IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 56/2016

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

REPUBLIC OF ZAMBIA
SUPREME COURT
OF ZAMBIA
-7 DEC 2018
MASTER OF THE SUPREME COURT
COMMISSIONER FOR OATHS
P. O. BOX 50067, LUSAKA

LIEUTENANT ALICK BRUCE MAKONDO **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

Coram : **Wood, Kabuka and Mutuna, JJs**

On 4th December 2018 and 7th December 2018

For the Appellant : **Mr. J. Mataliro, Messrs Mumba Malila and Partners**

For the Respondent : **Ms D. Mwewa, Assistant Senior State Advocate, Attorney General's Chambers**

J U D G M E N T

Mutuna, JS. Delivered the judgment of the Court.

Cases referred to:

1) **R v East Birkshire Health Authority, ex parte Walsh (1985) QBD 152**
2) **Ridge v Baldwin (1963) 2 ALL ER 66**
3) **Chitala (Secretary of Zambia Democratic Congress) v Attorney General (1995-1997) ZR 91**

4) **R v Inland Revenue Commissioner ex parte National Federation of Self Employed and Small Business Limited (1982) AC 617**
5) **R v Epping and Harlow General Commissioners, ex parte Goldstraw (1983) 3 ALL ER 257**
6) **Shilling Bob Zinka v Attorney General (1990/1992) ZR 73**
7) **R v Chief Constable of Mersey Side Police, ex parte Calveley (1986) QB 424**
8) **The Minster of Home Affairs and The Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of The Southern African Resolution of Disputes, SCZ judgment No. 23 of 2007**
9) **Mungomba and others v Machungwa and another, SCZ judgment Number 3 of 2003**

Legislation referred to:

1) **Zambia National Service Act, Cap 121**
2) **The Supreme Court Practice, 1999 volume 1**
3) **National Service (General) Regulations, Statutory Instrument Number 2 of 1973**

Introduction

1) This appeal stems from the judgment of the Learned High Court Judge denying the Appellant leave to commence judicial review proceedings. The decision followed an application by the Appellant for leave to commence judicial review proceedings in which he intended challenging the decisions of the School Commander, tribunal at Zambia National Service (ZNS) Kabwe, Commandant (ZNS Headquarters) and

subsequently, the President, which led to his dismissal form ZNS.

2) The Appellant contends there was procedural impropriety, want of due process in the course of the hearings and want of authority on the part of the decision makers in effecting his dismissal.

Background

3) The Appellant was employed by ZNS as a Lieutenant. During his employment, he and two others were on 27th June 2014 charged with three counts of offences pursuant to Section 29 of the ***Zambia National Service Act (ZNS Act).***

4) The offences alleged oppressive and tyrannical conduct by the Appellant and his co-accused towards recruits who were inferior in rank to them.

5) Later, on 3rd July 2014 the Appellant appeared before what was termed the Record of School Commander's Summary Trial at Kabwe ZNS training school. The charges were laid out to him and he pleaded not guilty. After the Appellant took plea, the presiding officer called five witnesses who testified against the Appellant in respect of the charges. The Appellant cross examined all but one of the witnesses following their examination in chief.

6) After the hearing, the presiding officer found that a *prima facie* case had been established against the Appellant and referred the matter to a tribunal for a hearing. The presiding officer also advised the Appellant to prepare his defence.

7) On 3rd July 2014, the Commanding officer of the tribunal submitted a request to the Commandant ZNS headquarter to convene a hearing for the Appellant because the Commander ZNS Kabwe had no power to convene one in respect of the Appellant. Pursuant to this request, the Commandant ZNS constituted a tribunal which held a hearing of the matter.

8) On 5th September 2014 a Colonel R. C. Mbewe writing on behalf of the Commandant ZNS, informed the Appellant that the confirming Authority had studied the proceedings of the tribunal and concurred with its findings recommending that he be dismissed. The Appellant was also informed that the recommendation was subject to approval by the Commander in Chief of the Armed Forces, (the President). He was further advised of his right of appeal to the President.

9) The Appellant exercised his right of appeal and on 16th September 2014 he lodged a letter of appeal to the President. In doing so he advanced two grounds of appeal which contested the recommendation of the tribunal that he be dismissed and alleged that the

punishment imposed upon him was harsh in view of the fact that he had been a loyal servant of ZNS.

10) The President responded by letter dated 10th June 2015, indicating that he found the grounds of appeal *"insufficient and lacking merit to warrant any consideration for leniency"*. He accordingly invoked his powers under Section 33(3) of the ***ZNS Act*** and dismissed the Appellant from service forthwith. This did not please the Appellant so he applied to the High Court for leave to commence judicial review proceedings pursuant to Order 53 rule 3(1)(2) and (10)(a) of the ***Supreme Court Practice, 1999,*** (***White Book***).

The Appellant's claim in the High Court, contentions and arguments by the parties

11) The Appellant launched his application in the High Court with his two other colleagues who had suffered the same fate. The application was by way of Notice of Application for leave to apply for judicial review, supported by a statement and affidavits verifying facts.

12) The statement, as it is relevant to the Appellant's case, revealed that the Appellant was challenging the following:

12.1 the decision by the President to dismiss him;

12.2 the proceedings before the summary trial held by the School Commander of ZNS at Kabwe;

12.3 the decision by the School Commander of ZNS Kabwe that a *prima facie* case had been established against him and the subsequent decision to refer his case to the tribunal for a trial;

12.4 proceedings of the tribunal convened under Order number 06/2014 held on 5th July 2014;

12.5 the decision by the confirming authority by way of the letter by Colonel R.C. Mbewe concurring with the findings and recommendations of the tribunal to recommend to the Commander-In-Chief that he be dismissed from ZNS.

13) The relief sought by the Appellant was as follows:

13.1 a declaration that the decision by the President to dismiss him from ZNS was unlawful;

13.2 an order of certiorari to remove into the High Court for purposes of quashing the decision by the President to dismiss him from ZNS or at all;

13.3 an order prohibiting the Commander of ZNS and or his subordinates and or persons of like authority from doing anything that would give effect to the decision of the President to dismiss him from ZNS;

13.4 If leave is granted, the leave to operate as a stay of the decision the President pursuant to Order 53 rule 3 (10)(a), pending the hearing of the motion or summons or until further order;

13.5 An order of certiorari to remove into the High Court for purposed of quashing the decision of the School Commander of ZNS, Kabwe in so far as it purports to establish a prima facie case against him for the offences of oppressive conduct, disobedience to orders and conduct prejudicial to good order and discipline and the decision to refer his matter to a tribunal for trial;

13.6 an order of certiorari to remove into the High Court for purposes of quashing the decision of the tribunal in so far as it purports to find him guilty and its decision in so far as it purports to recommend that he be dismissed from ZNS;

13.7 an order of certiorari to remove into the High Court for purposes of quashing the decision of the "*confirming Authority*" and or Col. R. C. Mbewe in so far as it purports to concur with the findings and recommendation of the tribunal to the President that he be dismissed from ZNS;

14) The grounds upon which the Appellant sought the relief were:

14.1 Illegality

Under this head, the Appellant challenged the decision by the President to dismiss him on the grounds that: he had no powers to do so; such powers are vested in the tribunal and the Commandant; the power was thus

exercised illegally as no such recommendation was made by either the tribunal or Commandant; the recommendation by the tribunal to the "*Confirming Authority*" to dismiss the Appellant contravened section 32 of the Act which mandates the tribunal to impose and not recommend a punishment; and the "*Confirming Authority*" has no power to recommend the dismissal because such power was in the preserve of the Commandant. Further, such power could not be exercised by Col. R. C. Mbewe on behalf of the Commandant; as such, the purported exercise of the power by Col. R. C. Mbewe was illegal.

14.2 Procedural Impropriety

The Appellant's contentions under this head were that: the decision by the President was procedurally wrong because there was no decision made by the tribunal or Commandant on the punishment to be meted out to him which would have been subject to confirmation pursuant to Section 33(3) of the ZNS Act' there was want of compliance with the rules of natural justice by the President prior to the dismissal; the tribunal and the Commandant in dismissing him failed to comply with the procedure laid down in Section 32 of the ZNS Act and National Service (General) Regulations; and the decision of the School Commander and tribunal was wrong *ab initio* for want of adherence to the rules of natural justice and thus void *ab initio*. It was also contended that the presiding members were biased

14.3 Excess of Jurisdiction/Error of Law and Record

Under this head, the Appellant repeated the contentions contained in paragraph 14.2.

14.4 Irrationality

The contention here was that:

The President's decision was unfair because he did not consider the fact that the tribunal had denied him his right to be heard; the decision took into account irrelevant considerations; the decision failed to follow precedent and was thus discriminatory; and the decision to recommend the Appellant's dismissal was made without taking into account relevant factors and the punishment was harsh, regard having been had to the Appellant's disciplinary record.

15) The evidence in support of the claim recounted the Appellant's career in ZNS. It also set out the physical nature of military training which he said is strenuous and can lead to injury. He stated further that the training includes mental and psychological torture. By these contentions the Appellant sought to justify the treatment he and others meted out on the recruits.

16) The Appellant then set out the events leading to his dismissal and contended failure to observe rules of natural justice, failure to follow procedure and bias at various disciplinary levels of his case.

17) The thrust of the relevant portions of the Appellants arguments was that the Appellant had satisfied the test

for the grant of leave for judicial review as per Order 53 rule 14 sub-rule 21 of the ***White Book***. It was argued that the Appellant's substantive application for judicial review is not frivolous, vexatious or hopeless because there is a case fit for further investigation by the High Court at full *inter partes* hearing.

18) In addition, the affidavit evidence also revealed that there is an arguable case fit for further investigation by the Court.

19) In response, the Respondent contended that the Appellant's claim related to his employment and was thus governed by private law as opposed to public law. Judicial review was thus not the appropriate remedy as per Order 53 rule 14 sub-rule 33 of the ***White Book***, and the case of ***R v East Birkshire Health Authority, ex parte Walsh***[1]

20) The Respondent also opposed the application for leave to operate as a stay because it was akin to seeking an order of injunction against the State.

21) In reply the Appellant argued that the claim fell in public law because his dismissal was pursuant to a statute as opposed to a contract of employment. In this regard the question was whether there was compliance with statute and not terms and conditions of employment. In support of this argument reliance was placed on the case of ***Ridge v Baldwin***[2].

Consideration by the Learned High Court Judge and decision

22) The Learned High Court Judge considered the arguments and evidence presented before her and identified the issue for determination as being whether or not leave to apply for judicial review can be granted in respect of the decision by the President to dismiss the Appellant from ZNS. She then set out the purpose of an application for leave prior to applying for judicial review as being elimination of vexatious or hopeless applications at *ex parte* stage; and to ensure that an applicant is only allowed to proceed to the substantive hearing if the Court is satisfied that there is a case fit for further investigation at full *inter parte* hearing.

23) To reinforce her finding, the Learned High Court Judge referred to our decision in the case of ***Chitala (Secretary of the Zambia Democratic Congress) v Attorney General***[3] where, quoting from the case of ***R v Inland Revenue Commissioners ex parte National Federation of Self employed and Small Business Limited***[4], we set out the purpose of leave at page 95 as follows:

> **"... 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 proceeding for judicial review of it was actually pending even though misconceived."

24) In addition, the Learned High Court Judge identified the other factor to be taken into consideration at leave stage as being whether the applicant had exhausted alternative remedies available to him. She referred to the case of ***R v Epping and Harlow General Commissioner, ex parte Goldstraw***[5] where the English Court held that save in exceptional circumstances, the judicial review jurisdiction will not be exercised by the Courts where other remedies are available and they have not been used.

25) After the Learned High Court Judge set out the foregoing principles on leave, she reminded herself that at that stage she was not called upon to determine the merits or demerits of the case. Her role was to determine whether leave for judicial review is the proper remedy for deciding if the Appellant's dismissal from ZNS was lawful.

26) The Learned High Court Judge found that the decisions the Appellant sought to contest were made by the tribunal which tried him. Therefore, one cannot say that the President made the original decision to dismiss the Appellant. As a result, she found that there was no case fit for further investigation. She also found that this was a case where alternative remedies could be explored.

27) The Judge concluded by holding that the application lacked merit and dismissed it.

Grounds of Appeal to this Court and arguments by the parties

28) The Appellant is unhappy with the decision rendered by the Learned High Court Judge and has launched this appeal on three grounds as follows:

28.1 The learned trial judge misdirected herself in law and fact when she failed to find that there was a cause fit for further investigation and therefore refused to grant leave to the Appellant to apply for judicial review

28.2 The learned trial judge misdirected herself in law and fact when she held that there were other remedies available to the Appellant which he did not avail himself to; and failed to specify such remedies in relation to the facts which were presented before her

28.3 The learned trial judge erred in law and fact when she held that both the ZNS Commandant and tribunal which tried the Appellant had made decisions to dismiss the Appellant and not the President.

29) Both parties filed heads of argument in support and opposing the appeal which counsel relied upon entirely at the hearing of the appeal. A substantial portion of the two sets of heads of argument addressed the substantive claim which the Appellant sought to bring before the Court. These arguments are not relevant to the application which was before the Learned High

Court Judge as we have explained in the latter part of this judgment. Our focus is only on those parts of the heads of argument which are relevant to the application placed before the Learned High Court Judge.

30) Arguing ground 1 of the appeal the Appellant contended that there was and still is a *prima facie* question suitable for further investigation warranting the grant of leave for judicial review. The Appellant then set out the purpose of the remedy of judicial review and referred to the case of ***Shilling Bob Zinka v Attorney General***[5] in which we set out the instances where it is permissible for a public authority to derogate from the principles of natural justice in the exercise of its powers. He argued that in this case the decision by the President to dismiss him was contrary to the law, as such the matter was one amenable to judicial review.

31) The Appellant extended his arguments by contending that the Learned High Court Judge erred at law when she failed to see that there were questions of illegality, procedural impropriety, excess jurisdiction and error of law on the record in the manner the decision to dismiss him from ZNS was made. The Appellant concluded by arguing in detail all the four heads upon which he sought to challenge the decision to dismiss him from ZNS.

32) Coming to ground 2 of the appeal, although the Appellant made lengthy arguments, his bone of contention was merely this that, despite the Learned High Court Judge finding that there were alternative remedies open to the Appellant other than judicial review, she did not specify them. He also argued that the Learned High Court Judge erred at law by failing to determine whether the case fell under private or public law.

33) The Appellant concluded arguments under ground 2 of the appeal by restating the arguments he advanced before the Learned High Court Judge that since the Appellant's dismissal was provided for under statute, his remedy lay in judicial review. This he argued, was similar to the situation in the case of ***Ridge v Baldwin***[2]**.** He argued that in that case the Court found that the dismissal of the police constable was amenable to judicial review because his employment was governed by statute.

34) In relation to ground 3 of the appeal, the Appellant questioned the finding by the Learned High Court Judge that the Commandant and the tribunal made the decision to dismiss the Appellant. He contended that the two merely recommended his dismissal to the President who then decided to dismiss him.

35) In response to ground 1 of the appeal, the Respondent argued that the Appellant's arguments were inviting us to delve into the merits and demerits of the substantive matter. It was argued that at leave stage an applicant merely seeks to show the Court that there is a case fit for further investigation. We were once again referred to our decision in the case of ***Chitala (Secretary of the Zambia Democratic Congress) v Attorney General***[3] where we set out the purpose of the requirement of leave to apply for judicial review.

36) Like, the Appellant, the Respondent concluded its argument under ground 1 by arguing in detail what constitutes illegality, procedural impropriety, excess of jurisdiction and error of law on the face of the record.

37) Regarding ground 2 of the appeal, the position taken by the Respondent was simply this, that there is no obligation placed upon the court to explain the alternative remedy available where it finds that judicial review is inappropriate. The Respondent argued that this was clearly stated in the case of ***R v Chief Constable of Mersey Side Police, ex parte Calvery***[7] when the Court held that there is no obligation on the Court to demonstrate how other remedies other than judicial review applied to the facts. The Respondent also drew our attention to the decisions in the cases of ***The Minister of Home Affairs and the Attorney General v***

Lee Habasonda suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of disputes[8] and ***Mungomba and others v Machungwa and another***[9]**.** It argued further that in terms of Order 53 of the ***White Book***, judicial review is a remedy of last resort and a party is thus expected to exhaust all other remedies before resorting to it.

38) In response to ground 3 of the appeal the position taken by the Respondent was that the Commandant and tribunal did make a finding which is the decision the Appellant is aggrieved with. That the proceedings of tribunal which tried the Appellant reveal that it imposed a punishment and sentenced him along with others. This is what was subject to confirmation by the confirming authority.

Consideration by the Court and decision

39) We have considered the arguments by the parties and the record of appeal. It is settled law, and to the parties' credit they are in agreement, 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 partes* stage. Applications for leave to apply for judicial review, thus, allow courts to sieve cases and weed out frivolous,

vexatious and hopeless applications thereby, keep busy bodies and vexatious litigants outside the doors of the court.

40) The foregoing is the test that the Appellant was called upon to surmount and as a result the only issue that falls for determination which will address all three grounds of appeal advanced is, did the Appellant demonstrate to the Learned High Court Judge that he had a case fit for further investigation? We intend addressing this issue from two fronts, namely, the challenge against the decision by the School Commander and tribunal and Commandant ZNS on one hand, and the challenge against the decision by the President on the other hand.

41) The statement on ex parte application for leave to apply for judicial review which the Appellant filed in the Court below reveals that he challenges the decision of the School Commander at ZNS Kabwe, summary trial by the tribunal and confirming authority Commandant ZNS as per the letter by Col. R. C. Mbewe. The first two decisions were made administratively and were subject to appeal to the Commandant ZNS in accordance with Section 33(1) of the ***ZNS Act***. The Section states as follows:

> **"Any serviceman aggrieved by any finding of an appropriate tribunal or any award of an appropriate**

tribunal may, within seven days of the notification to him thereof, appeal to the Commandant in writing and the Commandant may quash, confirm or vary any finding of the appropriate tribunal could have received upon the evidence, including additional evidence which the Commandant in the hearing of the appeal and may quash, confirm or remit any punishment imposed by the appropriate tribunal or may substitute therefore any punishment which the appropriate tribunal could have imposed."

To the extent, therefore, that there is a remedy prescribed under section 33(1) of the Act, the Appellant ought to have resorted to that remedy and not judicial review. There is no evidence whatsoever, on the record of appeal to show that the Appellant appealed against the decision of the School Commander or the tribunal in accordance with Section 33(1) of the ***ZNS Act***.

42) The record of appeal merely reveals at page 55 that the Kabwe Training School referred the Appellant's case to the Commandant ZNS Headquarters at Lusaka on the ground that the Commander at Kabwe had no power to try the Appellant.

43) To this extent, the Appellant did not avail himself to the remedy available to him of appeal and thus cannot resort to judicial review. There was thus no misdirection on the part of the Learned High Court Judge when she

found that there was alternative remedy against those decisions.

44) In regard to the decision by the Commandant one might argue that the Appellant did indeed appeal to the President in line with Section 33(3) of the Act. But a perusal of his grounds of appeal to the President reveals that he was not challenging the decisions of the three but rather sought mitigation by the President. He, in this regard, argued that he ought to have been fined since there was an option of a fine and he had been a loyal servant. He did not advance arguments on procedural impropriety and illegality which he advanced in the judicial review application before the President.

45) To the extent, therefore, that the Appellant did not avail himself to the remedy of appealing the decisions, his application for leave to apply for judicial review was not only improperly presented before the Court but demonstrated that he did not have a case fit for further investigation. Consequently, we agree with the finding by the Learned High Court Judge.

46) Turning our attention to the decision by the President, the challenge launched by the Appellant is that the President has no power under the Act to dismiss him and that the decision was unfair. Section 33(3) of the Act upon which the President acted states as follows:

> **"Any serviceman aggrieved by the finding or award of the Commandant under the provisions of subsection (1) of this section, or subsection (3) of section thirty-one, may, within fourteen days of the notification to him thereof, appeal to the President in writing and the President may confirm or vary any finding of the Commandant and may vary, remit or confirm any punishment imposed or confirmed by the Commandant and in all such cases the decision of the President shall be final."**

Without having to decide the matter on its merits because all we are considering is whether the Appellant did establish a *prima facie* case fit for further investigation, the section we have quoted reveals, on its face, that the President is empowered to dismiss the Appellant by confirming the decision to dismiss made by the Commandant. To this extent, the Appellant failed to establish a *prima facie* case fit for further investigation.

47) In addition, although the Appellant alleges unfairness on the part of the President on the ground that he should have considered imposing a lighter sentence, on the face of it, the section does not compel the President to impose a lighter sentence based on the grounds advanced by the Appellant. In any event, the President has the sole discretion under the section to decide on the sentence.

Conclusion

48) As a consequence of our determination, all three grounds of appeal lack merit and the appeal collapses. We accordingly dismiss it with costs, to be taxed in default of agreement.

.....

A.M. WOOD
SUPREME COURT JUDGE

.....

J.K. KABUKA
SUPREME COURT JUDGE

.....

N.K. MUTUNA
SUPREME COURT JUDGE