SCZ Judgment No. 5 of 2014

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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 162/2008**

HOLDEN AT KABWE **SCZ/8/179/2008**

(Civil Jurisdiction)

BETWEEN:

C K SCIENTIFIC GROUP ZAMBIA LIMITED **APPELLANT**

AND

ZAMBIA WILDLIFE AUTHORITY **RESPONDENT**

CORAM: Mambilima, D.C.J, Chirwa, Mwanamwambwa, J.J.S.

On the 10th of August, 2010 and 16th January, 2014.

For the Appellant: Mr L.C. Zulu, Messrs Malambo and Co.

For the Respondent: NKM and Associates but not in attendance.

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Liswaniso V. The People (1976) Z.R. 277 (SC)**

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2. **R V. Inland Revenue Commissioners Exparte National Federation of self-Employed Small Businesses Limited (1982) AC 617**
3. **R. V Secretary of State for the Home Department Ex parte Rukshanda Begum (1990) COD 107**
4. **Sharma V. Brown-Antoine (2007) 1 WLR 780 AT 787**
5. **R. Disciplinary Committee of the Jockey Club, exparte. The Aga Khan (1993) 2ALL ER 853**

Legislation referred to:

1. **Rules of the Supreme Court, 1999, Order 53, rule 3 and 14**

Other works referred to:

1. **Peter Murphy, 'Murphy on Evidence', 5th Edition, (2000), page 77**

Honourable Justice D.K Chirwa was part of the Court that heard this Appeal. He has since retired. This Judgment is, therefore, by the majority.

This is an Appeal against the Ruling of the High Court, dated the 12th of May, 2008. By that Ruling the learned trial Judge

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refused the Appellant's application for leave to apply for Judicial Review.

The brief facts of this matter are that on the 25th of March, 2008, the Appellant instituted an action against the Respondent, for:

> **"an order that leave be granted to them to apply for Judicial Review for an order of mandamus directed to the Zambia Wildlife Authority to compel or require them to adjudicated and award according to law, the tender No. ZAWA/DG/002/07 for the granting of Safari Hunting Concession in Nyampala Hunting Block in the Munyamadzi Game Management Area and that upon the granting of leave, the order acts as a stay of any further proceedings or decisions relating to the said Nyampala Hunting Block, other than those relating to the adjudication and award of the aforesaid Tender, until the final determination of this matter or until further order."**

The matter was heard exparte and the Appellants relied on the Affidavit of one Christopher Kangwa. He deposed that in the period of September and October 2007, the Respondent ran a series of public advertisements in which they invited tenders from interested bidders for granting of a Safari Hunting Concession in the Nyampala Hunting Block. He stated that the Appellant respondent by purchasing a bid document at the price of US$200. He went on

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to state that all bids invited in respect of the said tender were to be submitted by 14:30 hours on the 19th of October, 2007. He added that two months after the closing date, having heard nothing from the Respondents, the Appellant wrote a letter to the Respondent inquiring as to when the Respondent would announce the winning bidder. That on the 24th of December, 2007, the Respondent caused the public newspapers to run another advertisement in which they were seeking to employ a Professional Hunter to run the Nyampala Hunting Block. He went on to state that on the 26th of December, 2007, the Appellant instructed their advocates to write a letter to the Respondent expressing concern in relation to the bids. He added that in the meantime, fortuitously and anonymously, on the 19th of December, 2007, the Appellant received a copy of the valuation report prepared by the Committee through an unmarked post. That the report showed that the Appellant was the most responsive bidder. He deposed that on the 27th of December, 2007, the Appellant received a faxed letter from the Respondent dated 15th December, 2007, advising that the tender had been cancelled.

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On the 12th day of May, 2008, the learned trial Judge passed a Ruling, rejecting the Appellant's application for leave to commence Judicial Review proceedings. In that Ruling the trial Judge stated that:

> **"the Court had the privilege of having a sight of the referred to tender No. ZAWA/DG/002/07 which the Applicant's Advocate never submitted for the Court to look at, but same was quoted in the affidavit and was referred to by the Applicant's advocate viva voce."**

The Learned trial Judge proceeded to state that:

> **"Tender document No. ZAWA/DG/002/07 under Part II(E), on award of contracts, it is stated:**
>
> **19.1. Zambia Wildlife Authority reserves the right to accept or reject any bid, and to announce the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for its action."**

The Trial Judge then went on to say that:

> **"From this paragraph, it is quite clear that the Respondent had put it to who would be a bidder its stand in respect of awarding of a contract if at all the tender was to be awarded and what will happen if at all the tender was never awarded. The Applicant definitely must have come across this paragraph in the Tender document which is self explanatory and needs no further explanation as of the intention of the Respondent regarding Tender No. ZAWA/DG/002/07 which was open to the public for tender and invited interested bidders to obtain further information and bidding documents from the office of the Director General, at the Zambia Wildlife Authority, Head Office, Chilanga. Therefore, the Court**

> **has found out that there was nothing wrong for the Respondent to cancel the tender in their letter addressed to the Applicant dated 15th December, 2007. Thus the Applicant's application for leave to apply for Judicial Review is hereby dismissed."**

There are three Grounds of Appeal in this matter and these are:

Ground one:

> **The Learned Judge in the Court below erred in fact and law in personally seeking out a document that had not been produced in evidence on record and relying on the same.**

Ground two:

> **The Learned Judge in the Court below erred in fact and law by disregarding the impropriety of the Respondent's failure to assign reasons for cancellation of the tender notwithstanding the Court's reliance on Clause 19.1 Tender Document No. ZAWA/DG/002/07.**

Ground three:

> **The Learned Judge in the Court below erred in law in failing to appreciate the purpose of the process of obtaining leave in commencing Judicial Review proceedings.**

When the matter came up for hearing, counsel for the Appellant relied on the filed heads of Argument. There was no appearance from the Respondent and no Heads of Argument from them. We shall therefore deal with the matter on its merits. For

convenience, we shall deal with Ground one, then Ground three and lastly Ground two.

Under Ground one, Mr Zulu submits that by the ex-parte summons dated the 25th of March, 2008, the Appellant sought an order for leave to apply for Judicial Review against a decision by the Respondent. He added that the Appellant did not produce document No. ZAWA/DG/002/07 because it was lodged with the Respondent upon being successfully completed. He argued that the learned trial Judge fell into grave error by going out of his way to go and seek a document that had not been formally produced before the Court by the applicant. That it was erroneous on the part of the trial Judge to abandon his role as an adjudicator and taking up the role of Counsel for the Respondent. He added that if the document contained important provisions, the procedure the Court ought to have adopted was to grant leave to the Appellant so that it may commence proceedings by way of Judicial Review. That it was in those proceedings that the Respondent would have brought out clause 19.1 of Tender document No. ZAWA/DG/002/07 if it found

it relevant to the defence of the action. He submits that the only possible conclusion that may be drawn is that the learned Judge could have only obtained the document from the Respondent without the knowledge and involvement of the Appellant.

We have looked at the evidence on record and considered the submissions on this ground. **Peter Murphy** in his book entitled **'Murphy on Evidence', 5th Edition, (2000) on page 77**, stated that:

> **"the rule governing the admissibility of illegally or unfairly obtained evidence in civil cases is the same as that in criminal cases, namely that relevant evidence is admissible regardless of the manner in which it is obtained. The court is concerned with the relevance, not the source of evidence and will leave the parties to other remedies for any wrongful acts indulged in to obtain evidence…"**

In the case of **Liswaniso V. The People (1)**, this Court held that:

> **"Apart from the rule of law relating to the admissibility of in voluntary confessions, evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an in admissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether or not it violates a provision of the Constitution (or some other law)."**

We note that the provision in the tender document which the learned trial Judge relied upon is undoubtedly relevant to these proceedings. We wish to state that the tender document, in light of its relevance, should have been produced by the Appellant.

Order 53/14/57 provides that:

> **"an applicant for leave must show uberrima fides, and if leave is obtained on false statements or a suppression of material facts in the affidavit, the court may refuse an order on this ground alone."**

Therefore, it is a requirement for an applicant for leave to disclose all the necessary information and documents to the Court. The Appellant contended that they could not produce the document because it was lodged with the Respondent. We find this to be a mere excuse. The application rested on the award of the tender. So we believe that the Appellant should have made an effort to obtain the tender document for the Court to look at and make a decision based on the correct facts. The Tender document was crucial to the application as it had the terms and conditions which the Appellant agreed to. The Court will not grant an application for leave if there has been deliberate misrepresentation or concealment of material

facts in the applicant's affidavit. This is what happened in this case; material facts were not produced before the trial Court.

However, coming to the admissibility of the tender document, we do not believe that the rule on the admissibility of illegally or unfairly obtained evidence extends to evidence produced by the Court itself. We do not believe that the rule, stated above in **Murphy on Evidence** and the **Liswaniso** case envisaged a situation where the evidence would be coming from the Court itself. We believe that the rule envisaged a situation where the illegally or unfairly obtained evidence is coming from the parties to the proceedings. We wish to state that a Judge plays the role of an unbiased adjudicator who listens to both parties present their case before him. Even in an exparte application like in this case, the role of the Judge does not extend to him or her producing evidence from the bench. It is not the role of the Judge or Court to begin to look for evidence and rely on it. In the present case, it is not clear where the learned trial Judge obtained the tender document from because the application was made exparte. Proceeding in the manner in

which the learned trial Judge did breed suspicion on how the Judge found the document that he relied on. It also breeds suspicion that the learned trial Judge is biased or may have had an interest in the matter. We therefore agree with the submission by the Appellant that the Judge erred by taking into account evidence which he found from an unknown source and relied on it. We feel that what the Judge should have done was to order the Applicant to produce the tender document, since the Applicant had referred to it or it should have ordered that the application be heard inter parte. We therefore find that the learned trial Judge erred when he relied on the tender document produced by him. This Ground of Appeal therefore succeeds.

Under Ground three, Mr Zulu submits that it is trite law that the requirement to obtain leave to apply for Judicial Review serves a twofold purpose, namely:

(1) to eliminate frivolous, vexatious or hopeless applications for Judicial Review without the need for a substantive inter partes Judicial Review hearing: and

(2) to ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full inter partes hearing.

He added that the requirement that leave must be obtained is designed to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived. He cited the case of **R V. Inland Revenue Commissioners Exparte National Federation of self-Employed Small Businesses Limited**[(2)]**,** in support of his argument.

He added that it was held in the case of **R. V Secretary of State for the Home Department Ex parte Rukshanda Begum (3),** that the test to be applied in deciding whether to grant leave for Judicial Review is whether the Judge is satisfied that there is a case fit for further investigation at a full inter partes hearing of a substantive application for Judicial Review.

He argued that the privy council in a subsequent case of **Sharma V. Brown-Antoine (4)** stated that: " the ordinary rule now is that the Court will refuse leave to claim Judicial Review unless there is an arguable ground for Judicial Review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy…But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in application… It is not enough that a case is potentially arguable, an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen."

He added that if, on considering the papers, the Judge cannot tell whether there is, or is not, an arguable case, he should invite the putative Respondent to attend the hearing of the leave application and make representations on the question whether leave should be granted. He added that this would be in conformity with the flexible nature of the threshold test for the grant of leave. He submits that the learned trial Judge treated the application as though it were the actual hearing of the substantive application for Judicial Review itself. That the learned trial Judge was rigid in his application of the principles governing an application for leave. He stated that by the very fact that the learned trial Judge in the Court below saw it fit to go and seek out the tender document No. ZAWA/DG/002/07 shows that there was an arguable case for further investigation at inter partes hearing.

We have looked at the evidence on record and considered the submissions filed by the Appellant in this matter. **Order 53 of the Rules of the Supreme Court, 1999**, deals with Judicial Review. Rule 3 provides as follows:

"(1) no application for Judicial Review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made exparte to a Judge by filing;

(a) A notice containing a statement of

(i) The name and description of the applicant

(ii) The relief sought and the grounds upon which it is sought;

(iii) The name and address of the applicant's advocates(if any);

(iv) The applicant's address for service; and

(b) An affidavit verifying the facts relied on.

Order 53/14/21 provides that:

"no application for Judicial Review can be made unless leave to apply for Judicial Review has been obtained. Applications for leave are normally dealt with exparte by a single Judge, in the first instance without a hearing. The purpose of the requirement of leave is:

(a) To eliminate frivolous, vexatious or hopeless applications for Judicial Review without the need for a substantive inter partes Judicial Review hearing; and

(b) **To ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter partes hearing."**

Order 53/14/25 provides that:

"Judicial Review will not lie against a person or body carrying out private law and not public law functions"

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Order 53/14/54 provides that;

"the applicant for leave must:

(a) have a sufficient interest;
(b) have a case sufficiently arguable to merit investigation at a substantive hearing; and
(c) apply for leave promptly."

From the above, it is clear that an applicant for leave to commence Judicial Review proceedings needs to show that he or she has an arguable case with a likelihood of succeeding in the substantive matter. In the case before us, the application for leave arose out of a failure by the Respondent to award a tender. The Respondent invited people or companies to tender but later, they cancelled the tender. This is clearly a matter of private law and not public law. Issues of tender or cancellation of a tender fall under the realm of the law of contract, which is private law. It is clear that Judicial Review is not concerned with challenging decisions that infringe on private law rights but with those that infringe on public law rights. In the case of **R. Disciplinary Committee of the Jockey Club, exparte. The Aga Khan (5)** the Court of Appeal held

that Judicial Review did not lie against a decision of the Jockey Club Disciplinary Committee because the applicant was someone who had entered into a contract with the Club and therefore the case was within the province of private law, not public law.

We agree with the argument that the Respondent is a public body but we also note that the powers it was exercising when it decided to cancel the tender were those to do with private law. The Respondent was exercising private law and not public law functions when it cancelled the tender. It is clear from the reading of Order 53, Rules of the Supreme Court, 1999 that matters of private law are not amenable to Judicial Review proceedings. It is clear that a matter like this one has no prospect of succeeding in the substantive hearing. We therefore do not believe that a matter like this one is fit for further investigation on the hearing of a substantive matter.

Further, it is clear from Order 53 that an applicant for leave to commence Judicial Review proceedings needs to show sufficient interest in the matter. We do not see how the Appellant has

sufficient interest in the fact that the tender was not awarded to any of the bidders. The Appellant was not the only bidder, there were other bidders. At the point when he tendered, there was no guarantee that he would be awarded the tender because the tender would have been awarded to any of the other bidders. It would be a different situation if the Respondent had communicated to the Appellant that they were the successful bidder and that after that communication, the Respondent decides not to award the tender to the Appellant. However, even then, the Appellant's rights should be enforced using methods of enforcing private rights and not public rights such as the law of contract and not through Judicial Review. The valuation report which the Appellant received anonymously was not a communication from the Respondent. We do not know where it came from and whether it was authentic. We believe that Judicial Review is not meant to curtail public bodies from exercising administrative discretion. Public bodies should be given the opportunity to make decisions freely without fear that if they advertise a tender for example, they cannot cancel it and that they

should, by all means, award it to somebody. We do not believe that this is the intention of Judicial Review. For the reasons we have given above, we find that the application for leave to commence Judicial Review proceedings was misconceived. We find no merit in this Ground of Appeal and we dismiss it.

Under Ground two, Mr Zulu submits that the learned trial Judge erred by not taking into account the impropriety of the Respondent's failure to assign reasons for cancelling the tender. He added that the Court below ought to have granted the Appellant leave to commence Judicial Review proceedings in light of the fact that the Respondent never gave reasons for cancellation of the tender. He argued that since the Respondent is a public institution, it ought to conduct its affairs in accordance with the principles of transparency and integrity and should, therefore, have revealed reasons for cancelling the tender.

We have looked at the evidence on record and considered the submissions on this Ground. We have said under Ground three that the application for leave was groundless and misconceived. We

therefore, do not see the need to deal with this Ground in light of what we have said under Ground three. This Ground is therefore dismissed.

In conclusion, out of the three grounds of appeal, one has been successful while the other two have been unsuccessful. In the result, the whole appeal is dismissed on the grounds we have given. Costs will follow the event, to be taxed in default of agreement.

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I.C. Mambilima

DEPUTY CHIEF JUSTICE

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M. S. Mwanamwambwa

SUPREME COURT JUDGE