

IT

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

Appeal No.33/2020
CAZ 08/220/2020

B E T W E E N :

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

BETWWEN:

THE PEOPLE

V

THE ATTORNEY GENERAL

THE ENERGY REGULATION BOARD



APPLICANT

1st RESPONDENT

2nd RESPONDENT

CORAM: **Kondolo, Chishimba and Mulongoti JJA on**

18th June, 2020 and 29th September, 2020

For the Applicants : Mr. M. Mwenye (S.C.) & Mr. Kaluba of MessrsMwenye & Mwitwa Advocate
Mr. R Simeza of Messrs Simeza, Sangwa & Advocates

For the 1st Respondent: Mr. L Kalaluka (S.C.) Attorney General of Zambia, Mr. J. Simachela, Chief State Advocate, and Ms. J. Magulanika, Acting Senior Advocate, Ms. A Chisanga and M. S. K Kaoma, State Advocates

For the 2nd Respondent: Mr. A. Musukwa and Mr. N. Mulemba of Messrs Andrew Musuka & Co.

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the court.

CASES REFERRED TO:

1. R V. Inland Revenue Commissioner, ex- parte v. National Federation of Self Employed and Small Business Ltd (1982) AC 617.
2. Wynter M. Kabimba v. The Attorney General 1996 S.J.
3. Attorney General v. Nigel Mutuna and Others Appeal No. 88 of 2012.
4. Zambia Wildlife Authority and others v. Mutete Community Resources Board Development Cooperative Society (2009) ZR 156.
5. R v. Trade Secretary ex-parte Perestello 1981 QB 19.
6. CK Scientific Group Zambia Ltd v. Zambia Wildlife Authority (2014) IZR 123.
7. Lungwangwa and Others v. Attorney general CAZ/08/178/2017 (unreported).
8. Motto (SG Zambia Association of Timber and Forestry Based Industry) v. Director of Forestry and another 2017/HP/1016.
9. Chitala v Attorney General SCZ Judgment No. 140f 1995.
10. North-Western Energy Company ltd v. The Energy Regulation Board (2011) ZMHC 78.
11. Zambia State Insurance Pension Trust v. Zambia Extracts Oils and Colourants Limited and Another (2014) ZMHC 178.
12. B. P Zambia Plc v. Interland Motors limited SCZ Judgment No.5 of 2002.
13. Chick Masters Limited v. Investrust Bank PLC Appeal No. 74 of 2014.
14. R v. Epping and Harlow General Commissioner Exp. Goldshaw (1983) 3 ALLER 257
15. Development Bank of Zambia v. KPMG Peat Mawwick (1995/97) ZR 187 (SC)

LEGISLATION AND OTHER WORKS:

1. Order 53 of the Rules of the Supreme Court of England 1965.
2. Statutory Instrument No. 57 of 2020.

3. Judicial Review by Graham Aldous and John Alder, 2nd Edition Butterworth London (1993)

1.0 INTRODUCTION:

1.1 The applicant Copperbelt Energy Corporation PLC (CEC) by way of renewal seeks leave of this court to commence judicial review proceedings which was declined in the court below. The Notice of Renewal is made pursuant to **Order 53 Rule 14 (61)** of the **Rules of the Supreme Court of England 1965 (RSC)**. The application is supported by a statement of facts dated 22nd June 2020.

1.2 The sought leave is in respect of the decision made by the Minister of Energy dated 29th May 2020 declaring the applicant's transmission and distribution lines as common carrier to be used on the terms and conditions determined by Energy Regulation Board (ERB) and the decision of ERB dated 31st May 2020 directing the applicant to charge a wheeling tariff of USD 5.84/KW/month.

2.0 BACKGROUND FACTS:

The applicant (CEC) is an independent power generation, transmission, distribution and supply company. It supplies electricity to the Copperbelt Province of Zambia and to mining entities in the Democratic Republic of Congo (DRC).

It owns, wheels and operates transmission inter connections with DRC and 43 other substations across the Copperbelt.

- 2.1 On the 21st November 1992, the applicant (CEC) and ZESCO Limited (ZESCO) entered into a contract for the supply and purchase of power, (hereinafter referred to as the BSA agreement), which expired on 31st March 2020. The applicant in turn entered into various long-term power supply agreements amongst them, a contract with Konkola Copper Mines Plc (KCM) which expired on 31st March 2020 and was extended to 31st May 2020.
- 2.2 According to the applicant, whilst negotiating with the Government Negotiating team (GNT) for a new Power Supply Agreement (PSA) to replace the Bulk Supply Agreement (BSA), it became apparent that the intention was to agree on a new agreement on totally different terms. As at 31st of March 2020 there was no agreement reached between the GNT and CEC.
- 2.3 On the same date, the Minister of Energy at a press briefing announced that a decision had been made declaring CEC's transmission and distribution lines as common carrier and imposing unilateral and non-negotiable terms for an interim arrangement of power supply between CEC and ZESCO.

Despite the terms not being acceptable to the applicant, ZESCO made attempts to enforce the unilateral terms.

- 2.4 Whilst the impasse between CEC and ZESCO continued, the applicant attempted to recover a debt owed to it by KCM in excess of USD144million. This arose from the PSA between the two parties. KCM is now under the control and direction of the Government of Zambia through its appointed provisional liquidator. Though the PSA expired on 30th March 2020, its terms were extended to 31st of May by a letter of intent dated 17th April 2020.
- 2.5 The applicant stated that KCM as a customer is under a duty to pay its electricity bills for power supplied to it. Therefore, the applicant is and was legally entitled to suspend supply of electricity to KCM. The debt of USD 144 million is not disputed by KCM which entered into a supplementary agreement on 18th July 2019, undertaking to liquidate the indebtedness.
- 2.6 In furtherance of the above, the applicant and the liquidator of KCM met on 28th May 2019 and agreed on the terms to facilitate the continued supply of electricity between the parties as well as the settlement of the amounts outstanding

and the payment of future supply of electricity. The applicant went on to state that 47% of the total electricity generated by it is supplied to KCM, hence the adverse impact on the applicant.

- 2.7 Due to persistent defaults in settling the debt owed, CEC restricted supply to KCM, which in turn issued court process restraining CEC from disconnecting power supply.
- 2.8 On 26th May 2020, ZESCO requested use of CEC transmission network to supply power to an unknown client on the Copperbelt. The request was acknowledged as long as the customer involved had no valid PSA with CEC and did not owe the applicant money. On the 29th May 2020, the Minister of Energy requested the applicant to give wheeling path to ZESCO to supply power to KCM. Upon realizing that the intended customer was KCM, the applicant insisted that it would restrict power supply to KCM since the PSA had expired and KCM was indebted to it.
- 2.9 On the 29th of May 2020, Statutory Instrument No. 57 of 2020 was issued by the Minister of Energy declaring the applicant's transmission and distribution lines as common carrier. According to the applicant, the declaration is intended to

facilitate the transmission of electricity power from ZESCO to KCM using its infrastructure.

- 2.10 On 31st of May 2020, pursuant to the above, ERB communicated a wheeling tariff of USD 5.84/km/month for use of the applicant's infrastructure. This was set without any consultation with the applicant and is equivalent to 30% of its current terms charged for use of the CEC network. Despite the above, the applicant continued to supply power to KCM as directed by the Minister.
- 2.11 The applicant states that the declaration by the Minister to declare its transmission and distribution lines as common carriers affected its entire network including lines which supply other customers.

3.0 AFFIDAVITS IN OPPOSITION

The 1st respondent filed an affidavit in opposition dated 13th July 2020 deposed by the Permanent Secretary at Ministry of Energy. It was stated that following issuance of S.I No. 57/2020, the Applicant's transmission and distribution lines were declared common carrier for purposes of the Electricity Act and to be used on terms and conditions determined by ERB.

- 3.1 The deponent further stated that the wheeling of power to ZESCO for it to supply KCM was temporal, pending the negotiation and finalization of the wheeling agreement as required by law.
- 3.2 The 1st respondent disputes the assertion that it denied the applicant an opportunity to negotiate with ZESCO. There was not ample time to conclude the negotiations by 1st June 2020, hence the temporal measures implemented. Neither was the applicant prevented from enforcing its right against KCM for the debt owed. In any event there is a matter before court between ZESCO and KCM on similar facts.
- 3.3 The 2nd respondent filed an affidavit in opposition. The pertinent facts being that ERB was informed about the negotiations for a wheeling agreement between the applicant and ZESCO limited. The said parties did not reach an agreement before power supply was to be cut off from KCM on 1st June 2020.
- 3.4 The 2nd respondent stated that the threat by the applicant to discontinue supply of power to KCM was confirmed by the applicant through a media statement issued on 29th April 2020. On the same date, the Minister of Energy issued a

Statutory Instrument declaring the distribution lines common carriers.

- 3.5 In view of the lack of agreement between ZESCO and CEC, the 1st respondent further requested ERB to determine a provisional wheeling tariff pursuant to Section 15 of the Electricity Act. ERB accordingly sought approval of the interim wheeling charge from the Minister, who approved the same in a letter dated 31st May 2020 and urged ERB to consult all parties when determining the final terms and conditions.
- 3.6 According to the deponent, ERB has the legal mandate to determine terms and conditions governing a common carrier where the parties fail to reach an agreement. That due to the appellant and ZESCO failing to finalize a wheeling agreement before 1st June 2020, ERB determined an interim wheeling charge of US\$ 5.84/KW/Month pending determination of a final tariff. The said tariff was determined in accordance with the wheeling tariffs used by Southern African Power Pool (SAPP) and existing domestic ZESCO wheeling tariffs for retail customers on the Copperbelt. ERB stated that it had commissioned a cost of service study (COSS) in December

2019 to come up with the minimum cost reflective rates for wheeling and power supply, which is still in progress. Further that in any event, the applicant is protected from any loss of income occasioned by the wheeling rate set by ERB because the executed wheeling agreement between ZESCO and applicant would be back dated to 1st June 2020 regardless of the date of execution.

4.0 ARGUMENTS ADVANCED BY THE PARTIES:

- 4.1 The applicant relied on its canvased written submissions dated 22nd June 2020. The applicant began by submitting that under Order 53 of the Rules of the Supreme Court of England (RSC) an applicant can renew an application for leave to commence judicial proceedings where it is denied by the court below.
- 4.2 As regards the requirements for the grant of leave under Order 53/14/58, an applicant must have sufficient interest, a case sufficiently arguable to merit investigation at a substantive hearing and must promptly apply for leave. In terms of the threshold to be met for the grant of leave to commence judicial review proceedings, the case of **R v. Inland Revenue Commission v. National Federation of**

Self Employed and Small Business ltd ⁽¹⁾ was cited.

Namely whether on the material available, there is disclosed what might on further consideration turn out to be an arguable case for granting the relief claimed.

- 4.3 As regards the relief sought for an order to stay the decision of ERB to impose a wheeling tariff pending determination of the application, the case of ***Wynter M. Kabimba v. The Attorney General*** ⁽²⁾ was cited for the proposition that a decision of a person/body which is amenable to challenge by judicial review can be stayed pending determination.
- 4.4 It was contended that the applicant has sufficient interest in the matter as it was directly affected by the decisions made by the Minister and ERB. Further, that it has presented an arguable case fit for further investigation at a substantive hearing. As authority, the case of ***Attorney General v. Nigel Mutuna and Others*** ⁽³⁾ was cited in which it was stated that at leave stage, all the applicant is required to present is sufficient evidence for the court to be satisfied that the issues raised require further investigation, that there is a prima facie case or arguable case fit for further investigation. In addition, the cases of ***Zambia Wildlife Authority and others vs.***

Mutete Community Resources Board Development Cooperative Society⁽⁴⁾ and R v. Inland Revenue Commissioner, ex parte National Federation of Self Employed and Small Business Ltd⁽¹⁾ were cited on the issue of grant of leave.

- 4.5 The applicant submits that the basis for the challenge are namely illegality, procedural impropriety and improper motive/bad faith. Under illegality it is contended that S.I No. 57 of 2020 promulgated by the Minister of Energy is ultra vires or repugnant to Section 15(2) of the Electricity Act.
- 4.6 The applicant's contention being that once the transmission and distribution lines are declared a common carrier, the terms and conditions of use ought to be agreed between the owner of the transmission and distribution lines and the enterprise intending to use the lines. The matter is only referred to ERB in the event of default of agreement by the said parties. Therefore, the Minister has no power under **Section 15 (2) of the Energy Act** to order that the terms and conditions of use of the transmission/distribution line should be determined by ERB. In a nutshell that, the Minister acted

outside the law by ignoring the procedural rules laid down in **Section 15 (2)** of the said Act.

- 4.7 In the second instance, the Minister's decision is argued to be illegal and contrary to **Section 15 (1) of the Electricity Act**, which only empowers him to declare a transmission/distribution line as a common carrier but not declare the entire transmission network as a common carrier. It was contended that there is a distinction between a distribution and transmission line and a distribution and transmission system or network.
- 4.8 The Minister ought to have specified which of the lines he had declared a common carrier out of the numerous transmission/distribution lines owned by the applicant dedicated to numerous customers as earlier aforementioned.
- 4.9 In regard to the decision by ERB, it was submitted that ERB's role to set a wheeling tariff only comes into play when the parties have failed to negotiate and agree on a tariff. The '*interim*' tariff determined by the ERB is contrary to **Section 15 (2) of the Electricity Act**. The said **Section 15 (2)** kicks in upon default of agreement.

5.10 In respect of the ground of bad faith and improper motive, the applicant contends that the Minister utilized his power under **Section 15** to prevent the applicant from enforcing its contractual rights against KCM (in Liquidation) and to punish it for what he termed “**reckless actions**”. Thereby interfering in the contractual obligations of the parties to the detriment of CEC. The said KCM owes monies in excess of USD 144 million, accrued during the period the company was under the charge of the provisional liquidator. Therefore, the Minister acted not only in bad faith and for improper motives, the decision was also ‘infected’ by malice and improper purpose of preventing recovery of debt owed by KCM.

4.11 In conclusion, the applicant submits that it has demonstrated on the material before court that it has an arguable case fit for further investigation at the substantive hearing of the application for judicial review and that therefore leave ought to be granted. The applicant prayed that the Minister’s decision to declare lines as common carrier and to impose a wheeling tariff be stayed pursuant to **Order 53 Rule 3(10) (a) of the Rules of the Supreme Court.**

4.12 The 1st respondent submits that the issue is whether the applicant has established a *prima facie* case warranting a full investigation at the hearing of a substantive application for judicial review. The 1st respondent cited the cases of **CK Scientific Group Zambia Ltd v. Zambia Wildlife Authority**⁽⁶⁾ and **Lungwangwa and Others v. Attorney general**⁽⁷⁾ which dealt with the threshold to be met in an application for leave to commence judicial review.

4.13 The contention by the 1st respondent is that the material before court does not show an arguable case fit for full investigation at a hearing. Contrary to the contention by the applicant that S.I No. 57/2020 is ultra vires Section 15 of the Electricity Act, the cited provision empowers the Minister of Energy to make regulations declaring a transmission and distribution line as a common carrier. Reference was made to the Preamble of the said Act which sets out the purpose and objective of the Act.

4.14 It is argued that the decision by the Minister falls within the purpose of the Enacted law and was made to facilitate the transmission of the power. The network remains the applicants. Though the Applicant argued that it was not given

an opportunity to negotiate the terms as per procedure, the measures and decisions made by ERB were temporal. It was not possible to conclude negotiations for the distribution of power before the pending disconnection of power. The right to negotiate was not taken away as contended by the applicant.

4.15 In respect of the allegation that the decision was made in bad faith, it was submitted that the Minister's decision was not made in bad faith. That it was made within the legal limits of Section 15 of the Act. The High Court decision of **Motto (SG Zambia Association of Timber and Forestry Based Industry) v. Director of Forestry and another** ⁽⁸⁾ was cited on the issue of bad faith. The 1st respondent went on to refer to the cases of **Chitala vs. Attorney General** ⁽⁹⁾ and **North Western Co Ltd v. Energy Regulations Board** ⁽¹⁰⁾, which dealt with the concepts of bad faith, improper motives and irrationality.

4.16 The argument by the 1st respondent being that there was an impending crisis, namely the threat of disconnecting power supply to KCM, by the applicant since ZESCO has no infrastructure of its own to supply power to KCM, the Minister invoked his power under the Act.

4.17 The 1st respondent contends that the applicant must prove that the decision was infected with improper motives, such as fraud/or dishonesty malice or personal interest and the burden of proof is heavy. The 1st respondent went on to contend that in any event nothing stops the applicant from exercising its contractual right against KCM in respect of the debt of US\$ 144 million. As authority the case of **Zambia State Insurance Pension Trust v. Zambia Extracts Oils and Colurants Limited and another**⁽¹¹⁾ was cited.

4.18 The third argument advanced by the 1st respondent is that the application for leave is an abuse of court process in that there is pending before the High Court another matter in cause 2020/HP/0563, in which the applicant has been sued by ZESCO and KCM. We were drawn to the attention of the cases of **B. P Zambia Plc vs. Interland Motors Limited**⁽¹²⁾ and **Chick Masters Limited vs. Investrust Bank PLC**⁽¹³⁾ on the issue of abuse of court process.

4.19 It was submitted that the application for leave to commence judicial review should be dismissed as it does not disclose an arguable case fit for full investigation at trial. The 2nd respondent contends that the applicant ought to have instead

proceeded in accordance with section 34 of the Energy Regulation Act instead of commencing judicial review proceedings against ERB. Therefore, the renewed application should be denied because the applicant had an alternative avenue. As authority, **Order 53/14/27** and the case of **R v. Epping and Harlow General Commissioner Exp. Goldshaw (14)** were cited.

4.20 As regards the alleged grounds of illegality and procedural impropriety, reference was made to sections 2, 3 and 15 of the Electricity Act. It was argued that ERB has the legal mandate to approve, determine, review and regulate wheeling charges when there is no agreement reached between the owner of the transmission and the person intending to use those facilities. The wheeling charge was effected within the confines of the Act, which was approved by the Minister.

4.21 In response to the issue of improper motive/ bad faith, the 2nd respondent contends that there was no improper motive or bad faith on the part of ERB. The wheeling charge was not done arbitrarily and was for an interim period.

4.22 As regards the contention of unreasonableness of the decision to arbitrarily determine the wheeling charge in issue, ERB

submits that the charges were based on SADC region approved rates and rates chargeable to Copperbelt customers. It was prayed that the renewed application for leave be denied and dismissed.

5.0 ISSUES FOR DETERMINATION:

5.1 We have considered the renewed application for leave to commence judicial review. We have also considered the authorities cited and the arguments advanced by the Learned State Counsel on record and Advocates. We have further considered the highlighted arguments at the hearing of the application.

5.2 The issues for determination arising from the arguments advanced and the facts are as follows;

- (i) *Whether the applicant had an alternative avenue available to exhaust instead of seeking leave to commence judicial review proceedings*
- (ii) *Whether the action is an abuse of court process*
- (iii) *Whether the applicant has shown sufficient interest*

(iv) *Whether there is an arguable case fit for further investigation at a substantive hearing.*

6.0 REASONING OF THE COURT:

6.1 The grant or refusal of leave involves the exercise of judicial discretion. It is trite that the purpose of the requirement to obtain leave to commence judicial review, is designed to prevent the time of the court from being wasted with trivial and frivolous complaints etc. It is a prerequisite to making a substantive application for judicial review. An applicant has establish that he/she has arguable case fit for further investigation at the substantive hearing.

6.2 At the leave stage, an applicant must show sufficient interest in the matter, that it is affected in some way by the decision being challenged. The matter must be concerned with public law, based on some rule of public law. The decision complained of must have been made by a public body established by statute. We will not belabor on the jurisprudence on the question of grant of leave, which both Learned State Counsel have ably cited and stated.

6.3 Before determining whether there is a case fit for further investigation at the substantive hearing of the application for

judicial review, we shall determine the issue raised by the respondents in respect of an alternative avenue. The 2nd respondent contends that the applicant ought to have instead proceeded in accordance with section 34 of the ERB Act. The Learned State Counsel contended in the second instance that the alternative avenue is in form of the court proceedings sought under Cause number 2020/HP/0563 commenced on 3rd June 2020 between ZESCO and KCM against the applicant.

6.4 The State further contends that the applicant also failed to disclose full material facts of the proceedings under 2020/HP/0563 and the injunction order restraining the applicant from distributing power. Further, that even the basis upon which Judge Bowa refused to grant leave in the lower court was not disclosed.

6.5 We are of the view that the issue of exhaustion of alternative remedies only arises when an applicant seeks leave to commence judicial review of the decision assailed, without pursuing available remedies. It is trite that where there is a clear procedure for redress of a particular grievance by an Act, the procedure should be strictly adhered to before the jurisdiction of the court is invoked.

6.6 The first contended avenue of recourse is allegedly pursuant to section 34 of the Energy Regulation Act No. 12 of 2019 which states that

"A person aggrieved with any decision of the Energy Regulation Board may appeal to the Minister within thirty days of the decision in the prescribed manner and form".

We have perused the decision effected by the Minister under **Section 15 of the Electricity Act.** The said section provides that;

"15. (1) The Minister may, by statutory instrument, declare a transmission or distribution line as a common carrier for the purpose of this Act."

The provision empowers the Minister to declare by statutory instrument a transmission or distribution line as a common carrier. In our view, the decision against which leave to commence judicial review is sought, was made by the Minister of Energy pursuant to the Electricity Act. Whereas **Section 34 of Energy Regulations Board Act** cited by the respondents relates to decisions made by the ERB under the Energy Regulation Act No. 12 being appealable to the Minister within thirty days of the decision. We therefore reject the contention that the applicant had an alternative avenue in respect of the decision of the Minister issued in **Statutory**

Instrument Number 57 of 2020. We refer to the said Statutory Instrument made pursuant to the Electricity Act.

6.7 As regards the 2nd alternative avenue namely, the suit commenced between ZESCO Limited, Konkola Copper Mines PLC (in-Liquidation) vs. Copperbelt Energy Corporation that cannot in our considered view amount to an alternative remedy or avenue. The said suit is between the aforestated parties and does not involve the decision made by the Minister. It is a suit commenced by ZESCO AND KCM (in Liquidation) seeking a declaration for an order that the action by the defendant (CEC) to unilaterally restrict power supply to the 2nd plaintiff (KCM) contravenes the law and an order of injunction. The issues therein are unrelated to the issue in casu. Furthermore, this does not amount to an alternative remedy contemplated by statute under the Electricity Act.

7.8 The second issue raised, connected to the above is whether the application for leave is an abuse of court process. The respondents contend that because there is another matter before court (2020/HP/0563) in which the applicant has been sued by ZESCO, the application for leave is an abuse of court process. Abuse of court process refers to instances where

parties commence a multiplicity of procedures and proceedings over the same subject matter. See the cited case of ***Development Bank of Zambia and KPMG Peat Marwick (15).***

7.9 Abuse of court process has been defined as improper and tortuous use of a legitimately issued court process to obtain a result that is beyond the process's scope. It also refers to relitigations of the same subject matter from one action to another action. See the case of ***BP Zambia PLC vs. Interland Motors Limited (supra).***

7.10 In respect of the issue of abuse of court process, we are of the view that there is no abuse of process by the applicant. The action under 2020/HP/0563 is not in respect of the same subject matter. The matter before us is on the subject of judicial review, seeking leave to challenge the exercise of power by a public body. We fail to comprehend how the existence of court proceedings between commercial entities amounts to an alternative remedy. We reject the contentions therein.

7.11 As regards the threshold of sufficient interest or *locus standi*, it is not in issue that the applicant has sufficient interest in the matter. The decision sought to be challenged affects the

applicant's proprietary rights. We refer to the learned authors of **Judicial Review by Graham Aldous and John Alder**, at page 139 where it is stated that;

*"in order to obtain leave to apply for judicial review, an applicant must satisfy the court that he has sufficient interest in the matter to which the application relates. This in effect is the filter provided to bar from pursuing doomed applications through the courts. Following the House of Lords decision in *IRC v. National Federation of Self-employed and Small Businesses Limited* (1982) A. C. 617, the issue of whether a particular person or body is entitled to ask the court for relief is closely linked to the merits of the complaint which is being made. Leave ought therefore to be granted were an applicant can show that he might have locus standi to show the court for relief."*

We are of the further view that there is no issue of lack of promptness in making the application by the applicant.

7.12 Having resolved the above issues as to an alternative remedy, the sole issue remaining to be determined is whether or not there is disclosed an arguable case meriting further investigation at a substantive hearing. The Supreme Court in the case of **William Harrington v. Dora Siliya and the Attorney General** held that:

"a party wishing to commence judicial proceedings must apply for leave to do so and must show that there is a case fit for further investigations at full inter parties hearing"

Further, in the case of **Lieutenant Alick Bruce Makondo v. The Attorney General** the court held that:

"at leave stage an applicant has to demonstrate to the court that he has a case fit for further investigation and therefore deserves a hearing of the substantive matter at inter parties stage. Applications for leave to apply for judicial review, thus allow courts to sieve cases and weed out frivolous and vexatious and hopeless applications thereby, keeping busy bodies and vexatious litigants outside the doors of the court."

7.13 We are at this stage not concerned with the merits of the substantive hearing of the actual judicial review or its determination. We are merely concerned with whether the applicant has demonstrated to the court that it has an arguable issue to be resolved at a full hearing.

7.14 It is not in issue that the applicant's transmission and distribution lines were declared common carrier and ERB imposed a '*temporal*' tariff before the parties could agree. The background to what transpired prior to the declaration of the applicant's lines is stated earlier on in our back ground facts in the judgment and needs not be rehashed save to state that KCM in liquidation owed and owes the applicant an undisputed sum in excess of USD 144,000,000. A demand was made, followed by the applicant's intention to discontinue further supply of the commodity.

7.15 We refer to the media statement by CEC dated 29th May 2020 to the effect that it would from 1st June 2020 discontinue the supply of power to KCM in view of the outstanding debt of USD 132 million which as at 31st May 2020 was projected to grow to USD 143 million.

7.16 On the 29th of May 2020, **Statutory Instrument Number 57 of 2020** was issued by the Minister of Energy, the schedule therein stipulated that all transmission and distribution lines operated by Copperbelt Energy Corporation were declared common carrier. Prior to that, certain media statements were allegedly made or ascribed to the Minister of Energy warning the applicant not to disconnect supply to KCM in-liquidation.

7.17 In our view from the documents on record, we are satisfied that the applicant has met the threshold to be granted leave to commence judicial review proceedings. There appears to be an arguable case fit for further investigation at a substantive hearing of the judicial review proceedings vis-a-viz whether the decisions assailed were legally or procedurally effected, or made in bad faith and for improper motives.

7.18 We hold the view that the material on record in respect of the renewed application discloses an arguable case fit for further

investigation. We accordingly exercise our judicial discretion by granting leave to the applicant to commence judicial review proceedings in the court below.

7.19 We however decline to order a stay of execution of the decision made pending judicial review proceedings. Having granted leave to commence judicial review, we accordingly order that the said proceedings be heard before another Judge.

7.20 Costs to the applicant to be taxed in default of agreement.

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

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

.....
J. Z. Mulongoti
COURT OF APPEAL JUDGE