IN THE COURT OF APPEAL OF ZAMBIA **CAZ/08/301/2017**

HOLDEN AT NDOLA/LUSAKA

(Civil Jurisdiction)

B E T W E E N:

PETER CHAZYA SINKAMBA **APPLICANT**

AND

ATTORNEY GENERAL **RESPONDENT**

CORAM: **CHISANGA JP, KONDOLO AND MAJULA, JJA**

On 20th February 2019 and 28th June 2019

For the Applicant: *Mr. C. Tafeni of Messrs Suba Tafeni & Associates*

For the Respondent: *Mr. C. Mulonda, Senior State Advocate, Attorney General's Chambers*

J U D G M E N T

CHISANGA JP, Delivered the Judgment of the Court

Cases referred to:

1. ***Inland Revenue Commissioners and National Federation of Self Employed and Small Business Limited 1981 2 ALL ER P. 93***
2. ***Associated Provisional Pictures Houses Limited vs Wednesday Corporation (1948) 1KB 223***
3. ***Chitala vs Attorney General (1995-97) ZR 91***
4. ***Attorney General vs Mutuna, Kajimanga & Musonda SCZ/8/185/2012.***
5. ***R vs Barnsley Metropolitan Borough Council ex parte Hook (1976) 3 ALL ER 452***
6. ***British Oxygen vs Minister of Technology (1971) AC 610***
7. ***Lloyd vs Macmillan (1987) A. C. 625***

Legislation referred to:

1. ***Section 9 of the Narcotic Drugs and Psychotropic Substances ACT CAP 96 of the Laws of Zambia***
2. ***Sections 6 and 8 of the Dangerous Drugs Act CAP 95 of the Laws of Zambia***
3. ***Medicines and Allied Substances Act No. 3 of 2013***
4. **Section 22 of the Dangerous Drugs Act**
5. **Sections 15, 16 and 34 of the Medicines and Allied Substances Act.**
6. **See Order 53/14/21 RSC 1999 Edn**

Peter Chazya Sinkamba is a politician, and President of the Green Party of Zambia. He describes himself as a Consultant, Development Planner, Businessman and Environmentalist. He made an application to the Minister of Health for a Medical Cannabis Licence, in line with the Ministerial Statement issued by the Home Affairs Minister honourable Stephen Kampyongo on 2nd March 2017. In that statement, the Minister of Home Affairs drew attention to **Section 9 of the Narcotic Drugs and Psychotropic Substances ACT CAP 96 of the Laws of Zambia.** He thereafter noted that the section recognizes certain circumstances under which a person can, with lawful authority cultivate cannabis, and that one can legally cultivate cannabis for medicinal purposes. The Minister went on to state that it was mandatory for one to obtain the requisite lawful authority to enable them cultivate cannabis for medicinal purposes. He cited **Sections 6 and 8 of the Dangerous Drugs Act CAP 95 of the Laws of Zambia,** and concluded that the Minister of Health was the licensing authority for cultivation of cannabis for medicinal purposes.

The applicant made the application on the Green Party of Zambia letterhead. He however requested that the licence be granted under the trade name of Green Gold Medicinal Marijuana Investments (Zambia) Limited. He did not get a response to the application, but was advised that the Minister would issue a Ministerial Statement concerning his application in Parliament in due course. The Minister's statement was issued on 6th July 2017, and he informed the House that he had decided not to grant the Applicant the licence. Aggrieved with this turn of events, the Applicant applied for leave to move for judicial review.

Upon hearing the application, the learned judge in the court below refused it stating that the Minister was conferred with discretion whether or not to issue the licence. She was of the further opinion that as the Applicant intended to use the licence on a substantial and commercial scale, this was contrary to section 9 of the Narcotic Drugs and Psychotropic Substances Act, CAP 96 of the Laws of Zambia, as well as the spirit of the Act, which was to control the importation, exportation, production, possession, sale, distribution and use of narcotic drugs and psychotropic substances. She stated that she had found no arguable case and refused to grant leave.

The Applicant now seeks the leave of this court to move for judicial review, in respect of the decision of the honourable Minister of Health, Dr. Chitalu Chilufya's announcement through a ministerial statement in Parliament on 6th

July 2017, denying him a licence to cultivate, import, export, produce, possess, sale, distribute and use cannabis for medicinal purposes.

He seeks the following reliefs:

(i) A declaration that the Respondent's decision, acts and omissions are unconstitutional, unlawful, unreasonable and ultra vires Section 17(2) and 34(4) of the Medicines and Allied Substances Act, No. 3 of 2013.

(ii) A declaration that the Respondent's decision, acts and omissions are tarnished by irrationality and procedural impropriety as it violated the outlined procedures in Sections 15, 16, 17, 34, 35 and 36 of the Medicines and Allied Substances Act, No. 3 of 2013.

(iii) A declaration that the Applicant's Certificate of Registration in the trade-name of ***"Green Gold Medical Marijuana Investments Limited"*** is deemed to be duly registered on 10th May, 2017 pursuant to Section 16(2) of the Medicines and Allied Substances Act, No. 3 of 2013.

(iv) A declaration that the Import Licence was duly granted to the Applicant in the trade-name of ***"Green Gold Medical Marijuana Investments Limited"*** on 10th June, 2017 pursuant to Section 36(1) of the Medicines and Allied Substances Act, No. 3 of 2013.

(v) A declaration that the Import Licence was duly granted to the Applicant in the trade-name of ***"Green Gold Medical Marijuana***

Investments Limited" on 10th June, 2017 pursuant to Section 36(1) of the Medicines and Allied Substances Act, No. 3 of 2013.

(vi) A declaration that the Marketing Licence was duly granted to the Applicant in the trade-name of ***"Green Gold Medical Marijuana Investment Limited"*** on 10th June, 2017 pursuant to Section 39(2) of the Medicines and Allied Substances Act, No. 3 of 2013.

(vii) An Order of Certiorari to quash the decision.

(viii) An Order of Prohibition to restrain the Respondent, the Minister of Home Affairs, the Commissioner of the Drug Enforcement Commission, the Director General of the Zambia Medicines Regulatory Authority (ZAMRA)

(ix) An Order of Prohibition to restrain the Respondent, the Minister of Home Affairs, the Commissioner of the Drug Enforcement Commission, the Director General of the Zambia Medicines Regulatory Authority (ZAMRA), and other Government officials generally, from unduly restricting the Applicant to cultivate, import, export, produce, possess, sale, distribute, and use of cannabis/marijuana for medicinal purposes.

(x) Damages.

(xi) Costs.

(xii) Any further or other relief the Court may deem fit.

The grounds on which the relief is sought are the following:

1. The refusal of the honourable Minister of Health to grant the Applicant a license to cultivate, import, export, produce, possess, sale, distribute, and use cannabis/marijuana for medicinal purposes violates national principles and values; principles of executive authority; principles of public service; and the right to be heard per Articles 8, 18(9), 90 and 173 of the Constitution of Zambia and violated the Applicant's right to be heard.

2. The refusal of the honourable Minister of Health to grant the Applicant a license to cultivate, import, export, produce, possess, sale, distribute, and use cannabis/marijuana for medical purposes violates Sections 17(2) and 34(4) of the Medicines and Allied substances Act, No. 3 of 2013 as well as breaches the rules of natural justice on the Applicant's right to be heard.

3. The Respondent's decision to refuse to register, and grant a license/licenses to the Applicant, as stated above, was procedurally improper as the decision was made contrary to the procedure outlined in Sections 15, 16, 17, 34, 35 and 36 of the Medicines and Allied Substances Act, No. 3 of 2013.

4. The decision of the Respondent to deny the Applicant a license to cultivate, import, export, produce, possess, sale, distribute, and use cannabis/marijuana for medical purposes was irrational and

unconstitutional as it relied on contradictory statements, conjecture and speculation, half-truths, falsehoods, as well as unsubstantiated, unprofessional, and unethical statements, as a basis to refuse to register, and grant the Applicant the license/licenses applied for and was contrary to Articles 5, 10, 90. 114(2) and 173, of the Constitution of Zambia.

5. The refusal of the Respondent to grant a license to cultivate, import, export, produce, possess, sale, distribute, and use cannabis/marijuana for medicinal purposes was illegal as it violates international law, namely, the United National (UN) Single Convention on Narcotic Drugs of 1961 (as amended in 1972) as domesticated under Section 3, 4, 5, 6, 7, 8 and 22 of the Dangerous Drugs Act Chapter 95 of the Laws of Zambia and Section 9 of the Narcotics and Psychotropic Substances Act Chapter 96 of the Laws of Zambia, which recognise cannabis as medicine.

In the Affidavit in Support, the Applicant deposed that he submitted an application to the Minister of Health for a licence/licences upon which he would be lawfully authorised to cultivate, import, export, produce, possess, sale and distribute cannabis also known as marijuana for medicinal purposes.

He expected to receive multiple licences from this one application namely, an import licence; export licence; production or cultivation licence; and distribution (or marketing) licence. He attached a conceptual framework to the

application for the project, providing a synopsis of the project, including security arrangements, licensing, regulatory and other project imperatives.

The project, with a capital injection of US$10 million is earmarked to produce up to 500 tonnes of export grade cannabis for medicinal purposes; to run as a pilot project for 3 years, as a means to encourage individual initiatives in terms of self-reliance, promoting indigenous investment, boost youth employment and help create wealth and prosperity in the nation.

The project was set to commence operations from June 2017 to June 2020, with the possibility of scaling up production, if pilot findings show positive outcomes.

When more than 60 days had elapsed from the date of submission of the application without a response, the Applicant made a follow-up. He learnt that the Respondent had acted on the application on or about the 10th March 2012 and had delegated the Permanent Secretary to facilitate. When he called upon the Permanent Secretary, the latter informed him that the Minister would make a Ministerial Statement about the application in Parliament in due course.

The Minister did issue a Ministerial Statement in Parliament, informing the House and the nation at large that he had decided not to grant the Applicant the licence/licences.

The Applicant was shocked because he was never consulted on his application before the drastic decision was made. His understanding was that if an action

taken by a public servant, body or entity would have an adverse impact upon the person against whom the decision is made, then that person must be consulted before that decision is made.

The Applicant cannot understand the basis of the drastic decision. He however got the official record of the ministerial speech. From this statement, he observed that the Minister had delegated to the Zambia Medicines Regulatory Authority (ZAMRA), the duty to handle authorisation on his behalf of all licences granted under sections 4, 5, 6, and 8 of the Dangerous Drugs Act, including importation, exportation, production, possession, sale and distribution and cultivation of cannabis. He also learnt that the licences were to be issued by ZAMRA, pursuant to the **Medicines and Allied Substances Act No. 3 of 2013** by virtue of this delegation.

Upon probing relevant provisions of the applicable law, the Applicant concluded that applications for the certificate and all licences or authorisations delegated by the respondent to ZAMRA pursuant to **Section 22 of the Dangerous Drugs Act** can only be ideally submitted, issued, granted and rejected pursuant to the procedure outlined in **Sections 15, 16 and 34 of the Medicines and Allied Substances Act.**

On perusal of sections 16(1) and 16(2) of that Act, he wondered why he was not issued with a certificate for Green Gold Medical Marijuana Investments (Zambia) Limited. His conclusion was that he was deemed to have been issued with a certificate, a pharmaceutical licence.

The Applicant noticed that the procedure adopted by the Minister, to reject his application through Parliament after 117 days of submission of the application was not contemplated or provided for by the Act. Upon considering the basis of rejection of his application, as stated by the Minister of Health in Parliament, he reached the conclusion that the decision was embedded in irrationality and illegality.

The application is opposed by an affidavit sworn by one Chibesa Mulonda, a Senior State Advocate in the Attorney General's Chambers. He deposed that some paragraphs of the affidavit in support of notice of re-application for judicial review contained legal arguments, prayers and conclusions. He deposed further that the application giving rise to this application was written on the Green Party of Zambia headed paper, and that the applicant was designated as Party President of the Green Party of Zambia. That therefore, the application was made by the Green Party of Zambia and not the Applicant in his personal capacity.

He went on to depose that the Applicant had not demonstrated that according to its registration document, one of its objects was to apply for licences for medicinal marijuana or commercial scale marijuana. He also deposed that the Applicant had not provided medical evidence of the need for marijuana for medicinal purposes by either any other person, or himself.

The deponent further stated that the reliefs sought by the Applicant in the High Court are substantially different from those being sought from this court. He

asserted in the alternative, that the Applicant's application was not directed to the Zambia Medicines and Regulatory Authority.

The Applicant's arguments as per the skeleton arguments were as follows:

1. The framework of the Dangerous Drugs Act CAP (95) of the Laws of Zambia is to ensure that persons are granted licences to deal in cannabis for medicinal purposes and that needy Zambians have access to the herbal remedies available in marijuana.

2. The Minister may make regulations for dealing in cannabis. The absence of Regulations do not prevent the Minister from granting a licence as the enactment of Regulations is in his discretion as he sees fit, to assist in carrying out the mandate of the Act.

3. Parliament has legalized the cultivation of marijuana for medicinal purposes in absolute terms in the Narcotics and Psychotropic Substances Act CAP 96 of the Laws of Zambia. It also legalizes cultivation of marijuana on small scale and commercial scale.

4. The framework and intention of Parliament follows the framework of the 1988 United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances in recognising the indispensable medicinal and scientific purposes of marijuana and that its availability for this purpose should not be unduly restricted.

5. The medicinal uses of marijuana as listed by the Minister of Health in his ministerial statement would be beneficial to a lot of patients if the Minister implemented the law as stipulated in the Dangerous Drugs Act, the Narcotics and Psychotropic Substances Act and International law.

6. The Applicant was not heard on his application for a licence despite requesting for audience to discuss the matter with the Minister. This decision making process was flawed, and his legitimate expectation denied.

7. The Minister's decision of not intending to grant licences shows that he contravened or exceeded power conferred on him to grant licences to deserving applicants. He pursued an objective other than the one for which the power to grant licences was conferred. The Minister had no discretion in implementing the law as required of him. His decision was illegal.

8. The Minister went against the guidelines in Article 10 of the Constitution in disregarding the applicant's conceptual framework for the proposed Green Gold Medicinal Marijuana Investment project; in not affording the applicant an opportunity to be heard before denying him a licence on the basis of inter alia, not meeting a criteria which is unspecified and not communicating to him and the guidelines which are not known; and in deciding to arbitrarily not to issue out.

9. The Minister's decision not to grant the applicant a licence and not to intend to issue licences because Zambia has alternative registered medicines is irrational. ***Associated Provisional Pictures Houses Limited vs Wednesday Corporation[1].***

10. The Minister having delegated the licensing responsibility to ZAMRA, the guiding law in this regard is found in sections 5, 15, 16, 17, 34, 35, 36, 37 and 39 of the Medicines and Allied Substances Act No. 3 of 2013.

The submissions made on behalf of the respondent were as follows:

1. Access to judicial review is not a matter of right but subject to the discretion of the court – **See Order 53/14/21 RSC 1999 Edn, *Inland Revenue Commissioners National Federation of Self Employed and Small Business Limited 1981 2 ALL ER page 93[1]*, *Chitala (Secretary of the Zambia Democratic Congress) vs Attorney General[2]*, *Attorney General vs Mutuna, Kajimanga & Musonda[3].***

2. The application is on a headed paper of the Green Party. Applicant made the application in his capacity as President of the Green Party. Therefore, it was the Green Party that made the application for medical marijuana licence. Political parties registered under the Societies Act Chapter 119 are not permitted to conduct the business of growing marijuana for medicinal purposes or on a substantial commercial scale.

3. The applicant cannot move the court to challenge the decision of the Minister of Health not to issue him with a licence to grow cannabis. This is so because he has no interest as he had neither exhibited his medical report nor that of any other person, requiring marijuana as medicine.

4. The applicant would not be entitled to be issued a licence to grow cannabis on commercial or substantial scale in view of the provisions of Section 9 of the Narcotic Drugs and Psychotropic Substances Act CAP 96 of the Laws of Zambia. This is because the applicant seeks, primarily, to grow marijuana on a commercial scale so as to yield commercial benefits.

5. The applicant does not seek to renew the application for leave for judicial review. The Notices of Application for leave filed at Kabwe High Court and the one filed before this court contain different reliefs.

6. The application was directed to the Minister of Health and not the Zambia Medicines Regulatory Authority as required by Section 15 of the Medicines and Allied Substances Act, 2013. Therefore, the provisions of Section 16 or the whole Act do not apply to this case.

At the hearing, Mr. Tafeni, learned counsel for the Applicant, placed reliance on the Skeleton and Supplementary Arguments filed into court. He augmented his arguments as follows:

1. The applicant, being President of the Green Party of Zambia was not precluded from commencing this action as the party was not a corporate sole. The Minister of Health understood that it was the Applicant who had made the application to his office for a licence for medicinal marijuana.

2. The remedies of Declaration, Certiorari, Mandamus and Prohibition were the same remedies that had been sought in the High Court.

Mr. Mulonda, learned counsel appearing for the Respondent placed reliance on the heads of argument, and augmented them as follows:

1. While the use of marijuana is permitted for medicinal purposes, the Applicant has not demonstrated to the court whether he or anyone else required marijuana for medicinal purposes.
2. Under the Medicines and Allied Substances Act of 2013, an application should be made to the Zambia Medicines and Regulatory Authority, and not the Minister.

In reply, Mr. Tafeni argued as follows:

1. Marijuana can be grown on a commercial or subsistence scale for medicinal purposes. There is no restriction in this regard.
2. The medicinal usefulness of marijuana was acknowledged by the Minister of Health.

3. It was appropriate to cite the Minister of Health as he is mandated by the Dangerous Drugs Act and the Medicines and Allied Substances Act to put regulations in place for the cultivation or use of marijuana for medicinal purposes.

We have considered this application for leave to move for judicial review. We are in that connection required to determine whether the Applicant has made out a prima facie case in his favour, warranting investigation at a substantive hearing. The existence or otherwise of a prima facie case is to be determined on the material now before us, that is, the applicable statutes, and the decision of the concerned minister. We are cognizant of Lord Diplock's articulation of the *'threshold'* question on such applications, in ***Inland Revenue Commissioners and National Federation of Self Employed and Small Businesses***[2]. He said:

> ***"The 'threshold' question is whether, upon directing my mind to the application I can form a prima facie view in favour of the Applicants which view may alter upon further consideration in the light of the further evidence that might be before the court at the second stage."***

This approach has been endorsed in this jurisdiction as confirmed by our proposed approach above. It was argued that the application before us was not the one in the court below, as it is different. We note that the Applicant sought declarations, and Orders of certiorari, mandamus and prohibition. Here, he seeks Declarations in respect of additional matters, and Orders of certiorari and prohibitions. He has added other reliefs.

We will consider the application nonetheless. We are in this regard persuaded by the Court of Appeal's approach in ***R vs Barnsley Metropolitan Borough Council ex parte Hook***[5]. There, the court allowed an applicant to argue matters he had not raised in the court below, on an application for judicial review. Part of the reason for allowing him was that the statement of grounds filed under RSC Ord 53r 1(2) should not be treated as rigidly as a pleading in an ordinary civil action. Adopting this approach, we will not strike out the reliefs the Applicant proposes to seek in the event he is granted leave to move for judicial review.

Another matter raised by learned counsel for the Respondent is that the application was made by the Green Party which is incapable of applying for a cannabis medicinal licence.

Indeed, we note that the application was made by the Green Party of Zambia, by the Party President. However, the request was that the licence be granted under the trade name of Green Gold Medicinal Marijuana Investments (Zambia) Limited.

We conceive that any consideration of issuance of the proposed licence would have been with the named company in mind, and not the Green Party of Zambia. We find learned counsel's argument on that score insignificant.

We move then to consider the applicable statutes prayed in aid by the Applicant. The preamble of the **Dangerous Drugs Act, CAP 95 of the Laws of Zambia** states that it is an **Act to control the importation, exportation,**

production, possession, sale and distribution, and the use of dangerous drugs; and to provide for matters incidental thereto. *(Emphasis ours)*.

Part II of the Act, in section 3, provides that that part applies to cannabis, cannabis resin and all preparations of which cannabis resin forms the base, among others. Sections 4 and 5 render it unlawful for a person to import or export a drug under this part without a licence granted by the Minister. Section 6 empowers the Minister to make regulations for controlling, or restricting the production, possession, sale and distribution of drugs, under Part II. He may also promulgate regulations for prohibiting the production, possession, sale or distribution of the affected drugs, except by persons licenced or otherwise authorised by the Minister, as well as the cultivation of plants from which such drugs are derived.

Section 8 of the Act provides:

> ***A person who, except under a licence granted by the Minister knowingly cultivates any plant of the genus cannabis shall be guilty of an offence under the Act.***

Section 22 of the Act reads as follows:

> ***A licence or Authority issued or granted for the purposes of this Act by the Minister may be issued or granted on such terms and subject to such conditions (including, in the case of licence, the payment of a fee) as the Minister thinks proper."***

The Minister has issued Regulations for the better carrying out of the provisions of the Act. Regulation 7 stipulates as follows:

7(1) No person who is not a person licenced under the regulations shall cultivate any plant from which a drug is derived.

(2) No person licenced under this regulation shall cultivate any plant from which a drug is derived otherwise than in accordance with the terms and conditions of the licence.

Regulation 39 is in the following terms:

An application for a licence under the Act or for a licence or permit under these regulations shall be –

(a) made in such form as the Permanent Secretary may determine;

(b) accompanied, if the application is for a licence to export any drug from Zambia by the original copy of the certificate of the country of importation officially approving the import of that drug; and

(c) ***accompanied by the appropriate fee, if any, prescribed in the Third Schedule.***

Section 9 of the Narcotic Drugs and Psychotropic substances Act, CAP 96 of the Laws of Zambia criminalises unlawful cultivation of any plant which can be used or consumed as a psychotropic substance, or from which a narcotic drug or psychotropic substance can be extracted. The proviso to this section however, enacts as follows:

"Provided that no person shall be guilty under this section if the plant is cultivated for purposes of medicine or is not on a substantial and commercial scale".

The Medicines and Allied Substances Act No. 3 of 2013 enables the registration and regulation of pharmacies, health shops and agro-veterinary shops. It also provides for the registration and regulation of medicines and allied

substances, the regulation of the manufacture, importation, exportation, possession, storage, distribution, supply, provision, advertising, sale and use of medicine and allied substances. Medicine is defined:

> ***"medicine" means human medicine, veterinary medicine, medicinal product, herbal medicine or any substance or mixture of substances for human or veterinary use intended to be used or manufactured for use for its therapeutic efficacy or for its pharmacological purpose in the diagnosis, treatment, alleviation, modification or prevention of disease or abnormal physical or mental state or the symptoms of disease in a person or animal."***

The Zambia Regulatory Authority is a body corporate, with perpetual succession and a common seal, capable of suing and being sued in its corporate name. The functions of the Authority are to:

(a) grant pharmaceutical licences and marketing authorisations;

(b) inspect any premises used for the purposes of manufacturing, distribution, sale, importation or exportation of medicines or allied substances or for any other purposes regulated under this Act;

(c) regulate and control the manufacture, importation, exportation, distribution and sale of medicines and allied substances;

(d) regulate and control the advertising and promotion of medicines and allied substances;

(e) register and regulate pharmacies, health shops and agro veterinary shops;

(f) serve and protect the public interest in all matters relating to the sale of medicines and allied substances;

(g) establish, maintain and enforce standards relating to the manufacture, importation, exportation, distribution and sale of medicines and allied substances.

A Board of the Authority is provided for under section 8 of the Act. Section 9 of the Act enacts as follows:

9. (1) ***The Board shall constitute an Export Advisory Committee which shall consist of experts in human medicines, veterinary medicine and allied substances.***

(2) The Expert Advisory Committee constituted under subsection (1) shall –

(a) advise the Board on –

(i) licensing of medicines and allied substances;

(ii) monitoring the advertisements on medicines and allied substances;

(iii) monitoring the standards relating to medicines and allied substances; and

(iv) monitoring the conduct of clinical trials.

(b) provide technical and scientific advice on any aspect of medicines and allied substances;

(c) review risk assessment and risk management measures relating to medicines and allied substances;

(d) recommend containment measures, reporting mechanisms, remedial measures monitoring procedures and other appropriate conditions for medicines or allied substances;

(e) make policy recommendations to the Board; and

(f) perform any other function conferred on the Expert Advisory Committee by the Board for purposes of this Act.

.....

Those intending to operate pharmacies are required to apply to the Authority for Certificates of Registration (Section 15). The Authority is required, within 60 days of receiving an application made under section 16, to issue the applicant with a certificate of registration if –

The application meets the requirements of the Act, the premises are suitable for conducting pharmacy business, is under the management and control of a registered pharmacist at all times, and the activity or business to be carried out does not contravene any other written law.

By section 17 of the Act, the Authority is obligated to reject an application for a certificate of registration if the activity or business to be carried out contravenes any law in force. Where the Authority rejects an application on this ground, it must inform the Applicant in writing, giving reasons for the rejection.

Section 34 (1) of the Act reads as follows:

34(A person who intends to manufacture, distribute or deal in any medicine or allied substance shall apply to the Authority for a pharmaceutical licence in the prescribed manner and form upon payment of the prescribed fee.

(1) The Authority shall, within ninety days of the receipt of an application under subsection (1), issue a pharmaceutical licence to the applicant if the applicant meets the requirements of this Act.

(2) The Authority shall reject an application which does not meet the requirements of this Act and inform the applicant of the reasons for the rejection.

(3) The Minister may, on the recommendation of the Authority, by statutory instrument, provide for –

(a) The criteria for the licensing of persons under subsection (1);
(b) The procedure for applying for a pharmaceutical licence and the grant, amendment, renewal, transfer and revocation of a pharmaceutical licence;

(c) The terms and conditions attaching to an application, grant, amendment, refusal, renewal, transfer or revocation of pharmaceutical licence; and

(d) Such other matters as are necessary or incidental to the effective regulation of licences under this Part.

Section 35(1) proscribes the importation of any medicine or allied substances without an import permit.

Section 36 (1) forbids the exportation of medicine or allied substances without an export permit. Under both sections, the Minister may, on the recommendation of the Authority, by Statutory Instrument, provide the criteria for the regulation of persons under subsection (1). In particular, subsection 3 of section 36 reads as follows:

The Minister may, on the recommendation of the Authority, by statutory instrument, provide for –

(a) the criteria for the regulation of persons under subsection (1;

(b) the procedure for applying for an export permit and the grant, amendment, renewal, transfer, suspension and revocation of an export permit;

(c) the terms and conditions attaching to an application, grant, amendment, refusal, renewal, transfer, suspension or revocation of an export permit; and

(d) such other matters as are necessary or incidental to the effective regulation of export permits under this Part,

Section 37 is crucial:

37. ***Where a person intends to import or export a narcotic drug, psychotropic substance or precursor for medical or scientific use, the person shall-***

(a) in addition to obtaining an import or export permit, obtain additional authorisation from the Authority; and

(b) comply with additional requirements as may be provided for under the Dangerous Drugs Act and Narcotic Drugs and Psychotropic Substances Act and any other written law.

A reading of these provisions indicates that Dangerous Drugs are controlled. The Dangerous Drugs Act was enacted for purposes of controlling drugs that are considered dangerous. Their cultivation, importation and exportation are controlled, and this function is reposed in the Minister. ZAMRA is responsible for licencing the manufacture of drugs, marketing and running of pharmacies. The Minister is empowered to make regulations for regulating those licenced to export medicines and allied substances, the procedure for applying for export permits, the terms and conditions applying to these licences among other matters.

While a licence to grow cannabis is grantable by the Minister, Section 22 of the Dangerous Drugs Act conferring on him or her discretion to issue a licence on such terms and subject to conditions as the Minister thinks proper, the discretion is very wide, and is subject to the overriding object of the Act, which is to control dangerous drugs. The Minister, in exercising this discretion, is bound to take into account all relevant matters that implicate control of such drugs.

Noteworthy too is the fact that the Dangerous Drugs Act does not set out a mandatory procedure to be followed when submitting an application. Discretion has been left to the Permanent Secretary to prescribe the format in which the application may be made. We have not seen, nor has our attention

been drawn to such a form. The receipt of the application as made by the applicant suggests that issue was not taken with the format. This implies that no procedural code is in place.

The Minister appears to have duly considered the application, and given reasons for refusing to grant the application, not by response to the applicant directly, but to parliament through a ministerial statement.

The question that arises on this material is whether a case, fit for further investigation exists. The Applicant contends that the Minister's decision was illegal and irrational. It is trite that a decision maker must understand his decision making power and give effect to it. He must ask himself the right questions. **De Smith's Judicial Review**, states in the 6th Edition, that the task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision maker.

A decision is irrational if it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

The rules of natural justice require that the decision maker approaches the decision making process with fairness. What is fair in relation to a particular case may differ. As pointed out by Lord Bridge in ***Lloyd vs Macmillan***[6], *"The rules of natural justice are not engraved on tablets of stone."*

If the Applicant has certain legitimate expectations, for example to have his licence renewed, the rules of natural justice may also require that they are given an oral haring and that their request may not be rejected without giving reasons.

In the present case, did the Minister understand the power conferred on him? Our considered response to this question is that he did. He was alive to the fact that the Narcotics and Psychotropic Substances Act is concerned with illicit and unlawful use of narcotics, while the Dangerous Drugs Act is concerned with the licencing, importation, exportation, production, possession, sale, distribution and use of dangerous drugs, including cannabis or marijuana and its derivatives, intended for medicinal and scientific use in humans and animals. He was equally aware that a person could apply for a licence or authorization. Noteworthy however is that sections 4 and 5 of the Act confer the power to grant a licence on the Minister. We have not seen, nor has our attention been drawn to, Regulations requiring that the application be made through the Zambia Medicines Regulatory Authority. Nonetheless, the correct understanding of the Minister was that the Minister has power to grant licences with or without conditions.

This power is discretionary. This is because the Acts in question do not compel the Minister to issue a licence to cultivate any plant of the genus cannabis. Section 22 of the Dangerous Drugs Act, CAP 96 leaves no doubt that the widest discretion to grant a licence, on terms the Minister thinks fit is reposed in the

Minister. When section 8 of the Dangerous Drugs Act is looked at in isolation, one might think that an applicant would be entitled to a licence to grow cannabis on applying for one as a matter of right. However, once the applicable statutes are given full and mature consideration, and it is borne in mind that the scheme of CAP 95 is to control dangerous drugs, it becomes crystal clear that there is reposed in the Minister the duty to consider how effectively dangerous drugs may be controlled. It is erroneous therefore to consider the power to grant licences in isolation from the rest of the provisions of the Act. This brings us to the considerations he took into account in refusing to issue a licence to the applicant.

The Minister considered the fact that marijuana consists of over 400 chemicals, including many toxic psychoactive chemicals, whose long term effect on the human remains largely unstudied. His view was that it would be irresponsible and medically unethical to allow such toxic substances to be administered to Zambians under the guise that the Ministry of Health had allowed it.

The Minister also noted that though some research had demonstrated the effectiveness of marijuana in certain ailments, there was insufficient research on the long term ill effects of its use. Further, that marijuana had not in any way demonstrated to have a higher efficacy and safety profile as compared to other medicines available in Zambia.

The Minister also stated that the field of medicinal marijuana science was ever growing. His view was that if the body of knowledge grew to the extent that it

would be prudent to consider cultivation and dispensation of cannabinoids in Zambia, then this would have to be under the most rigorous ring fencing of the supply of such products right from the farm to the point where the patient takes it with no room allowed for leakage of supplies into the recreational arena.

It seems to us that the Minister was entitled to take these factors into account. It should be remembered that this court has no power to usurp the discretion of the Minister and impose its own decision. The court's function is to see whether the Minister did not understand the powers reposed in him and asked himself the wrong question. If a cursory glance at the applicable statutes and material available suggests illegality or irrationality, a case fit for further investigation at a substantive hearing would be revealed. We have discerned neither on the material before us, as the Minister, in keeping with the scheme of the Act, which is, to control dangerous drugs, as we have discerned, understood the remit of his powers, and took pertinent matters into account. This can only mean that he asked himself the right questions.

Cultivation of cannabis is unlawful without a licence. No one has the right to cultivate this psychotropic substance. As pointed out above no procedure exists in relation to applications for licences to grow cannabis. The right to be heard does not therefore arise, as the applicable statutes have not imposed a duty on the minister to give a hearing to applicants. We do not think this is a matter where principles of natural justice apply. This is on account that the

applicant was not defending a licence he has been granted before, but was seeking a licence to grow cannabis for the first time. His position was as stated in DE SMITH'S JUDICIAL REVIEW SIXTH EDITION by Harry Woolf, Jeffrey Jowell and Andrew Le Sueur London Sweet & Maxwell, 2007 P 367:

> ***"Applicants for new licences are in a different position from those whose existing licences are revoked, suspended, varied or not renewed. The reason why applicants for new licences or other permissions may be denied a hearing is because in many cases there is no vested interest involved to defend. The applicant will be adversely affected by a refusal of something which he does not yet have only to the extent that he is disappointed and may have suffered some 'transaction costs' in the process of the application."***

Scarman LJ, referring to the 3rd Edition of S A de Smith's book, Judicial Review of Administrative Act, quoted these words in ***R vs Barnsley Metropolitan Borough Council ex parte Hook***[5]:

> ***"Non-renewal of an existing licence is usually a more serious matter than refusal to grant a licence in the first place. Unless a licensee has already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal even though no such duty is implied in the making of the original decision to grant or refuse the licence."***

Here, no case warranting a substantive hearing on account of denial of a hearing exists. We discern no legitimate expectation of a hearing on the applicant's part, as he was trying his luck for the first time, for the privilege to grow cannabis.

We have addressed the Minister's decision in this application even though the applicant's grievance related to licences he thought he obtained by default from the Zambia Medicines Regulatory Authority (ZAMRA). This is because he sought an order of certiorari, and this could only have related to a decision made on his application by the Minister.

The Applicant's application was addressed to the minister, and not to ZAMRA. Yet he seeks declarations that that the respondent's decisions are irrational for violating the procedures outlined in sections 15, 16, 17, 34, 35 and 36 of the Medicines and Allied Substances Act No. 3 of 2013. It will be seen that applications for certificates of registration to operate a pharmacy, and pharmaceutical licences are to be made to the Zambia Medicines Regulatory Authority, and not the Minister. Sections 15 and 34 of the Medicines and Allied Substances Act leave no doubt in this respect.

Marketing authorisations are granted by the Authority, upon application, as provided by Section 39 of the Act. There can be no doubt that the Applicant seeks review concerning matters he did not bring to the attention of the Authority. He did not apply to the Authority for these licences and authorisations. Review cannot therefore lie, as a case fit for further investigation at a substantive hearing does not exist.

Regarding export and import licences, the application was properly directed to the Minister, as provided in sections 4 and 5 of the Dangerous Drugs Act CAP 95 of the Laws of Zambia. It will be recalled that additional authorization would be required from ZAMRA even where import and export licences have been obtained. However, as explained above, the Minister, on whom is conferred the power and discretion to deal with such matters, duly considered them and took a position he was entitled to take as repository of discretion exercisable in the public interest.

The Applicant also proposes, on review, to obtain an order of prohibition to restrain the Minister of Home Affairs, the Commissioner of the Drug Enforcement Commission, the director General of the Zambia Medicines Regulatory Authority (ZAMRA) and other Government officials generally, from unduly restricting the applicant to cultivate import, export, produce, poses, sale, distribute and use of cannabis (marijuana) for medicinal purposes.
Quite clearly, the purpose of judicial review has been misunderstood. The applicant has not had dealings with the named agencies apart from the Minister of Health. These other officials have not dealt with the Applicant in any way. The remedy of judicial review cannot therefore lie against them.

On the foregoing, the applicant has not made out a case fit for further investigation at a substantive hearing for judicial review. The application for

leave to move for judicial review is thus dismissed. Each party will bear own costs.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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M. M. KONDOLO
COURT OF APPEAL JUDGE

.....

B. M. MAJULA
COURT OF APPEAL JUDGE