDUSTRIAL AND
LABOUR RELATIONS ACT Nº 8 OF 2008

BETWEEN:

PROFESSIONAL TEACHERS UNION OF ZAMBIA

(suing through the Executive Committee)

APPELLANT

AND

THE LABOUR COMMISSIONER

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

CORAM: **Chashi, Lengalenga and Majula, JJA**

On 12th November, 2020 and 19th November, 2020.

For the Appellant:

Mrs. L. Mushota – Messrs Mushota &
Associates

For the 1st & 2nd Respondents:

Miss D. Mwewa – Principal State
Advocate



J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

- 1. DERRICK CHITALA (Secretary of the Zambia Democratic Congress) v ATTORNEY GENERAL (1995 – 97) ZR 91**
- 2. YOSI MITI v ATTORNEY GENERAL – SCZ/8/201/2015**
- 3. DEAN MUNG'OMBA & ORS v PETER MACHUNGWA & ORS (2003) ZR 17**
- 4. CHIKUTA v CHIPATA RURAL COUNCIL (1974) ZR 241**

Legislation referred to:

- 1. THE RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK)**
- 2. THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT Nº 2 OF 2016 OF THE LAWS OF ZAMBIA**
- 3. THE INDUSTRIAL AND LABOUR RELATIONS ACT, Nº 8 OF 2008 OF THE LAWS OF ZAMBIA**

Other works and materials referred to:

- 1. BRYAN A. GARNER'S BLACK'S LAW DICTIONARY**

1.0 INTRODUCTION

- 1.1 This appeal arises from a ruling of the Industrial Relations Division of the High Court delivered by Hon. Justice E. L. Musona on 6th June,

2019 by which he declined to grant orders to stay execution of that Court's rulings dated 27th June, 2018 and 9th May, 2019 respectively, pending appeal of the same.

2.0 BACKGROUND TO THE APPEAL

- 2.1 The brief background to this appeal is that the Appellant applied *ex-parte* for leave to commence judicial review proceedings against the 1st Respondent in the Court below. After hearing the application for leave, the learned trial Judge not only declined to grant the leave sought but '**dismissed the entire application in its totality.**' He also delved in the application for judicial review by stating that the Labour Commissioner can appoint an independent auditor provided he had reasonable belief that there was need to do so and concluded that the Commissioner did not act *ultra vires* when he appointed an independent auditor. The learned trial Judge thereafter granted the Appellant leave to appeal. This is contained in the ruling of 27th June, 2018.
- 2.2 Thereafter, on 24th January, 2019, the Appellant filed an application for interpretation of the Court's ruling of 27th June, 2018 and section 10(3) of the Industrial and Labour Relations Act, N^o 8 of 2008. By a

ruling dated 9th May, 2019, the Court below upheld its earlier ruling of 27th June, 2018 and gave guidance on the effect of section 10(3) of the Industrial and Labour Relations Act.

2.3 On 15th May, 2019 the Appellant filed a further application for leave to appeal against the ruling of 9th May, 2019 and for leave to appeal out of time against the ruling of 27th June, 2018. The Appellant simultaneously filed into Court on 15th May, 2019, an application for an order to stay execution of the two rulings of 27th June, 2018 and 9th May, 2019, pending leave to appeal against the two rulings.

2.4 Further to that, on 30th May, 2019, whilst the aforementioned applications were pending hearing, the Appellant caused to be filed into the Court below, a notice of motion to raise preliminary issue with supporting affidavit asserting that the Respondent's affidavit in opposition contained extraneous matter in the form of legal arguments and a prayer.

2.5 By a ruling dated 6th June, 2019, the learned trial Judge declined to stay execution of the rulings dated 27th June, 2018 and 9th May, 2019 respectively and stated that there were no prospects of the appeal

succeeding. It is this ruling of 6th June, 2019 that the Appellant has appealed against.

- 2.6 The preliminary issue raised by the Appellant was determined by a ruling dated 27th June, 2019 by which the learned trial Judge ruled that he had seen nothing offensive and extraneous in the Respondent's affidavit in opposition and he saw no reason to expunge the said affidavit from the court record. Thereafter, he dismissed the application with costs for the Respondent.

3.0 GROUNDS OF APPEAL

- 3.1 The Appellant being dissatisfied with Hon. Judge E. C. Musona's ruling dated 6th June, 2019 has appealed to this Court advancing the following grounds of appeal:

- 1. That the Court below misdirected itself in law and procedure applicable to judicial review, when not so as Order 53 of the Rules of the Supreme Court (RSC) 1999 Edition provides for appeals against a ruling on judicial review.**
- 2. That the Court below erred in law and in fact when it held that there were no plausible reasons advanced for the delay in appealing against the ruling on the substantive judicial review application, and that he saw no prospects of success.**

3. **That the Court below misdirected itself in law and in fact when it held that there was nothing in the Respondent's affidavit that offended Order V Rule 15 of the Rules of the High Court Act and discharged the stay of execution of the ruling on judicial review on that account.**

4.0 THE APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

- 4.1 The Appellant's heads of argument and authorities were filed into Court on 17th October, 2019 and on which the Appellant relied to support its grounds of appeal.
- 4.2 With respect to ground one, the Appellant's Counsel submitted that judicial review applications in Zambia are premised on Order 53 of the Rules of the Supreme Court of England and that Order 53 is applied in judicial review process by virtue of the provisions of section 10 of the High Court Act, Chapter 27 of the Laws of Zambia. In this regard, it was submitted that Order 53/3/4 of the Rules of the Supreme Court (RSC) 1999 provides that:

- "(4) Where the application for leave is refused by the Judge, or is granted on terms, the applicant may renew it by applying –**
 - (a) in any criminal cause or matter, to a divisional Court of the Queens Bench Division;**

(b) in any other case, to a single judge sitting in an open court, or if the Court so directs, to a divisional court of the Queen's Bench Division."

4.3 Appellant's Counsel further referred to Order 53/14/22 of the RSC, 1999 which provides that:

"if leave is refused after a hearing, the application for leave can be renewed before the Court of Appeal within seven days under Order 59 rule 14(3). If the Court of Appeal grants leave the substantive application will be sent back to be heard in the Queen's Bench Division..."

4.4 Appellant's Counsel relied on the case of **DERRICK CHITALA (Secretary of the Zambia Democratic Congress) v ATTORNEY GENERAL**¹ in which the Supreme Court entertained an appeal against the High Court's refusal to grant leave for commencement of judicial review proceedings and stated that:

"Under the Rules of the Supreme Court of England which apply to supply and *cassus omissus*, in our own rules of practice and procedure, this would be a renewal of the application for leave to the appellate court."

4.5 It was argued that in light of the cited provisions of the law, the Court below misdirected itself in law and in fact when it refused to

grant an application for leave to appeal against its refusal to grant leave to apply for judicial review.

- 4.6 Further reliance was placed on the case of **YOSI MITI v ATTORNEY GENERAL**² in which the Appellant appealed to the Supreme Court after the High Court discharged the *ex-parte* order for leave to apply for judicial review that was granted after the inter-partes hearing and the application to stay the discharge was also declined. The Supreme Court held that:

"Since the judicial review proceedings had been extinguished by the discharge, there should be no stay in the absence of fresh leave being sought to institute similar proceedings."

- 4.7 Appellant's Counsel distinguished the cited case from the present case in that an application was made in this case to institute proceedings in the Court of Appeal which should have been granted as permitted by the law.
- 4.8 With respect to ground two, it was argued that after the ruling of 27th June, 2018, the Appellant sought the Court's interpretation on who was supposed to pay for the second audit of the Appellant's accounts for the financial years 2016 to 2017, 2016 to 2017 and 2017 to 2018.

4.9 The Appellant further argued that the application followed a back and forth discussion over an administrative inquiry over the issue of paying the auditor since the Appellant had already paid JNMA Chartered Accountants. It was submitted that the Court's decision on the interpretation of its earlier ruling was delivered on 9th May, 2019. It was, therefore, argued that at no time was the Appellant idle for the Court to conclude that it advanced no plausible reasons for the delay in appealing against its ruling.

4.10 In support of ground three, Appellant's Counsel argued that the Court below erred when it found that paragraph 12 of the Respondent's affidavit in opposition did not consist of a prayer and conclusion contrary to Order 5, Rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia and which provision states that:

"An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion."

4.11 To fortify the Appellant's argument, reliance was also placed on **Bryan Garner's BLACK'S LAW DICTIONARY** where the learned author defines a prayer at page 1294 as:

"A request addressed to the Court and appearing at the end of a pleading; a request for specific relief or damages...."

4.12 A special prayer is defined as:

"A prayer for the particular relief to which a plaintiff claims to be entitled."

4.13 Appellant's Counsel also reproduced the said paragraph 12 complained of which states:

"That the Applicant's matter has no prospects of success on appeal and therefore this honourable Court should indulge itself in this fact when deciding whether or not to grant leave to appeal against the two rulings dated 27th June, 2018 and 9th May, 2019."

4.14 It was further submitted that Order 5 Rule 16 of the High Court Rules states that:

"Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true."

4.15 Appellant's Counsel concluded by praying that the whole appeal succeeds with costs.

5.0 THE RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE APPEAL

- 5.1 Respondents' heads of argument were filed into court on 27th November, 2019.
- 5.2 In opposing ground one, it was submitted on behalf of the Respondents, that the Appellant is misguided on this ground of appeal as the Court below did not err in law and in fact when it ruled that the Appellant could not be granted leave to appeal against the decision denying it leave to apply for judicial review. Reliance was placed on Order 59, rule 14(3) of the Rules of the Supreme Court that was referred to by Appellant's Counsel in her arguments. It was submitted that in view of the guidance in Order 59, rule 14(3) that if leave is refused after a hearing, the application for leave can be renewed before the Court of Appeal within seven days, it is clear that there is no provision for leave to appeal despite the fact that the ruling gave leave to appeal.
- 5.3 Respondents' Counsel cited the case of **DEAN MUNG'OMBA & ORS v PETER MACHUNGWA & ORS**³ where the Supreme Court guided on the need to strictly adhere to the provisions of Order 53 in judicial review applications in our jurisdiction.

5.4 To fortify their argument the Respondents further relied on section 8(2) of the Court of Appeal Act № 7 of 2016 which provides that:

"Despite subsection (1) where this Act or rules do not provide for a particular point of practice or procedure, the practice of the Court shall be –

(a) in relation to civil matters, in accordance with the Supreme Court Practice, 1999 (White Book) of England and the law and procedure in the Court of Appeal in England in force up to 31st December, 1999,"

5.5 It was submitted that the cited provision confirms that total regard must be had or given to the provisions of the Rules of the Supreme Court of England, 1999 when there is a *lacuna* in our own laws. It was further submitted that since there are no provisions on practice and procedure in relation to judicial review in the High Court or Court of Appeal Acts, the procedure to be adhered to is what is set out in the Rules of the Supreme Court of England.

5.6 In that regard, it was submitted that the Appellant mistakenly relied on the **DERRICK CHITALA** case in support of ground one. That case was distinguished from the present case in that the Appellant in the **DERRICK CHITALA** case rightly appealed to the Supreme Court for leave to apply for judicial review which was in essence a renewal

as stated by the Supreme Court. Whereas *in casu*, the Appellant has not renewed its application for leave to apply for judicial review. It is, contended, that the appeal is not properly before this Court and that the Court below was on firm ground by refusing to grant leave to appeal. Respondents' Counsel submitted that ground one must fail as it is not legally tenable.

- 5.7 In response to ground two, Respondents' Counsel reiterated their earlier submissions made in response to ground one and submitted that ground two is devoid of merit based on the argument that an appeal is not the proper procedure for the Appellant to take. It was further submitted that the application to appeal out of time against the ruling dated 27th June, 2018 was made under misconceived law as the Court below had no jurisdiction to grant leave to appeal out of time against its ruling by which it declined to grant leave to the Appellant to commence judicial review. It is contended that the requirements to be met when granting leave to appeal or appeal out of time, and the applicability of the Court's discretion in such applications are not tenable in this case as it was commenced under Order 53 of the Rules of the Supreme Court of England.

5.8 Respondents' Counsel, therefore, prayed that ground two fails as it is not supported by any law.

5.9 In response to ground three, Respondents' Counsel drew the Court's attention to the fact that the ruling that the Appellant seeks this Court to determine on appeal was made following the Appellant's application to raise a preliminary issue on the competency of the Respondents' affidavit in opposition filed in the Court below. It was submitted that they were guided by section 23(1)(e) of the Court of Appeal Act, No 7 of 2016 which provides that no appeal can lie to this Court against a ruling delivered on an interlocutory application by a Judge of the High Court without leave of a judge of that Court. It is the Respondents' contention that since there is no evidence on record of leave having been obtained, ground three is incompetently before this Court and they prayed that it should fail as it lacks merit.

6.0 THIS COURT'S DECISION

6.1 We have considered the grounds of appeal, respective arguments by Counsel, authorities cited and ruling appealed against. As we earlier stated in the introduction and background to the appeal, the Court below in its ruling of 6th June, 2019 dealt with the Appellant's

application to stay execution of that Court's rulings dated 27th June, 2018 and 9th May, 2019 respectively and declined to grant the orders sought.

- 6.2 With regard to ground one, the Appellant contends that the Court below misdirected itself in law and procedure applicable to judicial review when it held that a ruling on an application for judicial review is not appealable. It is clear from the evidence on record that the ruling referred to is the one dated 27th June, 2018 which is found at pages 56 to 61 of the record of appeal. From the contents of the ruling, what is apparent is that the Appellant applied *ex-parte* for leave to commence judicial review proceedings against the 1st Respondent herein and the Court below refused to grant the leave after delving in the main application for judicial review and determining it and stating that:

"On the basis, leave for judicial review is refused. For the avoidance of doubt, this entire application is dismissed in its totality."

- 6.3 The law pertaining to judicial review in Zambia is governed by Order 53 of the Rules of the Supreme Court, 1999 Edition because our High Court Act does not provide for the procedure and practice for judicial

review applications. As stated by the Supreme Court of Zambia in the case of **DEAN MUNG'OMBA & ORS v PETER MACHUNGWA & ORS**, Order 53 is comprehensive as it provides for the basis of judicial review: the parties; how to seek the remedies and what remedies are available.

- 6.4 In the Appellant's case, the application for leave to commence judicial review proceedings having been refused by the Court below, the Appellant should have proceeded as stipulated under Order 53 rule 3(4), Order 53 rule 14(22) and Order 59 rule 14(3) of the Rules of the Supreme Court by way of renewal of the application for leave before the Court of Appeal within seven days of the refusal.
- 6.5 Therefore, in light of the cited provisions of the Rules of the Supreme Court, we are of the view that ground one is misconceived as the Appellant should have renewed its application before the Court of Appeal within seven days of the refusal to grant leave by the Court below.
- 6.6 By way of guidance, we wish to state that the learned trial Judge misdirected himself by delving in the judicial review application and its merits when he was merely tasked with determining whether or

not there were factors upon which judicial review proceedings could be founded. He, therefore, *should* have focused on the provisions of Order 53 of the Rules of the Supreme Court, 1999 for guidance.

- 6.7 To fortify our position that the Appellant's appeal is misconceived and not properly before us, we refer to Order 53 rule 13 of the RSC which provides that:

"No appeal shall lie from an order made under paragraph (3) of rule 3 on an application for leave which may be renewed under paragraph (4) of that rule."

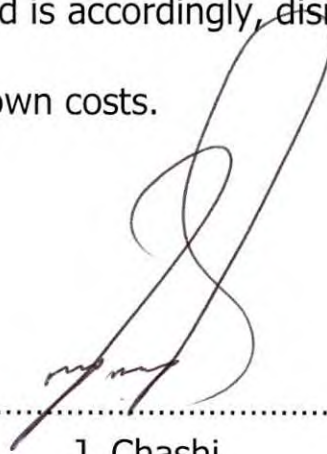
- 6.8 We further rely on the case of **CHIKUTA v CHIPATA RURAL COUNCIL**⁴ where the Supreme Court held that where the mode of commencement is wrong, the court has no jurisdiction to make any declaration. Similarly, in the present case, we have no jurisdiction to entertain grounds one and two.

- 6.9 With regard to ground three which is challenging the ruling of the Court below on the preliminary issue raised with respect to certain paragraphs of the Respondents' affidavit in opposition, as rightly pointed out by Respondents' Counsel, there is no evidence of leave having been granted to appeal against the interlocutory order or

ruling as required by section 23(1)(e) of the Court of Appeal Act, No 7 of 2016. We find that failure to obtain leave to appeal by the Appellant goes to the jurisdiction of this Court to entertain the appeal in ground three. For these reasons, this ground also fails and it is dismissed.

6.10 In conclusion, all three grounds being unsuccessful, the net result is that the appeal fails and is accordingly dismissed.

6.11 Each party to bear its own costs.



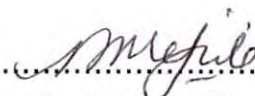
J. Chashi

COURT OF APPEAL JUDGE



F. M. Lengalenga

COURT OF APPEAL JUDGE



B. M. Majula

COURT OF APPEAL JUDGE