IN THE HIGH COURT FOR ZAMBIA **2016/HP/1669**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Between:

TEICHMANN AFRICA LIMITED **PLAINTIFF**

AND

ZAMBIA REVENUE AUTHORITY **DEFENDANT**

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 7TH SEPTEMBER, 2016 - IN CHAMBERS

For the Applicant : *Mr. C. M. Sianondo- Messrs Malambo & Co.*

For the Defendant : *Mrs. D. Goramota and Mrs. S. Zimba- In House Counsel*

RULING

CASES REFERRED TO:

1. ***Kansanshi Mining Plc v ZRA SCJ 8/162/2014***
2. ***Royal Trading Limited v ZRA SCZ 39/1999 and Turbulent Engineering***
3. ***Mining Supplies Limited v Jeffrey Mwiya Simwinga and ZRA 2008/HK/354.***
4. ***Zambia Wild Life Athority & Others v Muteeta Community Resource Board Development Co-operative Society (2009) ZR 156.***
5. ***Dean Namulya Mungomba & Others v Peter Machungwa (2003) ZR17.***

AUTHORITIES REFERRED TO:

1. ***Order 53 of the Supreme Court (RSC) (1999) Edition***
2. ***Order 33 Rules 3 & 7 and Order 2 Rule 2 as well as Order 14A Rules of the Supreme Court.***
3. ***Section 109 & 111, 164(1) of the Customs and Excise Act***

This is an application for Judicial Review by way of originating summons pursuant to ***Order 53 Rule 5(2) Rules of the Supreme Court (RSC) (1999) Edition*** seeking the following reliefs:

1. *An order of certiorari to remove into the High Court this Honourable Court for the purpose of quashing a decision made by the Zambia Revenue Authority and communicated to the Applicant, by its bank, on 3rd August, 2016 whereby it was decided that the Bank should remit to the Respondent the amount due to the Applicant in the custody of Barclays Bank Zambia Plc.*
2. *An order of mandamus directing the Respondent to restore the monies taken from the Applicant with interest.*
3. *A declaration that the decision of the Respondent aforesaid is invalid and void and of no effect.*
4. *Further or in the alternative damages arising from the matters herein and interest; any other relief and costs.*

It was also the Applicant's application that all proceedings on the said decision be stayed until after the hearing of the motion or further order. The reliefs sought were based on the following grounds:

a) *That the Respondent's decision was irrational and without justifiable reasons;*
b) *That the Respondent's decision was illegal;*
c) *That the decision of the Respondent was wrong at law;*
d) *That the decision was contrary to natural justice*

When the matter came up for hearing of the application for leave to commence Judicial Review, the Respondent sought to be

heard on a notice of intention to raise a preliminary objection on a point of law pursuant to ***Order 33 Rules 3 & 7 and Order 2 Rule 2 as well as Order 14A Rules of the Supreme Court.*** The Applicant in response filed a notice of motion to dismiss the notice of intention to raise preliminary objections.

At the hearing of the preliminary application, it was argued by Mrs. Goramota that this matter ought to be dismissed as it was irregularly before this court. She argued that the Applicant had not exhausted the procedure prescribed by statute of requiring anyone who is not happy with the decision of the Commissioner General to appeal to the Revenue Appeals Tribunal and that the Applicant would have come to court by way of appeal. She contended that this court had no jurisdiction to make any orders and that Judicial Review was not an option.

Counsel cited the cases of ***Kansanshi Mining Plc v ZRA SCJ 8/162/2014***

It was further contended that the Applicant offends the provisions of ***Section 164(1) of the Customs and Excise Act*** which is couched in mandatory terms and makes it mandatory for a person who wishes to sue to give a month's notice to do so. The Applicant had not given the requisite notice. Counsel cited cases of ***Royal Trading Limited v ZRA SCZ 39/1999 and Turbulent Engineering and Mining Supplies Limited v Jeffrey Mwiya Simwinga and ZRA 2008/HK/354.***

It was Counsel's contention that failure to give notice is a defect that cannot be cured.

Mr. Sianondo on behalf of the Applicant in response contended that the notice of motion filed by them was meant to impeach the Respondent's preliminary application as the application is incompetently before this court and urged the court to discount the application.

Counsel referred the court to the case of ***Zambia Wild Life Athority & Others v Muteeta Community Resource Board Development Co-operative Society (2009) ZR 156.***

Counsel stated that the Supreme Court stated in that case that when impeaching an application for Judicial Review an applicant cannot do so by way of preliminary application. An application has to file a summons to give sufficient notice to the other side in order to have the whole matter fully adjudicated upon. Counsel urged the court to dismiss the request by the Respondent. He further contended that the same case emphasizes that the court strictly follows ***Order 53 RSC***. Counsel further stated that this was the same emphasis by the Supreme Court in the case of ***Dean Namulya Mungomba & Others v Peter Machungwa (2003) ZR17.***

It was further argued that the Kansanshi case cites ***Sections 109 and 111 of the Income and Excise Tax Act*** and it is in reference to when an assessment had been made on a tax payer and the tax

payer is aggrieved that is when the procedure for appealing to the Revenue Tribunal kicks in. Counsel argued that his client received a restriction without being availed the basis on which it was being done.

Counsel further argued that the ***Tax Appeals Tribunal Act No. 1 of 2015 Section 5*** refers to the decisions of the Commissioner. He further argued that exhibit ***"MG2"*** shows that the notice did not come from the Commissioner General and neither does it purport that it was done on the Commissioner General's behalf.

In reply, Counsel for the Respondents argued that the case of Zambia Wild Life Authority (ZAWA) was distinguishable in that they had raise the issue of jurisdiction and what was raised in the ZAWA case was the issue of locus standi. Further that in that case leave had already been granted, whereas in this case leave has not yet been granted. In addition, ***"MG2"*** was a letter signed by the Director of the Respondent representing the Commissioner General in accordance with ***Section 7 of the Customs and Excise Act***.

I am indebted to Counsel for their submissions and authorities cited.

The Supreme Court has given clear directions that the procedure to follow for Judicial Review is ***Order 53 RSC, 1999***. The said ***Order 53*** is self contained hence the direction of the Supreme Court in

the Zawa case as cited by Mr. Sianondo. The Court held, among other things, that:

> ***"It is now mandatory, in matters of judicial review for the High Court when exercising its supervisory jurisdiction over proceedings and decisions of inferior Courts and tribunals which perform public duties and functions, to strictly follow the practice and procedure laid under Order 53."***

The procedure under ***Order 53/3 /3*** is that ***no application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.***

Therefore, the Applicant was on firm ground when they applied for leave. Getting back to ***Order 53***, the requirement for leave serves the following purposes:

> ***(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."***

This was also stated in the ZAWA case when the Supreme Court held as follows:

> ***"The requirement under common law for leave, underscores the importance of the protection which the Courts gives the public***

administrative bodies against vexatious, and hopeless claims by busy bodies."

It is therefore at the hearing of the application for leave that Counsel for the Respondents would have brought their arguments as they did in their preliminary application.

I agree with Counsel for the Applicant that the application to raise a preliminary issue was misconceived. The case of ZAWA clearly states:

"When impeaching an application for judicial review, an applicant cannot do that by way of a preliminary application."

What I expected before me was the Respondent's affidavit in opposition to the application for leave, if they wished to oppose the grant of leave. That is the correct procedure under ***Order 53 RSC, 1999*** as guided by the ***Supreme Court in the ZAWA*** case.

The preliminary application is dismissed.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 7TH DAY OF SEPTEMBER, 2016.

G.C. CHAWATAMA
JUDGE