IN THE COURT OF APPEAL OF ZAMBIA **CAZ/08/034/2016**

HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	ORDER 53 OF THE RULES OF THE SUPREME COURT (1999 EDITION) (THE WHITE BOOK)
IN THE MATTER OF:	AN APPLICATION FOR JUDICIAL REVIEW
IN THE MATTER OF:	THE ELECTRICITY ACT CHAPTER 433 OF THE LAWS OF ZAMBIA
IN THE MATTER OF:	THE ENERGY REGULATION ACT CHAPTER 436 OF THE LAWS OF ZAMBIA
AND	
IN THE MATTER OF:	A DECISION BY THE PERMANENT SECRETARY IN THE MINISTRY OF ENERGY AND WATER DEVELOPMENT DATED 3 DECEMBER 2015 GIVING RISE TO A DECISION BY ZESCO LIMITED DATED 7 DECEMBER 2015

BETWEEN:

KANSANSHI MINING PLC	APPLICANT
AND	
ATTORNEY GENERAL	1ST RESPONDENT
ZESCO LIMITED	2ND RESPONDENT

CORAM: ***CHISANGA JP, CHASHI AND MULONGOTI JJA***
On 7th March 2017 and 8th May 2017

For the Applicant:	*Mr. M. Sakala and G. N. Siamondo, Corpus Legal Practitioners*
For the 1st Respondent:	*Mrs. S. C. Sakala, Senior State Advocate*
For the 2nd Respondent:	*Mr. J. Mileji Principal Legal Officer*

J U D G M E N T

CHISANGA, JP delivered the Judgment
of the Court

Cases cited:

1. ***Chitala vs Attorney General (1995/1977) ZR 92***
2. ***Save Our Railways & Others vs Director of Passenger Rail Prancing (1996) CLC 589,601***
3. ***Norwich & Peterborough Building Society vs Financial Ombudsmen Server Limited (2002) EWHC 2393***
4. ***Nyambe vs Total Zambia Ltd (SCZ) judgment No. 1 of 2015 Unreported***
5. ***Leopard Ridge Safaris Limited vs Zambia Wildlife Authority (2008) Vol 2 ZR 97***
6. ***BP Zambia PLC vs Interland Motors Limited (2001) ZR 37***
7. ***Nyampala Safaris (Z) Limited & Others vs ZAWA & Others (2004) ZR 49***
8. ***Regina vs Secretary of State for Home Affairs, ex parte Hoseball (1977) 1 WLR 766 at P. 769***
9. ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) ALL ER 935***
10. ***Council for Civil Service Union vs Minister for the Civil Service (1984) 3 ER 935***
11. ***R vs Hull University Visitor EXP (1993) A.C. 682***
12. ***Attorney General vs E.B. Jones Machinist Limited (2000) ZR 114***

Other Works referred to

1. ***De Smith Judicial Review, by Harry Woolf, Jeffrey Jowell and Andrew Le Suevr, 2007 London, Sweet and Maxwell***

2. ***Grahame Aldews and John Alder in APPLICATION FOR JUDICIAL REVIEW Law and Practice of the Crown Office, 1993 Second Edition, Butterworths at page 23,***

This is a renewed application for judicial review, made pursuant to Order 53 rule 3 as read with Order 53 rule 14 (65) of the Rules of the Supreme Court White Book. Order 53 rule 14(3) provides that where leave to apply for judicial review is refused in a non-criminal case either by a single judge or by the Divisional court, the application for leave can be renewed before the Court of Appeal within seven days, in terms of rule 14(3) of the same Order. It will be noted that this renewal is consequent on a reasoned refusal of leave by a High Court judge. Needless to say, the procedure used in applying for judicial relief is that outlined in the Rules of the Supreme Court as there is legislative default in this jurisdiction. We therefore apply those rules in the context of our Court hierarchy. This implies that where an application for leave to launch judicial review proceedings is refused by a single judge after a hearing, the applicant can only renew the application for leave before an appellate court.

This is what happened in ***Chitala vs Attorney General***[1], Ngulube CJ as he then was, stated, at page 92, that under the Supreme Court of Zambia Act, the matter was brought before the Supreme Court as an appeal, while under the Rules of the Supreme Court of England, which apply to supply any *casus omissus* in our own rules of practice and procedure, it would be a renewal of application for leave to the appellate court.

Order 53 rule 14/65 requires an aggrieved applicant to renew the application for judicial review, and this is what the applicant has done. We will therefore proceed to determine the application accordingly.

The issue raised in this matter is whether the learned judge in the court below erred in refusing to grant leave to commence judicial review proceedings, and whether leave to launch judicial review proceedings ought to be granted by this court.

The grounds on which the applicant seeks to agitate the decision of the Permanent Secretary are the following:

(a) Illegality

On this ground, it is advanced that under the Electricity Act, and Energy Regulation Act, the Permanent Secretary in the Ministry of Energy and Water Development does not have power to impose electricity tariffs, which are regulated by Sections 7 and 8 of the Electricity Act, as well as Section 12(2) of the Energy Regulation Act. In terms of Section 7 of the Electricity Act, tariffs are determined with reference to an electricity supplier's licence and are set by the Energy Regulation Board under Section 12 (2)(b) of the Energy Regulation Act. Section 8 sets out how these tariffs can be varied. None of these provisions allow the Permanent Secretary in the Ministry of Energy and Water Development to impose tariffs on the electricity supplier and consumer.

(b) Procedural Impropriety

i. The decision was arrived at improperly because the Permanent Secretary in the Ministry of Energy and Water Development is partial

in the matter and the applicant was not given an opportunity to be heard. The decision is, therefore, in breach of the rules of natural justice.

ii. The Permanent Secretary in the Ministry of Energy and Water Development is part of GRZ and actually appoints the 2nd Respondent's Chief Executive Officer. The decision benefited the 2nd Respondent. The Permanent Secretary in the Ministry of Energy and Water Development could not have acted impartially in arriving at the decisions in the directive.

iii. The Permanent Secretary in the Ministry of Energy and Water Development as a public officer is required by the rules of natural justice, not to render a decision with adverse implications on a person without affording the person a right to be heard. Hence, the decision is also procedurally improper because the applicant was never given a right to be heard before the Permanent Secretary issued the decision.

(c) Unreasonableness

i. In arriving at the directives, the Permanent Secretary failed to take into account matters which a reasonable decision maker placed in the position they purported to act in would have taken into account. This is because the 10.35 cents/Kwh tariff was arrived at by the Permanent Secretary without consideration in arriving at a cost reflective tariff. The Permanent Secretary also simply imposed the

10.35 cents/Kwh tariff because it was in line with the President's directive; and

ii. That the decision making process by the 1st Respondent is flawed.

(d) Vitiating Error of Law

i. In arriving at the decision, the Permanent Secretary made material and vitiating errors of law and fact which a reasonable decision maker placed in the position the Permanent Secretary of the Ministry of Energy and Water Development purported to act in would not have taken into account, in as much as:

- There was no resolution of any Committee as alleged in the decision of the Permanent Secretary of the Ministry of Energy and Water Development; and
- The Applicant was not present and did not participate in that meeting, and did not agree to increase the tariff.

The facts as disclosed by the notice containing statement in support of the application for renewal of an application for leave to apply for judicial review, were filed in this court on the 24th November 2014. The Permanent Secretary in the Ministry of Energy and Water Development made a decision, dated 3rd December 2015 purporting to increase electricity tariffs payable by the applicant to the 2nd Respondent,(ZESCO) which decision is, according to the applicant, not founded on any provision of the law, as the Permanent Secretary does not have the power to vary or alter electricity tariffs.

The background to that decision, as stated in the affidavit verifying facts relied on by the applicant, and sworn by one Thomas Hayward Muller is that the applicant carries out mining operations in the Solwezi District of the North Western Province of the Republic of Zambia. The 2nd Respondent supplies electricity to the applicant, pursuant to a Power Supply Agreement executed by the applicant, and the 2nd Respondent.

On 2nd April 2014, the Energy Regulation Board (ERB) increased tariffs for electricity supplied to the applicant and other mining companies. The applicant and six other mining companies were aggrieved at that decision, and commenced judicial review proceedings under cause number 2014/HP/1015 against the decision of the ERB, following the grant of leave by the High Court. Subsequently, the applicants in that cause applied to join ZESCO to those proceedings. The Attorney General equally applied to join those proceedings on the 30th July 2015. A ruling on the joinder of the two parties was yet to be delivered, at the time the present application was filed.

The applicant and ZESCO were also involved in an arbitration regarding the ERB decision, and ZESCO's entitlement to charge the tariffs it claimed were fixed by the ERB decision, but the said arbitration was concluded by consent on 18th April 2016.

On 26th November 2015, the President of the Republic of Zambia held a press conference where he directed the Ministry of Energy and Water Development,

the Energy Regulation Board and ZESCO, to implement the new electricity tariff schedule, and progressively move to full cost reflective tariffs thereafter.

Following that directive, the Permanent Secretary of the Ministry of Energy and Water Development wrote to the applicant on 3rd December 2015, stating that the new electricity tariff for the mining companies had been adjusted to US$10.35 cents/Kwh effective 2016. On 4th December 2015, ZESCO informed the applicant that the new average mining tariff was pegged at US$10.35 cents/Kwh. According to the Permanent Secretary and ZESCO the stated tariff was purportedly agreed to by the Department of Energy, Copperbelt Energy Corporation PLC, Mopani Copper Mines Ltd, Konkola Copper Mines PLC, Lumwana Mining Company Limited, Southern African Alloys and the 2nd Respondent at a meeting held on 27th November 2015.

Upon receipt of the stated communication, the applicant wrote to the 2nd Respondent, on 14th December 2015, to express its disagreement with the adjusted tariff, stating that it was not at the meeting at which the said tariff was agreed to. The applicant also wrote to the ERB, to review the adjusted tariff, and stated the grounds on which it was inviting the ERB to review the tariff. It also requested for an Order varying the adjusted tariff. However, the ERB refused to review the adjusted tariff on the basis that the issues raised by the applicant were purportedly pending before a competent court, to which matter both the ERB and the applicant are parties. According to the deponent, the court in cause number 2014/HP/1015 is not considering or adjudicating

upon the US$10.35 cents/Kwh tariff, nor did the ERB make the decision to increase the tariff to US$10.35, but the Permanent Secretary.

The applicant decided to apply for judicial review against the decision of the President of the Republic of Zambia dated 26th November 2016, and the Permanent Secretary, and also sought an Order that the grant of leave should operate as a stay of execution of the said purported leave. The application was heard and determined by the High Court judge, who rendered a ruling dated 16th March 2016, refusing to grant leave for a number of reasons, including the following:

1. That the purported decisions of the President and the Permanent Secretary of the Ministry of Energy and Water Development were not directives but merely an endorsement of what the Attorney General and Zesco Limited had resolved to do and that they were policies and constituted a shareholder's approval of what Zesco intended to do.

2. That the dispute in the judicial review proceedings ought to be resolved through arbitration in view of the arbitration agreement in the Power Supply Agreement between the applicant and the 2nd Respondent.

3. Granting the application for leave to apply for judicial review sought by the applicant would result in a multiplicity of actions in view of the fact that the dispute in the intended judicial review proceedings relates to and is the same as that in the judicial review proceedings in cause number 2014/HP/1015.

4. The stay sought by the applicant is inappropriate as the correct application ought to have been that of an interim measure of protection under the Arbitration Act.

5. The application for leave to apply for judicial review was not made promptly.

In the present application, the applicant no longer wishes to challenge the decision of the President, but that of the Permanent Secretary, which decision it challenged before the High Court judge.

The application is opposed by the 2nd Respondent, through an affidavit sworn by one Joseph Ilunga and filed into court on 10th January 2017. The said deponent is Senior Manager Legal Services in the 2nd Respondent. He confirms that a Power Supply Agreement subsists between the applicant and the 2nd Respondent. He asserts that under paragraph 23 of the said agreement, the entrenched mode of settling disputes arising thereon is arbitration, upon issuance of a Notice of Intention to Arbitrate, issued by the aggrieved party. Arbitration is preceded by 21 days of good faith negotiations.

The deponent has further stated that under cause number 2014/HN/200, the applicant obtained an ex parte order of interim measure of protection pending arbitration, on 1st July 2014, following the service of a notice of intention to arbitrate pursuant to the Power Supply Agreement. The said ex parte Order was discharged by the High Court on 13th August 2014 for abuse of court

process as the applicant, together with other mining companies, had simultaneously with the said arbitration, applied for judicial review.

It is explained that at the time the application for leave to file for judicial review was made, there was on-going arbitration between the applicant and the 2nd Respondent on the effect of a tariff adjustment made by the Regulator on the Power Supply Agreement before the London Centre of Arbitration under Arbitration number UN 142838.

Further, that the applicant had earlier on attempted to join the 2nd Respondent to the initial judicial review proceedings which application is pending ruling before the High Court.

It is the deponent's view that the affidavit verifying facts relied upon on the renewal of an application for judicial review sworn by Thomas Hayward Muller does not disclose facts warranting reversal of the ruling rendered by the High Court judge who heard the initial application.

Heads of argument in support of the present application have been filed on the applicant's behalf. It is contended that the applicant has sufficient interest in the matter, as it has been directly affected by the directive in issue, which purports to increase the tariff and the applicant is liable to pay the 2nd Respondent under the Power Supply Agreement. The applicant has, as a result, a direct interest in the Order of Certiorari it seeks to obtain in the judicial review proceedings. Reliance is placed on Order 53/14/23, in that connection.

It is argued that when construing a document that is neither a statute nor a contract, a court should use a purposive and common approach. Support for this argument is (ex parte ***Save our Railways & Others) vs Director of Passenger Rail Prancing***[2] where it was reportedly stated:

> ***"In reading the objectives, instructions and guidance, the Court is not construing a statute, nor even subordinate legislation. The document must be read in a practical down-to-earth way as a commemoration by a Secretary of State to a responsible public official. The language used is not to be invested with more precision that it would naturally bear."***

Reliance is also placed on Ousley J's view in R (ex parte ***Norwich & Peterborough Building Society vs Financial Ombudsmen Server Limited***[3], where he uttered words to similar effect.

Learned counsel contends that the President's directive was not an endorsement of policy. No law was indicated by the learned judge in the court below as permitting His Excellency to endorse the actions of the Ministry of Energy and Water Development, ERB and the 2nd Respondent. That lack of authority should have led to the conclusion that the directive was probably illegal, warranting the grant of leave to issue judicial review proceedings.

It is contended that even were the directive policy, it would have been amenable to challenge before the courts. **Hamuwele (joint liquidator of Lima Bank Limited (in liquidation) and Another vs Ngenda Sipalo and Another (2010) ZR Vol 1, 160 and Patel vs Patel Appeal No 63 of 1996** (Unreported) are relied upon for this argument.

It is argued that the President's Directive was not a shareholder's approval of what the 2nd Respondent intended to do. This is because the Minister of Finance is the shareholder in the 2nd Respondent. Therefore, the President could not act or speak as the 2nd Respondent's shareholder.

Learned counsel for the applicant proceeds to argue that unlike the President's directive, the Permanent Secretary's directive actually set a tariff. That directive could not have been an endorsement of what the 2nd Respondent intended to do because it is not addressed to the 2nd Respondent, nor is it expressed as such. Even if it were a directive, it was issued without any legal authority, and in violation of the rules of natural justice as the applicant was not privy to the discussions sought to be endorsed. Additionally, the said directive is not expressed to be a policy statement but directs the implementation of a new tariff. Further, the directive cannot be said to be a shareholder's approval because the Ministry of Energy and Water Development is not a shareholder in the 2nd Respondent, as well as the fact that the decision was not made in a shareholder's meeting convened by the 2nd Respondent. Even the wording does not suggest the said endorsement.

It is further argued that the application for leave to apply for review was filed on 3rd March 2016, within the three months prescribed by Order 53 rule 4 of Rules of the Supreme Court. Prior to that, the applicant engaged the ERB after notification to apply the new tariff by the 2nd Respondent, by letter dated 31st December 2015. ERB only rejected the applicant's objection to the 2nd

Respondent's intention to increase tariffs on 6th January 2016. Thus the applicant was prompt, as it first exhausted the statutory appellate procedure before filing the application for leave to issue judicial review proceedings.

It is contended that an arguable case is disclosed on this application. It is pointed out that the 2nd Respondent has no independent justification for imposing the tariff in question. That the directive is contrary to established principles of public law for illegality, as the Ministry of Energy and Water Development has no power to impose tariffs, or to endorse or approve the change in tariff under both the Electricity Act CAP 433 and the Energy Regulation Act CAP 436 of the Laws of Zambia.

Further, electricity tariffs are regulated by the terms of the agreement with mining companies. The statutory power to regulate tariffs, which is inapplicable to mining companies resides in Sections 7 and 8 of the Electricity Act, as well as Section 12(2) (b) of the Energy Regulation Act. Power is conferred on Energy Regulation Board and not Ministry of Energy and Water Development. The latter cannot impose, endorse or approve tariffs on the electricity supplier and consumer.

It is contended that as the applicant was not present at the meeting where the new tariff was purportedly agreed to, the decision to impose the new tariff was wrong. The decision was without basis in fact or law as against the applicant rendering the implementation of the tariff as varied null and void by reason of flawed reasoning and or a material error of fact and law.

It is further argued that the directive was procedurally improper and unreasonable, as matters a reasonable decision maker placed in the position they purported to act in should have taken into account, were not taken into account.

Turning to the decision of the court below, it is argued that the decision that the directive fell to be determined in cause number 2014/HP/1015 is flawed. This is because the directive in issue was issued about 18 months after the proceedings in cause number 2014/HP/1015 were commenced.

It is additionally argued that the only similarity is that they both deal with the issue of tariffs. The key differences are that in cause number 2014/HP/1015, the decision maker is Energy Regulation Board, while in the present application, the decision maker is Ministry of Energy and Water Development. The decision made in the decision challenged in 2014/HP/1015 was made by a press statement while the decision in the present application was contained in a letter. The decision challenged in 2014/HP/1015 was made on 2nd April 2014, while the decision sought to be challenged in the present case was made on 3rd December 2015. The tariff imposed in the decision in cause number 2014/HP/1015 is 6.84/Kwh, while that in the present cause is US$10.35/Kwh.

It is further contended that it was untenable to amend the proceedings in cause 2014/HP/1015 to introduce the claim in the present case as doing so is

not allowed by Order 20 rule 5 as well as 20 rule 8(16) Rules of the Supreme Court.

Regarding arbitration, it is argued that there was no legal basis on which arbitration would have been invoked regarding Ministry of Energy and Water Development. ***Ody's Oil Company Limited vs Attorney General and Another (2012) 1 ZR 165*** is cited for this argument. It was held by the Supreme Court as follows, at page 183:

> ***"Further the fact that the 1st Respondent is not a party to the arbitration agreement and therefore, not bound by its terms or the outcome, also makes the arbitration inoperative in this matter. It is also a fact that the dispute in this matter arose from the same facts. Therefore, it would not be in the interest of justice to sever the dispute in the manner envisioned by learned state counsel, Mr. Banda, so that one segment is arbitrated upon, while the other is thereafter, resolved by the high court. Splitting the dispute would also result into multiplicity of actions which this court frowns upon....."***

The 1st respondent having not been privy to the arbitration agreement, it was rendered inoperative in so far as the issues raised herein are concerned. It was further argued that it was not shown that the dispute in this application fell within the scope of the arbitration agreement in the Power Supply Agreement between the applicant and the 2nd respondent. That this was a necessary pre-condition to arbitration. ***Nyambe vs Total Zambia Ltd***[4] was the premise of this argument.

Citing clause 23 of the Power Supply Agreement, which partly reads:

"If any dispute arises relating to this agreement or any claims for damages is made as a result of breach of any obligation hereunder.... the parties shall.... resolve such disputes by arbitration."

It is argued that the said agreement relates only to claims for damages arising from disputes relating to the agreement. The applicant does not claim damages. Therefore, it is contended, the present dispute is beyond the scope of the agreement. It is further argued that even were the dispute to properly arise on the agreement, the court could only refer the matter to arbitration if a party so requested at any stage of the proceedings, as provided in Section 10(1) of the Arbitration Act. Without that request, which should be made by summons, the court has no power to either refuse to adjudicate the dispute or refer it to arbitration.

It is submitted that the leave should operate as a stay of the directive, so as to maintain the status quo. This would advance the interest of justice. Contrary to the lower court's view that the applicant should have sought an interim measure of protection under arbitration, that was only possible where arbitration proceedings are pending, or imminent. That not being the case in this matter, such a measure could not be obtained. Learned counsel urged us to grant the applicant leave to issue judicial review proceedings, which leave should operate as a stay.

The 2nd respondent has equally filed heads of argument. It is argued that the court below was on firm ground in finding as it did.

It is observed that the present application is substantially different from the application which was before the court below, the applicant having indicated that the decision by the President would not form part of the application. It is contended that in terms of Order 20/8/15 Rules of the Supreme Court 1999 edition, amendments to applications of this nature should be made with leave of court. It is argued that changing the grounds relied upon by the applicant in the High Court is not a renewal, but a different application altogether. It should be refused on that score.

It is further argued that the applicant's application for leave was refused on account of being brought on the wrong forum, constituting multiplicity of actions, and for being made out of time. Reference is made to paragraph 23 of the Power Supply Agreement which reads:

> ***"If any dispute arises relating to this Agreement or any claims for damages is made as a result of breach of any obligation hereunder (including, but not limited to, any claims for damages arising under paragraph 20), the parties shall use their best effort to resolve such disputes through good faith negotiations. Any dispute or claim, as applicable not resolved by such negotiations within 21 days of one party notifying the other of the existence by arbitration as provided for in paragraph 24 of this agreement by service of either party of the notice of intention to arbitrate referred to in paragraph 24(a)."***

According to learned counsel, the presence of the arbitral clause obligated the lower court to stay proceedings and refer the matter to arbitration, as held in ***Leopard Ridge Safari Limited vs Zambia Wildlife Authority[5].***

It is contended that the applicant had other legal options through which its disputes against the 2nd respondent could be determined. It is further argued that the lower court was on firm ground when it held that the correct approach would be to seek for an interim measure of protection pursuant to Section 11 of the Arbitration Act as stated by the lower court. That therefore, the request for a stay was improper, in so far as the 2nd respondent was concerned.

It is submitted that in view of the proceedings under cause number 2014/HP/1015 and on-going arbitration, it was evident the applicant had elected to litigate in a scattered manner, contrary to established principle. This argument is premised on ***BP Zambia PLC vs Interland Motors Limited***[6].

It is sought to distinguish the *Ody's Oil Company Ltd* case from this one on the premise that that matter was tainted with illegality, and issues of public policy arose. It is contended that amendment could properly be made pursuant to Order 20/8/16 of the White Book. That the understanding to be placed on the expressions *"same facts"* and substantially the same fact is that the two terms do not mean the same thing. We have been urged to dismiss the application with costs.

At the hearing learned counsel for the applicant, Mr. Sakala informed the court that reliance was placed on the heads of argument filed on behalf of the applicant, and that Mr. Siamondo his colleague, would argue three points.

Mr. Siamondo emphasized a few points, some of which we will not repeat here as they are adequately stated in the heads of argument. He pointed out that there is no agreement between the Permanent Secretary and the applicant, requiring resolution by way of arbitration. The applicant having sufficient interest, and it having prima facie been shown that the Permanent Secretary could not point to any law which permits her office to alter electricity tariffs payable by the applicant, it was proper that the decision be interrogated by way of judicial review.

Learned counsel for the 2nd Respondent, Mr. Mileji informed the court that he was placing sole reliance on the heads of argument filed into court on behalf of the 2nd Respondent. Learned counsel for the 1st Respondent also supported the arguments advanced by Mr. Mileji.

We have considered the application before us, as well as the arguments for and against it. It is imperative to advert to the scope of the remedy of judicial review, so as to put the application before us in its proper context. We need only refer to ***Nyampala Safaries (Z) Limited & Others vs ZAWA & Others***[7] where the Supreme Court echoed the long established principle that judicial review is concerned with the decision making process, and not the merits. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and it is not part of that purpose, to substitute the opinion of the individual judge for that of the authority constituted by law to decide the matter in question.

Lord Widgery aptly stated the parameters of the court's jurisdiction in ***Regina vs Secretary of State for Home Affairs***[8], when he said:

> ***".....it is also, I think perhaps convenient, in view of the fact that this is a case which has attracted a certain amount of public interest, to notice what our function is. We are in no sense a court of appeal over the home secretary. We are in no sense in a position in which we can set aside his views and substitute our own.***
>
> ***All that is being said is that in reaching this conclusion the secretary of state was guilty of a procedural error of the kind referred to. What we are asked to do is to recognise the procedural error, set aside the deportation order and then events will have to take their course. Our concern is whether the allegations are sound that there was a substantial procedural error in making the order."***

While the application related to a deportation order, the stated approach is taken in all judicial review applications. Our remit therefore is to examine whether the 1st Respondent's decision making process fell short of the principles that inform decision making by those charged with public law functions. The applicant asserts that in arriving at the decision sought to be impugned, the 1st Respondent did so illegally, unreasonably, and the decision making process was tainted by procedural impropriety as well as vitiating errors of law and or fact.

We move then to state instances when it can be said illegality arises in the decision making process. ***DE SMITH JUDICIAL REVIEW, by Harry Woolf, Jeffrey Jowell and Andrew Le Suevr, 2007 London, Sweet and Maxwell*** states the following at page 225:

> *"An administrative decision is flawed if it is illegal. A decision is illegal if it:*

(a) Contravenes or exceeds the terms of the power which authorizes the making of the decision;

(b) Pursues an objective other than that for which the power to make the decision was conferred;

(c) Is not authorised by any power;

(d) Contravenes or fails to implement a public law duty."

The learned authors of the said work proceed to state that the task for the courts in evaluating whether a decision is illegal is essentially one of construing the context and scope of the instrument conferring the duty or power upon the decision maker. The instrument will normally be a statute or statutory instrument, but it may also be an enunciated policy, and sometimes a prerogative or other common law power. The Courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the 'four corners' of their powers or duties. They are also acting as guardians of parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of parliament's enactment.

The concept of unreasonableness was expressed in ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation***[9]. The facts were that the council had power to grant licences for Sunday entertainment subject to such conditions as it thought fit. It licenced a Cinema subject to the condition that no child under 15 should be admitted. It was held that that exercise of the discretion was not such that no other reasonable authority would have done the same.

Council for Civil Service Union vs Minister for the Civil Service[10] is a case where the grounds on which judicial review is recourced were restated and explained by Lord Diplock. He said the following:

> ***"By "illegality" as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or has not is par excellence a question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."....."***
>
> ***"By "irrational", I mean what can by now be succinctly referred to as Wednesbury unreasonable (Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) I KB. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it."***

In ***R vs Hull University Visitor***[11] Lord Brown Wilkinson said the following":

> ***"In the case of bodies other than Courts, in so far as they are required to apply the law correctly, if they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct that error of law so that they make their decision upon a proper understanding of law."***
>
> ***"...In my judgment the decision in Anismimic....rendered obsolete the distinction between errors of law on the face of the record and other errors of the law by extending the doctrine of ultra vires. Then afterward it was to be taken that parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis; a misdirection in law in making the decision therefor rendered the decision ultra vires, therefore....in general any error made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law."***

According to Grahame Aldous and John Alder in APPLICATION FOR JUDICIAL REVIEW Law and Practice of the Crown Office, 1993 Second Edition,

Butterworth's at page 23, procedural impropriety has two aspects. First the disregard of express statutory procedural requirements, and second, violation of general principles of fair procedure implied by the Common Law.

A public body will thus be open to challenge where it has acted unfairly towards the applicant, by failing to observe basic rules of natural justice, or by failing to act with procedural fairness.

Having adverted to the grounds on which it is sought to question the decision in question, we turn to consider the facts as revealed by the affidavits before us. It is common cause that the Permanent Secretary in the Ministry of Energy and Water Development wrote to the Chief Executive Officer of the applicant company on 3rd December 2015. That letter bears reproduction:

MEWD/101/12/1

MINISTRY OF ENERGY AND WATER DEVELOPMENT
OFFICE OF THE PERMANENT SECRETARY
P. O. BOX 31969
LUSAKA
ZAMBIA

3rd December, 2015

The Chief Executive Officer
First Quantum
P.O. Box 83 P/Bag e 835
SOLWEZI

RE: OUTCOME OF THE TECHNICAL COMMITTEE MEETING ON THE PROPOSED ELECTRICITY TARIFF FOR MINING COMPANIES

As you are aware, following the meeting that was held on 20th November 2015 between the Hon. Minister of Energy and Water Development and the Chief Executives of mining companies, at Radisson Blu in Lusaka, it was resolved that a Technical Committee be

constituted to review the components (energy and capacity) of the proposed tariff of US$10.35 cents/KWh for the mining houses. This committee was set up arising from concerns that the mines were not privy to the criteria used in the computation of the proposed tariff and there was need to review the tariff to ensure consensus among all stakeholders.

It is against the above background that we wish to inform you that the Committee held a meeting on 27th November 2015 at Intercontinental hotel in Lusaka and the following was resolved:

1. *Based on the analysis of the projected total power requirements of 6,800 GWh for the mines and the associated available energy for 2016, ZESCO would offer 90% at a cost of 10.35 cents/KWh. Power requirements above the above mentioned threshold were subject to the actual cost of power imports. This resolution was also made in accordance with the pronouncements of His Excellency the President of the Republic of Zambia on 26th November 2015 during his address to the nation regarding cost reflective tariffs in the power sector. It was agreed that the proposed tariff was an interim measure to mitigate the power crisis and ensure security of supply. However, the true cost of the tariffs would be established through the Cost of Service Study which was envisaged to be completed by fourth quarter of 2016.*
2. *In cognisant of the delays in the commissioning of power projects for 2016 such Maamba 300 MW Coal fired plant and concluding contract for power imports, it was agreed that a feasible and realistic migration path be implemented in ensuring the provision of energy requirements of the mines as outlined below:*

Period	*Energy Provision (Based on Energy Projections By the Mines for 2016)*
December 2015 – March 2016	*70%*
April to June 2016	*80%*
July to December 2016	*90%*

On account of the above, mining companies are free to negotiate the ratio of energy and capacity as long as the proposed tariff is maintained at US$10.35 cents/KWh.

3. *In view of the proposed tariff, issues regarding force majeure were technically still in effect but were subject to ZESCO's consideration.*
4. *Further, it was agreed that mining companies that felt the proposed tariff was too expensive were at liberty to import their own power provided authority was sought from the Ministry of Energy and Water Development.*

In light of the above resolution, kindly be informed that the new effective electricity tariff for the mines is US$10.35 cents/KWh starting 1st January 2016. To this effect, we request you to cooperate with government by adhering to the new tariff which is an interim solution in ensuring security of power supply for sustaining the operations of the economy. You may wish to note that with the implementation of the new tariff, the government is still obligated to provide a subsidy to bridge the financial requirement for the cost of power imports.

We look forward to your usual cooperation on this matter.

(signed)
Brig. Gen, E. Chola
Permanent Secretary
MINISTRY OF ENERGY AND WATER DEVELOPMENT

cc: ***Hon. Dora Siliya, MP, Minister of Energy and Water Development, LUSAKA***
Ms. Langiwe H. Lungu, Executive Director, Energy Regulation Board, LUSAKA
Mr. Victor Mundende, Acting Managing Director, ZESCO Limited, LUSAKA
Mr. Owen Silavwe, Managing Director, Copperbelt Energy Corporation (CEC), KITWE

On 4th December 2015, the 2nd Respondent wrote to the General Manager of the applicant company, notifying the applicant of the tariff adjustment. It read as follows:

Zesco

OUR REF: MD. 372/2015

4th December 2015

The General Manager
Kansanshi Mining PLC
c/o Choice Corporate Services Limited
Stand No. 3509/7 Matandani Close
Rhodespark
P.O. Box 32565
LUSAKA

Dear Sir,

NOTIFICATION OF TARIFFF ADJUSTMENT

AND

STATUS OF FORCE MEJEURE EVENT – REDUCTION OF SUPPLY OF ELECTRICITY IN BULK AT KANSANSHI MINING PLC LUANO – KANSANSHI 330KV TRANSMISSION PROJECT (POWER SUPPLY AGREEMENT – ZESCO LIMITED AND KANSANSHI MINING PLC)

Please refer to the above matter and to our letter of 20 July, 2015 bearing reference number 3.14/119/2015 being ZESCO's notification of a Force Majeure Event.

Further reference is made to the Meeting of 27 November, 2015 amongst the Department of energy, Copperbelt Energy Corporation Plc (CEC), Mopani Copper Mines Limited, Konkola Copper Mines Plc, Lumwana Mining (Barrick Gold) Southern African Alloys and ourselves.

Please be advised as follows:

New Tariff

The new average Mining Tariff agreed in the aforesaid Meeting shall be US$10.35 per

KWh. The tariff has been split into the following charges

a. ***Capacity Charge: US$49.53 KW/Month***
   Energy Charge: US$0.03620 kWh.

Further, as agreed in the aforesaid Meeting the effective date for the new tariff shall be 1st January, 2016 and it shall be binding on all mining customers.

Status of Force Majeure Event as notified to yourselves vide our letter of 20 July, 2015 as the Company is still facing the power deficit as outlined in the aforesaid letter.

Energy Cap

As agreed in the Meeting ZESCO has revised its cap on the energy offered up from the previous 70% to 90% which will be implemented in a staggered manner as shown below.

Percentage of 2016 Energy Projections (6,790,426 kwh)	*Period*
70	*December 2015 – March 2016*
80	*April 2016 – June 2016*
90	*July 2016 – December 2016*

Yours faithfully
ZESCO Limited

(signed)
VICTOR M. MUNDENDE
A/MANAGING DIRECTOR

MWV/Ncs

The applicant did not respond to the letter from the Permanent Secretary but wrote to ZESCO on 14th December 2015, pointing out that the applicant was not represented at the meeting where the tariff was purportedly agreed to by other mining companies present at the meeting. It also stated that the applicant had not agreed to the tariff adjustment. ZESCO was challenged to explain the legal basis on which the applicant would be invoiced according to the adjusted tariff. No response was forthcoming to this letter.

The applicant then wrote to the Board Chairperson of the Energy Regulation Board, on 31st December 2015, seeking the Board's intervention in the matter. Reference was made to the letter dated 4th December 2015 from the 2nd respondent, as well as the applicant's response, which were enclosed for ease of reference. The applicant's representation was that there was no legal basis, statutory or contractual, for the adjusted tariff, as the applicant had not agreed that the tariffs be adjusted.

The applicant expressed apprehension that ZESCO, having not replied to the applicant's letter, might misguidedly refer to the letter dated 4th December 2015 as a Notice under Section 8(2) of the Electricity Act, such that unless the applicant applied to the Energy Regulation Board as provided in Section 8(4) of the said Act, within 30 days, the adjusted tariff would come into effect pursuant to Section 8(3) of the Electricity Act.

The applicant expressed the view that Section 8 of the Electricity Act was inapplicable to bulk supply agreements entered into between ZESCO and

mining companies. Further or alternatively, ZESCO cannot issue a valid Notice under Section 8 in relation to tariffs which have been fixed by a Power Supply Agreement in accordance with ZESCO's licence. The applicant went on to state that the 4th December letter was not a valid notice under Section 8 of the Electricity Act in any event. It did not expressly state that it was, and was based on a purported agreement, or on force majeure considerations, which the applicant denied.

The applicant invited the Energy Regulation Board, if it was so disposed, contrary to the applicant's views on the matter, to notify the applicant that it considered ZESCO'S 4 December letter as a Notice under Section 8, giving reasons for that decision. In that event, the Energy Regulation Board was invited to treat the applicant's letter as an application under Section 8 (4) for a review of ZESCO'S proposal on the objections raised by the applicant in the letter, and confirm that it would not seek to argue that Kansanshi Mining Plc had delayed in issuing judicial review proceedings if the applicant awaits the outcome of any purported review by Energy Regulation Board, before issuing a claim in relation to its decision to treat ZESCO's 4th December letter as a Notice under Section 8 of the Electricity Act.

The applicant thereafter set out the grounds on which it was applying to the ERB to review ZESCO's adjustment of the tariff. The response from the Energy Regulation Board dated 6th January 2016 was terse. Noting the contents of the applicant's letter of 31st December 2015, the Board's Executive Director

informed the applicant that the Board was constrained to comment on and or respond to issues raised in the applicant's letter, considering that a similar matter was pending determination before a competent court under Cause Number 2014/HP/1015 to which the applicant and the Board were parties, as doing so may be deemed contemptuous.

The application for leave to apply for judicial review was made after receipt of the letter from the Energy Regulation Board. Upon hearing both parties, the High Court judge refused to grant leave. That refusal prompted the application now before us.

As can be seen from the cited authorities the remit of our jurisdiction at this stage is well settled. We are required only to consider whether the applicant has presented an arguable case. The obtaining of leave to move for judicial review serves the purpose of eliminating frivolous, vexatious or hopeless applications for judicial review without the need for a substantive inter partes judicial review hearing and 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. (See **Order 5B/14/21 Rules of the Supreme Court 1999 edition).**

At the leave stage, an applicant need only show that he has a prima facie case or arguable case or reasonable grounds for believing that there has been a breach, a threat or failure to perform a public duty. **(**See **Halsbury's Laws of England Vol 32, 4th Edn para 570).**

Lord Diplock articulated the question a court is required to ask itself on an application for leave to move for judicial review in **Inland Revenue Commissioners National Federation of Self Employed and Small Businesses Limited (1981) 2 ALL ER** page 93 at page 106, His Lordship said:

> ***".....My Lords, at the threshold stage, for the federation to make out a prima facie case of reasonable suspicion that the Board in showing a discriminatory leniency to a substantial class of tax payers had done so for ulterior reasons extraneous to good management, and thereby deprived the national exchequer of considerable sums of money, constituted what was in my view reason enough for the Divisional Court to consider that the federation, or for that matter, any taxpayer, had a sufficient interest to apply to have the question whether the Board were acting ultra vires reviewed by the Court. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the Court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the Court is exercising at this stage is not the same as that which it is called to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."***

We move then to examine whether a prima facie case is disclosed on the material before us in favour of the applicant. In examining the statutory powers of the decision maker in the present case, we have adverted to the Electricity Act CAP 433 of the Laws of Zambia. We should state here that on the view that we have taken, it behoves us not to pre-empt the matter. We will as a result express our views guardedly.

Section 8 of the Electricity Act states the following:

8(1) Subject to other provisions of this section, an operator of an undertaking that supplies electricity to the public may, with due regard to any or all of the following circumstances:

(a) The amount of electricity consumed;

(b) The uniformity or regularity in demand;

(c) The time when or during which the electricity is required;

(d) The expenditure of the operator of the undertaking in furnishing supply;

(e) Any other circumstances approved by the Board;

Vary prices in respect of the supply of electricity to a particular consumer either above or below the charges specified in the licence governing the undertaking and may, from time to time, alter the charges so varied.

(2) If an operator considers it expedient to vary or alter charges in respect of any supply of electricity, the operator shall give notice to the consumer of the proposal to vary or alter those charges, as the case may be.

Turning to the present case, and applying the approach articulated by Lord Diplock in the *IRC* case supra, it seems to us that there is a case fit for further investigation at a substantive hearing. Our view is premised on the following considerations.

Firstly, the altering or varying of prices for electricity supplied to any consumer is regulated by statute. That alone imports the claim into the realm of public law, notwithstanding the power supply agreement between the applicant and the 2nd respondent. This is because of the statutory underpinning to the

increase in prices for electricity. Further, estoppel cannot be set up against a statute. In the ***Attorney General vs E.B. Jones Machinist Limited***[12] Chirwa JS, delivering the judgment of the court, had this to stay at page 117:

> ***"Further, the learned trial judge misdirected herself when she ruled that by conduct the Attorney General could not rely on Section 14 of the Sheriffs Act.. There cannot be an estoppel to a statute. As the learned authors of Halsbury's Laws of England Vol 16 4th Edition state at para 962 that:-***
>
> ***"The doctrine of estoppel may not be invoked to render a transaction which the legislature has, on grounds of general public policy, enacted to be invalid, or to give the Court a jurisdiction which is denied to it by statute or to oust the Court's statutory jurisdiction under an enactment which precludes the parties from contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers."***

Analogously, the parties cannot contract out of statute, so as to set up the defence of estoppel against the provisions of a statute.

Secondly, Section 8 of the Electricity Act appears to confer power to alter or vary tariffs on Zesco. However we are unable to read the letter dated 3rd December 2015 authored by the Permanent Secretary as shareholder's approval of what Zesco intended to do, at this preliminary stage. To do so would amount to delving into the merits, when all that is required is to examine whether an arguable case is disclosed on the material before the Court. In our considered view, it appears the Minister was involved in discussions concerning adjustment of the tariff to US$10.35 Cents/Kwh for the mining houses. It seems the Mines had expressed concern that they were not

privy to the criteria used in the computation of the proposed tariff. In a bid to ensure consensus from the mines, a committee was set up. This committee held a meeting on 27th November 2015, and made certain resolutions.

On 3rd December 2015, the Permanent Secretary wrote to the applicant. Of particular interest to us, at this stage, is the last paragraph:

> ***"In light of the above resolutions, kindly be informed that the new effective electricity tariff for the mines is US$10.35 Cents/Kwh starting 1st January 2016. To this effect we request you to cooperate with government by adhering to the new tariff which is an interim solution in ensuring security of power supply for sustaining the operations of the economy. You may wish to note that with the implementation of the new tariff, the government is still obligated to prove a subsidy to bridge the financial requirement for the cost of power imports."***

Although ZESCO also wrote to the applicant, it was the Permanent Secretary who, on behalf of government, requested the applicant to adhere to the adjusted tariff. The fact that the applicant first pursued the 2nd Respondent concerning the adjusted tariff does not alter the fact that the Permanent Secretary wrote to the applicant, directing it to pay the adjusted tariff. In our view the Permanent Secretary's decision is not rendered unreviewable on account of the applicant having engaged the 2nd Respondent. We should also state that the application for leave to move for judicial review regarding the Permanent Secretary's decision was made within three months from the date the decision was made. It was therefore made in time.

We agree with the argument that the issues in this cause do not fall to be determined in cause number 2014/HP/1015. There, the decision in question is

that of the Energy Regulation Board, pertaining to adjustment of the tariff to 6.84/Kwh. Here, the decision was made by the Permanent Secretary in the Ministry of Mines, Energy and Water Development and related to a tariff in the sum of US$10.35C/Kwh. The date of that decision is 3rd December 2015, while the decision challenged in Cause Number 2014/HP/1015 was made on 4th April 2014. We fail to see how the decision made on 3rd December 2015 could have been impugned in Cause Number 2014.HP/1015, relating to a decision made on 4th April 2014.

The argument that arbitration could not avail the applicant is sound. We have not seen an arbitration agreement between the applicant and the 1st Respondent, as argued by learned counsel for the appellant. The arbitration that is on-going is between the applicant and the 2nd respondent, pursuant to the Power Supply Agreement. The Permanent Secretary is not a party to that agreement. We do not therefore see how it can be said the applicant has chosen to litigate in a scattered manner, or that there is multiplicity of actions. Judicial review being concerned with the decision making process and not the merits, we do not see how the danger of conflicting decisions arises, seeing as the decisions sought to be reviewed are totally different and were made on dates that are more than a year apart and by different authorities. Thus the learned high court judge fell into error in taking into consideration matters not relevant to the application before her. She clearly erred in refusing to grant the applicant leave to move for judicial review. As for the argument that the applicant was launching a new application altogether, our view is that the

decision made by the Permanent Secretary was considered by the court below. The abandonment of arguments regarding the Presidential directive does not deprive the applicant of the right to question the Permanent Secretary's directive.

Having considered the correspondence before us, we have formed the view that an arguable case is disclosed on the grounds advanced. We therefore set aside the ruling of the learned high court judge, and grant the applicant leave to move for judicial review. The said leave will not however operate as a stay because the status quo has subsisted for a long time now, and we consider it appropriate to leave matters in that state until the matter is determined by the court. We remit this case to the high court and direct that the application for judicial review be heard and determined by another judge. The costs will be in the cause.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

.....

J. CHASHI
COURT OF APPEAL JUDGE

.....

J. Z. MULONGOTI
COURT OF APPEAL JUDGE