IN THE SUPREME COURT OF ZAMBIA **SCZ/8/201/2015**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

YOSI MITI **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

CORAM: **Mwanamwambwa, DCJ, Kajimanga and Kabuka, JJS**
On 20th October 2016 and 24th January 2018

FOR THE APPELLANT: Capt. I. M. Chooka (Rtd), Messrs Lewis Nathan Advocates

FOR THE RESPONDENT: Ms M. Kalimamukwento, Assistant Senior State Advocate

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JUDGMENT

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Whynter Kabimba v Attorney General (1995/1997) Z. R. 152**
2. **Manal Investments Limited v Lamise Investments Limited (2001) Z. R. 24**
3. **Mumba and Three Others v Zambia Red Cross Society (2006) Z. R. 137**
4. **R v Berkshire Health Authority Ex parte Walsh [1985] QB 152**
5. **Monk v Bartram [1891] 1QB 346**
6. **Winchester Cigarette Machinery Limited v Payne and Another 2 Times Law Report of 15/12/1995**
7. **Linotye-Hell Finance Limited v Baker [1992] 4 ALL ER 887**
8. **Shell and BP Zambia Limited v Conidaris and Others (1975) Z. R. 181**
9. **Zambia Revenue Authority v Post Newspapers Limited – Appeal No. 36 of 2016**

Work referred to:

1. **Rules of the Supreme Court (1999 edition), Order 53/14/33**

By this motion the appellant seeks an order to set aside the ruling of a single judge of this Court delivered on 25th August 2015. By that ruling the single judge declined an order for a stay of the decision to dismiss the appellant and recall him from the foreign service; and for execution of the ruling pending appeal in this Court on the ground of want of jurisdiction.

The history of these proceedings is that the appellant served in the foreign service as First Secretary (Trade) at the Zambian High Commission in Tanzania. On 19th February 2014, the Permanent Secretary wrote to the appellant recalling him from the foreign service with immediate effect. On 22nd July 2014, the Public Service Commission wrote to the appellant dismissing him from the Public Service for absenting himself for a period of more than ten (10) consecutive days in accordance with the Terms and Conditions of Service for the Public Service No. 60(a) as read with the Disciplinary Code and Procedures for Handling Offences in the Public Service No. 21(a)(iii).

Not Surprisingly, the appellant was unhappy with these decisions and on 8th October 2014, he filed into the High Court an *ex parte* summons for leave to apply for judicial review pursuant to Order 53 of the Rules of the Supreme Court (1999 edition). The trial judge granted leave to apply for judicial review which was also to operate as a stay of the implementation of the decision of the Permanent Secretary, Ministry of Foreign Affairs, recalling him from the foreign service, as well as the decision of the Public Service Commission, dismissing him from the Public Service. A date for inter-partes hearing was set for 2nd December, 2014. Prior to that date, however, the respond filed summons to discharge the *ex parte* order for leave to apply for judicial review pursuant to Order 62 of the Rules of the Supreme Court (1999 edition).

After considering the affidavit evidence and the arguments advanced by the parties, the trial judge delivered a ruling on 17th June 2015, vacating her earlier order granting the appellant leave to commence judicial review and staying the decision of the Permanent Secretary, Ministry of Foreign Affairs and the Public Service Commission. The appellant was aggrieved by this decision and filed

into this Court a notice of appeal. At the same time, he also filed an *ex parte* summons for an order of stay of execution of the lower court's ruling.

The single judge of this court granted an *ex parte* order staying the ruling of the lower court, subject of appeal in the Supreme Court, and directed that the matter be heard inter-partes. After hearing the matter inter-partes and considering the affidavit evidence as well as the submissions of counsel for the respective parties, the single judge dismissed the application reasoning, *inter alia,* at page R16 of his ruling as follows:

> **"The power of a single judge of this court to entertain an application for a stay is contingent on pendency of proceedings in the High Court. Since the discharge of leave to commence judicial review proceedings meant that the appellant's action in the High Court was extinguished, fresh leave has to be sought to institute any similar proceedings. In the absence of such proceedings, there can be no stay."**

This is the ruling which triggered the motion before us. Four grounds of appeal have been advanced by the appellant in support of the motion as follows:

> **"(i) The Supreme Court, single judge, has jurisdiction to entertain an application for stay of a decision impugned and execution of [a]**

ruling of the High Court pending determination of an appeal emanating from judicial review proceedings pending appeal properly filed, where leave to appeal against the decision to discharge leave has been granted without the necessity of renewing an application for leave in the Supreme Court.

(ii) There are high chances of likelihood of success of the appeal against the decision of the High Court Judge to discharge the leave to commence judicial review on the basis that it falls within private law which operated as a stay of the decision to dismiss the appellant from public service and recall him from foreign service as the matter properly falls within the ambit of judicial review.

(iii) Unless there is an order for stay of the decision to dismiss the appellant from public service and recall him from foreign service as well as the execution of the Ruling of the High Court Judge, the appellant will suffer irreparable prejudice being a Zambian citizen yet to be repatriated back to Zambia and who together with his family is still based in a foreign country, Tanzania.

(iv) Alternatively, should the court agree with the single judge, then it being properly vested with jurisdiction, should grant an application for stay of the decision impugned against pending appeal as this is an appropriate case for such an order since there is a likelihood of success on appeal and the appellant would suffer irreparable prejudice."

Both parties filed written heads of argument. At the hearing, Capt. Chooka (Rtd) indicated, after his application for an adjournment was refused, that he would adopt the heads of argument filed by the appellant's former advocates.

In support of the first ground of appeal, the appellant in his heads of argument started by submitting that in the main, the issue for determination before us is the right procedure when the High Court has discharged leave to commence judicial review. That specifically, whether it is open for a private person to appeal against the decision to discharge leave, and apply before a single judge to preserve the status quo by way of a stay pending appeal. The appellant contended that a single judge has jurisdiction to entertain such an application. In support of this argument, the appellant relied on the case of **Wynter Kabimba v Attorney General**[1], where a single judge decided to refer the matter to the full bench but this Court held, *inter alia*, that the single judge would have been properly entitled to order a stay in the circumstances of that particular case. According to the appellant, the ruling of the single judge in these proceedings fails to take into account the important distinction so aptly articulated in the **Wynter Kabimba**[1] case between judicial review proceedings and injunctions.

The appellant also argued that once an injunction has been discharged by the High Court, a single judge of this court does not

have power to stay the decision pending appeal as a decision on an injunction is a final decision as settled in **Manal Investments Limited v Lamise Investment Limited**[2] and **Mumba and Three Others v Zambia Red Cross Society**[3]. The decision in these two cases, the appellant contended, are only applicable to injunctions and not to judicial review proceedings and appeals therefrom.

The appellant reiterated that the single judge has jurisdiction to entertain an application for stay of the impugned decision and execution of the ruling of the High Curt pending determination of an appeal emanating from judicial review proceedings pending appeal properly filed, where leave to appeal against the decision to discharge leave has been granted, without the necessity of renewing an application for leave in the Supreme Court.

As regards ground two, the appellant contended that the appeal he lodged in this court has merit. In support of this argument, we were referred to the case of **R v Berkshire Health Authority Ex parte Walsh**[4] where, according to the appellant, it was made very clear that not every employment matter falls outside the ambit of judicial review, but that as in the present case, where an employment

contract is not one served at the pleasure of the authority or pure servant and master relationship but one protected by statutory provisions, such a relationship enjoys public law remedies under judicial review.

The appellant's arguments in support of ground three were that the appellant has demonstrated the irreparable prejudice which he will suffer, absent the order of stay. The appellant urged us to note that the nature of the damage is similar to, if not more serious than, the one in the **Wynter Kabimba**[1] case, which this court approved to amount to irreparable prejudice.

We note from the appellant's heads of argument that there were no specific arguments advanced by the appellant in support of ground four. The appellant finally prayed that this notice of motion be upheld.

In response to ground one, the respondent submitted that the single judge correctly stated that he was bereft of jurisdiction to stay the decision of the lower court. The respondent also relied on the case of **Mumba and Others v Zambia Red Cross Society**[3] on the

principle that there could be nothing to be stayed by the court which could be enforced as a court order if the application had not been granted. Reliance was also placed on the case of **Manal Investments Limited v Lamise Investment Limited**[2] on the principle that the grant or refusal of an injunction is a matter involving the decision of appeal or final decision in terms of section 4 of the Supreme Court Act, Chapter 25 of the Laws of Zambia.

It was accordingly submitted that as demonstrated by the two cited authorities, the argument advanced by the appellant is not tenable. That the appellant should have challenged the lower court's decision by way of a substantive appeal to the Supreme Court.

The respondent's arguments in response to ground two are that it is misleading for the appellant to suggest that there is a high likelihood of success of the appeal against the decision of the High Court Judge to discharge the leave to commence judicial review. The basis of the respondent's argument is that this is purely an employment matter which is governed by private law. We were referred to the appellant's terms and conditions of service at pages

80 – 84 of the record. That the said documentation describes how the appointment may be terminated in the following terms:

> **"The appointment may be terminated by either party giving three (3) months' notice or paying the other party three months' salary in lieu of notice. The notice will be contained in the letter of recall."**

We were also referred to the letter of recall dated 19th February 2014, which stated in paragraph two that "on your arrival, you shall be paid three months [salary] in lieu of notice as stipulated in your letter of appointment."

The respondent also cited The Foreign Service Regulations and Conditions of Service (2007) which provide in clause 17 as follows:

> **"17(i) The Permanent Secretary may recall an officer at any time before the end of tour of service.**
>
> **(ii)The Permanent Secretary shall give an officer three months written notice for his or her recall from foreign service or transfer, except for cases of health, discipline or other exigencies of the service."**

It was, therefore, contended that the Foreign Service regulations give the prerogative to recall an officer from foreign service and that such a recall should not be a matter or subject of judicial review.

That if every diplomat who was recalled was to subject such a decision to judicial review and injunct it by way of a stay, this would lead to undesirable and embarrassing consequences which would significantly impede effective administration of the foreign service and also cast a negative light over the diplomatic profile of the country.

Regarding the subsequent dismissal, the respondent submitted that this was purely a private law and/or employment issue and it cannot be the subject of judicial review. The appellant, the respondent contended, should have challenged his dismissal by commencing an action by writ of summons. That the mere fact that the appellant was employed in the public service does not mean that his recall and/or dismissal are a matter of public law.

According to the respondent, the distinction between public and private law is provided by Order 53/14/33 of the Rules of the Supreme Court (1999 edition) which states in part that:

> **"Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule proceed by way of judicial review and not by way of an ordinary action whether for the declaration or as**

injunction or otherwise... If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process... it would as a general rule be contrary to public policy, and as such an abuse of the process of the court..."

The respondent submitted that the converse is equally true; that a party cannot commence judicial review proceedings in a case which falls under private law. That to do so would amount to an abuse of the court process.

In response to the appellant's arguments relating to ground three, the respondent submitted that there is nothing to stay. That the appellant was recalled in February 2014, the dismissal was effected on 7th August, 2014 and he has since returned to Zambia.

It was contended that the proceedings were properly dismissed by the High Court judge and so was the discharge of the stay. Further, that the stay granted by the single judge was also properly discharged.

The respondent's arguments in response to ground four were that this is not an appropriate matter in which a stay should be

granted by this Court. In support of this contention, the respondent relied on the case of **Monk v Bartram**[5], where Lord Esther M. R. observed that:

> **"It has never been the practice in either case to stay execution after the judge at trial has refused to grant it, unless special circumstances are shown to exist."**

The respondent also relied on **Winchester Cigarette Machinery Limited v Payne and Another**[6], where Ralph Gibson L. J. (as he then was) reasoned that for an applicant to be granted a stay, he must show some special circumstances which would take the case out of the ordinary.

The case of **Linotye-Hell Finance Limited v Baker**[7] was also cited in aid, where Staughton L. J. stated that:

> **"It seems to me that if a defendant can say that without a stay of execution he will be ruined, and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."**

The respondent accordingly submitted that from the above authorities, a stay could only be sustained if special circumstances existed which took the case out of the ordinary; the appeal has some

prospect of success; and the applicant would be ruined without a stay.

It was contended that "ruin" is comparable to irreparable damage as espoused in **Shell and BP Zambia Limited v Conidaris and Others**[8]. According to the respondent, the appellant will not suffer irreparable damage because any damage he may suffer can easily be atoned for in damages if the appeal were successful as he would be paid any withheld salaries or allowances. The respondent submitted, however, that if the appellant were to be reinstated as he presently seeks through a stay and the appeal failed, the State would be unable to recover the monies from him because he is greatly indebted on account of the sum of US$50,000.00 facility he obtained.

We were accordingly urged to dismiss this motion with costs for lack of merit.

In sum, the first ground of appeal is that a single judge of the court has jurisdiction to entertain an application for a stay of execution of a ruling of the High Court discharging leave to apply for judicial review pending determination of an appeal, without renewing an application for such leave in the Supreme Court. At the outset, we

would state that, the single judge of this Court was on firm ground when he held that his power to entertain an application for a stay was contingent on pendency of proceedings in the High Court and that since the judicial review proceedings had been extinguished by the discharge, there could be no stay in the absence of fresh leave being sought to institute similar proceedings. Indeed, there was nothing to stay.

This Court found itself dealing with a similar issue in the case of **Zambia Revenue Authority v Post Newspapers Limited[9].** The brief facts of the case, to the extent relevant to the application before us, are that the Post Newspapers Limited (the Post) owed Zambia Revenue Authority (ZRA) colossal amounts of money in unpaid taxes. In trying to resolve the issue ZRA invited the Post to a meeting where it was agreed that the Post should propose how it intended to settle the tax liabilities. The Post applied to pay the tax liabilities in six instalments but ZRA rejected the proposal. This prompted the Post to commence judicial review proceedings, but the High Court refused to grant all the remedies sought.

Aggrieved with the High Court decision, the Post appealed against the High Court judgment and applied for a stay of execution pending appeal. In dismissing the application for a stay, Mwanamwambwa, D. C. J emphatically and lucidly stated that:

> **"Where a Judgment or Ruling refuses Judicial Review or an injunction, there is nothing to stay; because such a Judgment or Ruling does not award a remedy, such as money or property, which can be obtained by court execution. In short, a failed Judgment or Ruling cannot be stayed because it did not award anything. If there is nothing to execute about such a Judgment or Ruling, then there is nothing to stay about it. Only a Judgment or Ruling which awards a remedy and which can be enforced by court process can be stayed ..."**

Similarly, there are no compelling reasons for us to reverse the decision of the single judge of this Court who refused to grant the stay as there was nothing to stay. Accordingly, we find no merit in ground one.

In ground two, the appellant asserts that his appeal in this Court against the High Court decision which discharged the leave to commence judicial review proceedings has high prospects of success as the matter properly falls within the ambit of judicial review. Whether or not there is merit in the appellant's appeal is a

substantive issue pending determination by this Court. Suffice it to state at this stage that in our view, it is highly doubtful that the appellant's appeal has any prospects of success. We say so because on the material before us and as aptly contended by the respondent, this is purely an employment matter which is outside the ambit of judicial review. As correctly argued by the respondent, the mere fact that the appellant was employed in the public service does not, *ipso jure*, mean that his recall and subsequent dismissal is a matter of public law.

The facts which are incontrovertible are that the appellant was a civil servant, serving as First Secretary (Trade) at our High Commission in Tanzania; he was recalled from the foreign service; and he was subsequently dismissed from the Public Service for absenting himself from work in accordance with the Terms and Conditions of Service No. 60 (a) as read with the Disciplinary Code and Procedures for Handling Officers in the Public Service No. 21(a) (iii). We posit that the dismissal of a civil servant from employment is a matter of private law which cannot be a subject of judicial review. If our opinion is correct, which we believe it is, it can safely be

concluded that contrary to the appellant's assertion, we do not see any prospects of success of the appellant's appeal in this court. Consequently, we also find no merit in ground two.

In ground three, the appellant states that unless there is an order for stay of the decision to dismiss him from the public service and recalling him from foreign service as well as the execution of the ruling of the High Court judge, he would suffer irreparable prejudice, being a Zambian citizen who is still based in Tanzania with his family and yet to be repatriated back to Zambia.

The appellant has yet again, placed reliance on the **Wynter Kabimba**[1] case in support of this ground. We hasten to state that the **Wynter Kabimba**[1] case is distinguishable from the present case. In that case the appellant was seeking a stay of his transfer from Lusaka City Council to Kitwe City Council, which the appellant considered to be of lower status. He instituted proceedings for judicial review in the High Court. The High Court granted leave to issue the application for judicial review and at the same time, the appellant was granted a stay of the order of transfer, pending the hearing. He also applied for and was granted, *ex parte*, an injunction

preventing the second respondent from transferring the applicant and ordering that the second respondent should not interfere with the appellant's performance of his duties as Town Clerk for Lusaka City Council. The respondents applied for the discharge of the injunction and the lifting of the stay of the order of transfer, and the trial judge granted the orders as requested. The appellant appealed to this Court against the orders and also applied for a stay of the orders pending the hearing of the appeal. After considering the arguments of the parties, this Court held that in the circumstances of that case, the stay of the order of transfer and the injunction against the second respondent be restored pending the outcome of the appeal. It is noteworthy that in that case the judicial review proceedings were still pending in the High Court.

However, in the case before us the appellant in the court below was seeking a stay of the decisions to dismiss him and recall him from foreign service. More importantly, the judicial review proceedings launched by the appellant to challenge the said decisions had been extinguished by the discharge of the leave. Therefore, the circumstances surrounding the two cases are different

and for that reason, the **Wynter Kabimba**[1] case cannot aid the appellant's appeal in any way.

A perusal of the material before us indicates that the appellant was recalled in February 2014; he was dismissed on 7th August, 2014; and he has since returned to Zambia. This, he has not denied, He subsequently launched the proceedings in the Court below on 8th October, 2014. From these facts, we agree with the respondent's submission that there is nothing to stay. Indeed, it is not possible now to order that the decisions to recall and subsequently dismiss the appellant be stayed. We adopt with approval, the principle enunciated in **Winchester Cigarette Machinery Limited**[6] that an applicant for a stay can be granted the order only if he/she shows that there are special circumstances which take the case out of the ordinary. In this case, the appellant has not shown such special circumstances.

On the issue of irreparable prejudice, we agree with the respondent that if, in the unlikely event that the appellant's appeal were to succeed, any damage he may suffer could be atoned for by

the payment of any withheld salaries or allowances. Without doubt, ground three also lacks merit.

In ground four, the appellant states in the alternative, that if we were to agree with the single judge of this Court that he was bereft of jurisdiction, then we should grant his application for a stay pending appeal. This ground is similar to grounds one and three where we have held that there was nothing to stay. We do not need to repeat what we said in those two grounds. All we can say is that ground four also suffers the same fate as grounds one and three.

All the grounds of appeal having failed, the net result is that this motion lacks merit and we accordingly dismiss it with costs.

M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE