

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Application No. 31/2022
CAZ/08/291/2022

IN THE MATTER OF: ORDER 53 OF THE RULES OF THE SUPREME
COURT 1965 (WHITEBOOK), RSC 1999
EDITION VOLUME 1 AND VOLUME 2

IN THE MATTER OF: SECTIONS 7, 48, 54 AND 57 OF THE ZAMBIA
WILDLIFE ACT NO. 14 OF 2015 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: SECTION 66, 69, 70, 71 AND 72 OF THE
PUBLIC PROCUREMENT ACT NO. 8 OF 2020
OF THE LAWS OF ZAMBIA

IN THE MATTER OF: REGULATION 24 AND 129 OF THE PUBLIC
PROCUREMENT REGULATIONS, 2011 OF
THE LAWS OF ZAMBIA

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF: THE PURPORTED DECISION OF MR. EVEANS
MUHANGA, THE PERMANENT SECRETARY
OF THE MINISTRY OF TOURISM AND ARTS,
MADE ON 4th MAY 2022 CANCELLING THE
TENDER FOR THE ALLOCATION OF SAFARI
HUNTING / PHOTOGRAPHIC TOURISM
CONCESSIONS IN THE NINETEEN HUNTING
BLOCKS IN VARIOUS GAME MANAGEMENT
AREAS

BETWEEN:

ZAMBIA COMMUNITY RESOURCES BOARD
ASSOCIATION LIMITED
MOPANE SAFARIS LIMITED

1st Applicant

2nd Applicant

AND

ATTORNEY GENERAL

Respondent

CORAM: Chashi, Siavwapa and Sharpe-Phiri, JJA on
13th September 2022 and 27th September 2022

For the Appellants: Mr. K. Kombe, Mr C. Bwalya and Mrs. N. Fumbeshi of Messrs Andrew & Partners
For the Respondent: No appearance

RULING

SHARPE-PHIRI, JA, delivered the Ruling of the Court

Legislation referred to:

1. *The Supreme Court Practice, 1965 (White Book) RSC 1999*
2. *The Zambia Wildlife Act No. 14 of 2015 of the Laws of Zambia*
3. *The Public Procurement Act No. 8 of 2020 of the Laws of Zambia*
4. *The Public Procurement Regulations, 2011 of the Laws of Zambia*

Cases referred to:

1. *C.K. Scientific Group Zambia Limited v Zambia Wildlife Authority (2004) Vol. 1 ZR 123*
2. *R. v Inland Revenue Commissioners, ex p. National Federation of Self Employed and Small Businesses Limited (1982) A.C. 617*
3. *Council of Civil Service Unions v Minister of State for Civil Service (1984) 3 All ER 935*
4. *Derrick Chitala (Secretary General of the Zambia Democratic Congress) v The Attorney General (1995) ZR 91*
5. *Communications Authority v Vodacom Zambia Limited (2009) ZR 196*
6. *Nkumbula v AG (1972) ZR 204 (CA)*
7. *Nyampala Safaris Limited and Others v Zambia Wildlife Authority and Others SCZ 6 of 2004.*

Other authorities referred to:

1. *Halsbury's Laws of England, Volume 37, 4th Edition*
2. *De Smith, Woolf and Jowell on Judicial Review of Administrative Action, 6th Edition*
3. *De Smith's Judicial Review, 7th Edition*

1.0 INTRODUCTION

- 1.1 This is a ruling on a renewed application made by the applicants, Zambia Community Resources Board Association Limited and Mopane Safaris Limited.
- 1.2 By this action, the applicants seek leave to apply for Judicial Review against the decision of one Mr. Evans Muhanga, the Permanent Secretary of the Ministry of Tourism and Arts made on 4th May 2022 cancelling the tender for the allocation of Safari Hunting/Photographic Tourism Concessions ('the Hunting Concessions') in the nineteen hunting blocks in various Game Management areas.

2.0 BACKGROUND

- 2.1 The brief facts of the case, as contended by the applicants, are that on 13th November 2020, the Government of the Republic of Zambia through the Ministry of Tourism and Arts, advertised in the Zambia Daily Mail for a tender for the granting of Hunting Concessions in nineteen hunting blocks in various Game Management Areas.
- 2.2 That the applicants successfully participated in the said tender and on 5th March 2021, the respondent notified the 2nd applicant of the award of a Hunting Concession in the Musalangu Game Management Area.

- 2.3 On 13th April 2021, the 2nd applicant, being the most responsive bidder after the technical and financial evaluations for the Musalangu Game Management Area, successfully negotiated a contract with the local Community Resources Board (CRB) for the area in question.
- 2.4 In line with the Cabinet Circular No. 11 of 2018, and as per Government procedure, the concession agreements were cleared for execution by both the Accountant General and the Attorney General.
- 2.5 On 7th December 2021, the Permanent Secretary in the Ministry of Tourism and Arts, sought guidance from the Attorney General about cancellation of the hunting tenders, but contrary to guidance provided, the Permanent Secretary proceeded to cancel all the tenders for Hunting Concessions on 4th May 2022.
- 2.6 The 2nd applicant appealed to the Minister of Tourism and Arts on 21st November 2021 against the non-signing of the Hunting Concessions on the basis that their rights had been violated and that they had suffered huge expenses.
- 2.7 Being aggrieved with the decision above, the applicants brought an application for leave to apply for Judicial Review before the High Court on 16th June 2022 under cause number 2022/HP/0925.

2.8 In determining the application, the learned Judge in the Court below, found that the application for leave to commence judicial review fell under the realm of private law as opposed to public law and that it was bound by the principle of *stare decisis*, and judicial precedent as set out by the decision of the Supreme Court in the case of **CK Scientific Group vs Zambia Wildlife Authority**¹. The learned Judge accordingly declined to grant leave sought by the applicants.

2.9 Being dissatisfied with the ruling of the lower Court of 14th July 2022, declining the application for leave to commence Judicial Review proceedings, the applicants renewed the application before this Court.

3.0 **THE RENEWED APPLICATION BEFORE THIS COURT**

3.1 The application is brought by *ex-parte* Summons filed on 20th July 2022 pursuant to **Order 53 Rule 3(4) of the Rules of the Supreme Court (White Book) 1999 Edition (RSC)**¹ as read with **Order 53 Rule 3 (5) and 53 Rule 14/3 of the RSC**.

3.2 By the summons, the applicants seek leave to apply for Judicial Review against the decision of the Permanent Secretary of the Ministry of Tourism and Arts made on 4th May 2022 cancelling the tender for the allocation of the Hunting Concessions in the nineteen hunting blocks in various Game Management areas.

3.3 By a subsequent Summons filed on 19th August 2022, the applicants sought a stay of execution of the invitation for bids (IFB) by the Ministry of Tourism and Arts dated Wednesday, 17th August 2022 and any further proceedings pending the determination of the applicants' renewed application for leave to apply for Judicial Review.

3.4 The contention of the applicants under the renewed application for leave is that:

i) ***The decision by the Permanent Secretary to cancel legitimately awarded safari hunting and photographic tourism concessions was illegal and void ab initio for breach of:***

(a) Section 7, 48, 54 and 57 of the Zambia Wildlife Act No. 14 of 2015 which reserves powers to cancel any hunting concession agreements to the Wildlife Management Licensing Committee and not the Permanent Secretary.

(b) Section 69 (1) of the Public Procurement Act No. 8 of 2020 of the Laws of Zambia which permits a procuring entity to cancel or terminate procurement proceedings 'at any time prior to notification of contract award' contrary to the cancellation done by the Permanent Secretary in this case.

ii) ***The decision by the Permanent Secretary to cancel legitimately awarded tenders to the applicants after notification of the award was procedurally improper and goes against public interests which demanded that the law be followed in the performance of public function.***

- iii) *The decision by the Permanent Secretary to cancel safari hunting and photographic tourism concessions on allegations of corruption without treating every matter on a case-by-case basis was irrational and unreasonable as the tender process was open and transparent and included members of the security wings to ensure full compliance with procedure.*
- iv) *Further, that the unreasonableness included bad faith, dishonesty, attention given to extraneous circumstances and failure to consider relevant matters.*
- v) *The decision of the Permanent Secretary to cancel all the tenders including those that had no other competitor, on ground of corruption or other illegality was excessive.*

4.0 **RELIEFS SOUGHT BY THE APPLICANTS**

4.1 Arising from these contentions, the reliefs sought by the applicants in the Notice of application dated 20th July 2022 are as follows:

- i) **An order of Certiorari to remove into the High Court for the purpose of quashing the decision of the Permanent Secretary of Tourism made on 4th May 2022 contained in an notification of cancellation of tender for the granting of the safari hunting / photographic tourism concessions in the nineteen hunting blocks in various Game Management Areas – MTA/SP/001/20.**
- ii) **A hearing of this application before the Judge pursuant to Rule 3 (10) (a) of Order 53 of the Rules of the Supreme Court.**
- iii) **If leave to apply is granted, a decision that such leave should operate as a stay of the said decision and further proceedings**

on the same pursuant to Order 53, Rules 3 (10)(a) of the White Book.

iv) If leave to apply is granted, a direction of the hearing of the application for Judicial Review be expedited.

v) An Order for costs.

5.0 OPPOSITION BY THE RESPONDENT

5.1 The respondent filed an affidavit in opposition on 12th September 2022 sworn by Martin Muyaku Lukwasa, a Deputy Chief State Advocate in the Ministry of Justice, stating that the respondent through the Ministry of Tourism did advertise for the grant of the Hunting Concessions and that the applicants did bid for the same. However, the applicants were never notified of the best evaluated bidder dispatched on or about 5th March 2021 as alleged. He also contended that the said notification also further expressly states that it is not a notification of contract award.

5.2 It was also contended by the respondent that the Ministry of Tourism cancelled the tenders on 4th May 2022 prompting the applicants to commence proceedings before the High Court seeking leave to apply for Judicial Review on 16th June 2022 which application was dismissed by the said Court on 14th July 2022.

5.3 The deponent contended that the Permanent Secretary in the Ministry of Tourism and Arts did not exceed his powers as

alleged by the applicants as he was empowered as a Controlling Officer in the said Ministry to issue and cancel the tender. He added that the said cancellation was done before the notification of contract award. It was also contended that the cancellation was done in accordance with the law governing procurement and cancellation of tenders.

6.0 **THE HEARING**

6.1 The application was heard *inter-partes* on 12th September 2022. The applicants' Counsel was in attendance, but the respondent was absent. The Court was informed that the respondent had been duly served with the process by the applicants and with the notice of hearing by the Court. An affidavit of service was on record to this effect.

6.2 Being satisfied that the respondent was fully aware of these proceedings and that a response to the application by the respondent is on record, we allowed the applicants to proceed in the absence of the respondents.

7.0 **APPLICANTS ARGUMENTS IN SUPPORT**

7.1 The applicants filed their Heads of Argument on 20th July 2022 contending that the application which was unsuccessful in the lower Court was necessitated by the action of the respondent through the Permanent Secretary in the Ministry of Tourism and Arts dated 4th May 2022,

cancelling the tender for the allocation of Hunting Concessions in the nineteen hunting blocks in various Game Management areas through a letter to all bidders.

7.2 The applicants argued that it is well settled that in an application for leave to commence Judicial Review, the Court need only form a prima facie view or be satisfied based on the evidence available before it, as to whether there is a case fit for further investigation at an *inter partes* hearing. This argument was anchored on the provisions of paragraph 570 of the 4th Edition under Volume 37 of the Halsbury's Laws of England¹ and Order 53/14/21 of the White Book¹.

7.3 The applicants also relied on several other decided cases to support their contention among them the case of **R. v Inland Revenue Commissioners, ex p. National Federation of Self Employed and Small Businesses Limited**², at p 644 where Lord Diplock stated that:

'Leave should be granted, if on the material then available the Court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the appellant.'

7.4 It was further contended that the elementary principle of Judicial Review is that it is concerned not with the merits of the decision, but with the decision making process so that individuals are given fair treatment by the authority to which they have been subjected adding that it was not the purpose

of Judicial Review to substitute the opinion of the individual Judge for that of the authority constituted by law to decide the matter in question. The applicants submitted that in the case in casu, the application before Court is concerned with the procedural issues and not the decision itself.

7.5 The applicants also cited the case of **Council of Civil Service Unions v Minister of State for Civil Service**³ which was extensively quoted by the Supreme Court in the case of **Derrick Chitala (Secretary General of the Zambia Democratic Congress) v The Attorney General**⁴ where the House of Lords established that the basis for Judicial Review could be subsumed under three principal heads, namely, illegality, irrationality and procedural impropriety adding that other grounds might emerge. By illegality, it was stressed that a decision maker must correctly understand the law that regulates his decision-making power and give effect to it.

7.6 The applicants went further to contend that, in the case before us, **Section 5(1) of the Zambia Wildlife Act**² vests the administrative function of the Act in the Department of National Parks and Wildlife through the Director under the general direction of the Permanent Secretary. It was argued that the said provision does not in any way clothe the Permanent Secretary with authority to make decisions on behalf of the Director and in cases of licensing, the Wildlife Licensing and Management Committee.

7.7 On the ground of irrationality, the applicants submitted that the decision to cancel the tender was irrational and/or Wednesbury unreasonable. Among the authorities cited for the contention were the learned authors of **De Smith, Woolf and Jowell on Judicial Review of Administrative Action**², particularly page 582 paragraph 13-046 regarding oppressive decisions, the authors advance that:

‘Official decisions may be held unreasonable when they are unduly oppressive because they subject the complainant to an excessive hardship or an unnecessary onerous infringement of his rights or interests.’

7.8 The learned authors go onto state the following at paragraph 13-047:

‘The focus of the attention in this case will be principally the impact of the decision upon the affected person. The outcome or end product of the decision-making process will thus be assessed rather than the way the decision was reached.’

7.9 The applicants concluded this ground by arguing that the unreasonableness also includes bad faith, dishonesty, attention given to extraneous circumstances and failure to consider matters which are bound to be considered or considering irrelevant considerations. The applicants stated that the decision by the Permanent Secretary to cancel or halt the Chikwa Hunting Block concession signing where the 2nd applicant was the most responsive and successful bidder

after notification of award was not only oppressive but was also *Wednesbury* unreasonable as it greatly prejudices the 2nd applicant's right as a successful bidder. It was further submitted that the Permanent Secretary made irrelevant considerations of allegations of corruption which considerations were not supported by any findings.

7.10 Under procedural impropriety, the applicants submitted that this ground envisages that Courts ought to ensure that administrative decisions or actions conform to the procedural rules that are expressly laid down in the statute, or the instrument by which the jurisdiction of the administrative body, or public officials is conferred.

7.11 Reliance for this proposition was the case of **Council for Civil Service Union and Others v Minister for the Civil Service**³, which case was quoted earlier. It was submitted that even though **Section 69(1)(f) of the Public Procurement Act**³ provides for the cancellation or termination of procurement proceedings on among other grounds, public interest, this could only be done by the Wildlife Management and Licensing Committee, and it should be done ***'prior to notification of contract award'***.

7.12 The applicants contended that the said procedure was ignored by the Permanent Secretary when he cancelled the tender in contention including the Chikwa Hunting Block assigned to the 2nd applicant. It was contended that even though the cancellation could only be done prior to the

notification of contract award, this power is only exercisable by the Wildlife Management and Licensing Committee.

7.13 The applicants further argued that in emerging jurisprudence, Judicial Review, has also experienced the development of principles of proportionality and legitimate expectation as additional grounds under Judicial Review. It was argued that under the ground of proportionality, an administrative authority is required, when exercising discretionary powers, to maintain a proper balance between any adverse effects which its decision may have as to the rights, liberties or interests of persons and purpose which it pursues. It was contended that the decision to cancel the subject tender interfered with the fundamental rights of the 2nd applicant under the law as the respondent was required to adopt a course that least interfere with those rights.

7.14 It was further argued that the ground of legitimate expectation which was also deliberated on by the Supreme Court in the case of **Communications Authority v Vodacom Zambia Limited**⁵ envisages that:

'Legitimate expectation arises where a decision maker has led someone to believe that they will receive or retain a benefit or advantage including that a hearing will be held before a decision is taken. The protection of legitimate expectation is at the root of the constitutional principal of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public. The doctrine of legitimate expectation derives its justification

from the principle of allowing the individual to rely on assurances given, and to promote certainty, and consistent administration.'

7.15 As regards the ground of legitimate expectation, the applicants contended that the respondent, through the Permanent Secretary in the Ministry, notified the 2nd applicant of contract award by issuing the public notice which created a legitimate expectation that the 2nd applicant will sign the hunting concession agreement for Chikwa Hunting Block. That the respondents did in fact continue to assure the 2nd applicant that the hunting concession agreement will be signed as evidenced in the signed negotiation minutes dated 13th April 2021.

7.16 The applicants also argued that the legitimate expectation is further evidenced by the fact that the procurement entity complied with **Section 72(2)(e) of the Public Procurement Act³** which provides that:

'A contract, purchase order, a letter of bid acceptance or other communication in any form conveying acceptance of a bid or award of contract shall not be issued prior to:

e) Any other approvals required, including clearance of the contract by the Treasury and legal advice of the Attorney General.'

7.17 The applicants also advanced the argument that the respondent wrongly used the public interest reason as stated

in the notice terminating tender. It was contended that the fact that the 1st applicant is party to these proceedings is demonstration that there was no participation or consultation from members of the 1st applicant who are key stakeholders in the allocation process as they are mandated by **Section 33(2)a) of the Zambia Wildlife Act.**

7.18 It was submitted that the remedies sought by the applicants will ensure that public interest considerations are taken care of as the 1st applicant's interest are more superior and at no time were they infringed upon by the tender which was cancelled.

7.19 The applicants cited the case of **Nkumbula v AG⁶** in augmenting its arguments under public interest considerations.

7.20 The Court of Appeal in that case held that:

'inter alia that what is in the public interest or for the public benefit is a question of balance; the interests of the society at large must be balanced against the interests of the particular section of the society or of the individual whose rights or interests are in issue, and if the interests of the society at large are regarded as sufficiently important to override the individual interests, then the action in question must be held to be in the public interest or for the public benefit.'

7.21 The applicants concluded their arguments by referring to the decision of the Court below which largely dismissed the

application for leave to commence Judicial Review on the principle of *stare decisis* and judicial precedent of the principles espoused by the Supreme Court in the case of **CK Scientific Group v Zambia Wildlife Authority**¹.

7.22 The **CK Scientific Group** case principally dismissed an application for leave to commence Judicial Review on the premise that the appellants' challenge of the cancellation of a tender and alleged failure by the respondent therein to award the tender was under the purview of private law as opposed to public law. The applicants attempted to distinguish the facts in that case from the facts herein submitting that the Zambia Wildlife Authority, as it existed in that case had a mandate and acted within its charge to administer the repealed **Zambia Wildlife Act of 1998**.

7.23 It was contended that the Authority acted within its statutory mandate when it cancelled the tender therein, a situation which must be distinguished from the case before us. It was further contended that the decision in the **CK Scientific Group** case was premised on now repealed law, the **Zambia Wildlife Act, No. 12 of 1998**. It was argued that the new **Zambia Wildlife Act, No. 14 of 2015** which repealed and replaced the former Act has clear and concise provisions under Part VII on who has authority to grant and revoke the award of hunting concessions.

7.24 It was also argued that as can be distinguished for the **CK Scientific Group** case, the application herein is not intended to challenge the cancellation of a tender per se but intended to examine and challenge the propriety of the cancellation by the Permanent Secretary of the Ministry of Tourism and Arts who lacked authority or mandate to act as he did. On account of the Permanent Secretary's lack of mandate to cancel the tender, it was impossible to appeal to the Minister against the decision of the Wildlife Management Licensing Committee as envisaged under the **Zambia Wildlife Act** or to appeal to the Zambia Public Procurement Authority as envisaged under the **Public Procurement Act**.

8.0 **RESPONDENT'S OPPOSING ARGUMENTS**

8.1 In the respondent's arguments filed into Court on 12th September 2022, it was argued that the application for leave to apply for Judicial Review was not properly before the lower Court and this Court as the applicants had not exhausted the administrative channels available to air the grievance which they have now brought before Court.

8.2 The respondent referred to **Section 100 of the Public Procurement Act, No. 8 of 2020** which provides that:

'A bidder or supplier who is aggrieved with a decision made by a procuring entity under this Act may appeal against the decision to the Authority.'

8.3 The respondent augmented their argument by submitting that even **Order 53 of the White Book** on which the applicants are relying recognized the requirement to exhaust all other avenues before seeking redress under Judicial Review. The respondent made specific reference to the provision of **Order 53/14/7 of the White Book**¹ which provides that:

‘The Courts will not normally grant judicial review where there is another avenue of appeal. It is a cardinal principle that, save in the most exceptional circumstances [the jurisdiction to grant judicial review] will not be exercised where other remedies were available and have not been used....’

8.4 The respondent reiterated the applicants’ arguments that **Section 69(1) of the Public Procurement Act** precludes a procuring entity from cancelling procurement proceedings after the notification of the contract award has been communicated to the successful bidder. They submitted that the publication of the list of successful bidders by the Ministry of Tourism did not amount to a notification of contract award as the said application had stated so.

8.5 The respondent also referred the Court to the provision of **Section 72(2) of the Public Procurement Act**³ to comprehend the difference between the notification of contract award and publication of notice of best evaluated bidder. The said section states as follows:

'A contract, purchase order, letter of bid acceptance or other communication in any form conveying acceptance of a bid or award of contract shall not be issued prior to:

- (a) An award decision by the appropriate approval's authority in accordance with Section 70;*
- (b) Publication and dispatch of the notice of best evaluated bidder in accordance with Section 71;*
- (c) Confirmation that the procurement is not subject to review by the Authority;*
- (d) Confirmation that funding is available for the contract; and*
- (e) Any other approvals required, including clearance of the contract by the Treasury and the legal advice of the Attorney-General.'*

8.6 The respondent further argued that the applicant's contention that only the Wildlife Management and Licensing Committee had the authority to cancel the hunting concessions is self-defeating as it presupposes that only the Committee has this authority. It was submitted that this would entail that the tender in contention was equally not legitimate as it was sanctioned and signed by the Permanent Secretary in the first place.

8.7 The respondent also placed reliance on **Section 5(1) of the Zambia Wildlife Act** which provides for the establishment of the Department of National Parks and Wildlife which is responsible for administration of the Act under the general direction of the Permanent Secretary.

8.8 The respondent concluded by stating that the action by the Permanent Secretary was within his jurisdiction as provided for under **Section 69(1) of the Public Procurement Act**. The respondent urged the Court to dismiss this application on the basis that it had not met the threshold of a *prima facie* case, fit for further investigation under Judicial Review, as established in the case of **Nyampala Safaris Limited and Others v Zambia Wildlife Authority and Others**⁷.

8.9 On the strength of the foregoing arguments, the respondent also opposed the applicants' application for stay of the Invitation for Bids (IFB) by the Ministry of Tourism dated 17th August 2022 stressing that the applicants' application had no basis upon which the Court could grant the reliefs they seek.

9.0 **DECISION OF THIS COURT**

9.1 We have carefully considered the evidence in the affidavits and the arguments of the respective Counsel.

9.2 By this renewed application to this Court, the applicants seek leave to apply for Judicial Review against the decision of the Permanent Secretary of the Ministry of Tourism and Arts made on 4th May 2022 to cancel the tenders for the allocation of Hunting Concessions in various Game Management Areas. The applicants also seek a stay of execution of the invitation for bids by the Ministry of Tourism dated 17th August 2022.

9.3 The application has been brought pursuant to **Order 53 Rule 3(4) and (5) RSC** seeking leave to commence Judicial Review proceedings. The purpose of the requirement for obtaining leave is set out in **Order 53/1-14/8 of the White Book¹** as follows:

‘The purpose of the requirement for leave is:

- a) To eliminate at an early stage any applications which are either frivolous, vexatious, or hopeless; 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 consideration.’**

9.4 The foregoing authorities are instructive that the purpose of the requirement to obtain leave to commence Judicial Review proceedings is for the Court to establish at an early stage if an application is fit for further investigation for it to proceed to the substantive hearing of the matter. An applicant must demonstrate a good arguable case that he is likely to succeed at a substantive hearing.

9.5 The purpose of the remedy of Judicial Review is to enable a Court to ensure that the exercise of administrative authority by public officers is done within the confines of the law.

9.6 This is in line with the provisions of **Order 53/0/2 of the White Book¹** which provide that:

‘The rules in this order were introduced for the exercise by the Court of its supervisory jurisdiction by way of Judicial Review over

the proceedings and decisions of inferior Courts, tribunals or other persons or bodies which perform public duties or functions.'

- 9.7 The learned authors of **De Smith's Judicial Review, seventh edition**³ also guide at page 4 that, Judicial Review is a mechanism that:

'Provides legal standards which are enforced through a process of litigation to enable people to challenge the lawfulness of decisions made by public bodies and others exercising public functions. The legal standards may be summarized as follows:

- 1. Public bodies must have legal authority for their actions. This may be derived from statute, the common law or (in the case of some central government function) a prerogative power. Public bodies must act within the scope of that legal authority.*
- 2. Powers must be exercised within the objects and purpose of the statute.*
- 5 Where a statute gives decision making power to a public body, that body (not another) must exercise its discretion; except in some recognized circumstances, it is unlawful to delegate the power.'*

- 9.8 The foregoing authorities provide guidance on the purpose of the process of Judicial Review. It provides a mechanism to challenge the lawfulness of the decisions made by public bodies and others exercising public functions.

9.9 The gist of applicants' grievance is that the powers of cancelling a tender for the Hunting Concessions was exercised by a wrong person, namely the Permanent Secretary of the Ministry of Tourism and Arts, in whom no such power vests.

9.10 The applicants further contended that the actions of the said Permanent Secretary were illegal, irrational, and procedurally improper and therefore seek among other reliefs, an Order of certiorari to remove into the High Court for the purpose of quashing the said decision of the Permanent Secretary of Tourism and Arts to cancel the tender for the granting of Hunting Concessions in 19 hunting blocks in the various Game Management Areas – MTA/SP/001/20.

9.11 Being mindful that the application before us at this stage is for leave to commence judicial review as provided for under **Order 53 Rule 3(4) of the White Book** which requires certain considerations to be made at a preliminary stage. Without delving into the merits of the substantive claims, we turn to consider the contentions of the applicants and whether on the face of it, they have established a case fit for further investigation. In doing so, it is necessary to examine the allegations and reliefs sought by the applicants as endorsed in the statement accompanying the application.

9.12 In considering this application, we begin by reviewing the provisions of the relevant legislation. The preamble to the

Public Procurement Act sets out the purpose for which it was enacted, which includes to regulate and control practices relating to public procurement to promote the integrity and fairness and public confidence in, the procurement process. By virtue of **Section 3(1) of the Public Procurement Act** it applies to procurements carried out by public procuring entities.

9.13 **Section 2** thereof defines a *‘procurement entity’* as:

- (a) “a Government Agency or parastatal body carrying out procurement using public funds or any other funds;*
- (b) any other body or unit established or mandated by Government to carry out procurement using public funds.”*

9.14 Turning to the matter at hand, the applicants contend that the Permanent Secretary of Tourism and Arts acted illegally and violated the provisions of **Sections 7, 48, 54 and 57 of the Zambia Wildlife Act** which reserves powers to cancel any Hunting Concessions to the Wildlife Management Licensing Committee.

9.15 They also contend that the said Permanent Secretary acted illegally and violated the provisions of **Sections 69(1) of the Public Procurement Act of the Laws of Zambia** which permits a procuring entity to cancel or terminate procurement proceedings at any time ‘prior to notification of contract award’ unlike the cancellation done in this case.

9.16 We begin with a review of the enabling Act which empowers the requisite public bodies to act in relation to National Parks and Wildlife. **Section 5(1) of the Zambia Wildlife Act** establishes the Department of National Parks and Wildlife (hereafter 'DNPW') which is responsible for the administration of the Zambia Wildlife Act under the general direction of the Permanent Secretary of the Ministry. The Ministry responsible is defined in the preamble to the Act as the Ministry of Tourism, now the Ministry of Tourism and Arts.

9.17 A further reading of **Section 6 (1) and 7(1) of the Zambia Wildlife Act**, provides for the appointment of a Director of the DNPW and the establishment of the Wildlife Management Licensing Committee (hereafter 'WMLC'). The Committee consists of appointments by the Minister of representatives of each Ministry responsible for the environment, land, fisheries, forests, finance, tourism, chiefs and mines, representative of the Attorney General, representative of a Security Agency, representatives of the Anti-Corruption Commission, the Environmental Management Agency, Tourism Council of Zambia, and a director as *ex-officio* member.

9.18 The functions of the WMLC are clearly stipulated therein to among other things '**consider applications for licenses, permits and certificates and grant, renew or refuse to grant or renew licenses, permits and certificates.**' The Committee also serves as advisor to the Minister, the

Permanent Secretary and the Director on matters relating to its duties under the Act.

9.19 The foregoing illustrates that **The Zambia Wildlife Authority Act** provides for the establishment of the Licensing Committee as the procurement entity for various procurements under the said Act. It among other things also provides for the establishment and existence of the said Licensing Committee as an advisory body with exclusive mandate over its functions and for which the Committee is required from time to time to provide advice to the Permanent Secretary, the Minister and Director on matters relating to its functions under the **Zambia Wildlife Act**.

9.20 The **Zambia Wildlife Act** and the **Public Procurement Act**, provide specific procedures to be complied with in public procurement by a procurement entity. In relation to procurement of Hunting Concessions as is the case *in casu*, the public procurement entity is the Wildlife Management Licensing Authority.

9.21 The provisions of the two pieces of legislation, are not mutually exclusive but should be read together in understanding the roles, powers, and functions of the Wildlife Management Licensing Committee vis-a-viz the licensing procurement process under the **Zambia Wildlife Act**.

9.22 The applicants contend that by virtue of the provision of **Section 7(1) of the Zambia Wildlife Act** the power to consider applications for licenses and to grant, renew or refuse to grant such licenses vests in the Wildlife Management Licensing Committee. The applicants contend that the Committee's functions were erroneously carried out by the said Permanent Secretary.

9.23 In response to the applicant's claims, the respondent filed an affidavit in opposition into Court on 12th September 2022 in which they concede that the Ministry of Tourism and Arts did cancel the tenders on 4th May 2022 as alleged but argued firstly, that the applicants were never notified of a contract award. Secondly, that the said Permanent Secretary did not exceed his powers as a Controlling Officer in the Ministry he is empowered to issue and cancel tenders. They also exhibited a copy of the said letter by the Permanent Secretary for the Ministry of Tourism on 4th May 2022 which reads in part as follows:

'As you may be aware, the Government through the Ministry of Tourism floated a tender for the granting of Safari Hunting/Photographic Tourism Concessions in Nineteen (19) Hunting Blocks in various Game Management Areas (GMAs) on 13th November 2020 and closed on 30th December 2020.

The Ministry regrets to inform all bidders who participated in the above-mentioned tender that the tender has been cancelled due to public interest. Any inconvenience caused is deeply regretted.'

9.24 The forgoing shows that the cancellation of the tender was undertaken by the Permanent Secretary of Tourism and Arts contrary to the applicant's contention that the cancellation could only be done by the WMLC as envisaged under **Section 7(1) of the Zambia Wildlife Act.**

9.25 It is in this light that the applicants seek leave of Court to apply for Judicial Review for among other reliefs 'an order for certiorari to remove into the High Court for the purpose of quashing the decision of the Permanent Secretary of Tourism made on 4th May 2022 contained in a notification of cancellation of tender for the granting of the safari hunting/photographic tourism concessions in nineteen (19) Hunting Blocks in various Game Management Areas (MTA)SP/00/20.

9.26 A consideration of further arguments advanced by the respondent is, that the application for leave is prematurely before the Court as the applicants have not exhausted the administrative channels available to them. The alternative avenues are to appeal to the Zambia Public Procurement Authority as provided for under **Section 100 of the Public Procurement Act³**, which enables, *'a bidder or supplier who is aggrieved with a decision made by a procuring entity under this Act may appeal against the decision to the Authority.'*

9.27 A similar provision exists for appeals to be made to the Minister under **Section 145 of the Zambia Wildlife Act** which provides that, *'a person who is aggrieved with the decision of the*

Director or the Committee under this Act may appeal to the Minister within thirty days of the receipt of the decision of the Director or Committee.'

9.28 A review of these two provisions reveals that the decision of the Permanent Secretary in this regard is not the one envisaged for appeal under the Zambia Public Procurement Authority or the Zambia Wildlife Act, which specifically refers to the Director or the Committee. Given that the Director or the Licensing Committee did not make any decision in relation to this matter, we take the view that the respondent's contention that the applicants could have explored other avenues to appeal cannot be sustained by this Court.

9.29 We have earlier ascertained that the intention of the legislators under the **Zambia Wildlife Act** was to provide for the establishment of the Wildlife Management and Licensing Committee as the procurement entity for matters falling under its mandate.

9.30 The contention in issue is the cancellation of a tender was purportedly undertaken by an officer or authority other than that provided for under the said pieces of legislation. The learned authors of **De Smith's Judicial Review** quoted in the earlier part of this ruling guide that powers that have been conferred on a public body or public officer must be exercised by such public body or officer and no one else except in exceptional circumstances. Further, that Judicial Review seeks to proscribe decisions of public officers or entities

which among others are made outside the mandate or parameter given in the enabling legislation or regulation.

9.31 It is this issue which forms the basis of what we would consider to be fit for further investigation and interrogation through Judicial Review proceedings. At this stage, we are merely making preliminary considerations as to whether there is an issue fit for further considerations at the substantive hearing of Judicial Review.

9.32 The applicants who are private entities are clearly aggrieved by the manner and extent of the decision in issue made by the Permanent Secretary of the Ministry of Tourism and Arts, and by this application seek to subject the decision to further interrogation.

9.33 It is our firm view that this is the scenario of the class of cases envisaged under **Order 53 of the White Book**. The case at hand is clearly distinguishable from the **CK Scientific Group** as the repealing act to the former Act, the Zambia Wildlife Act No. 14 of 2015 now establishes the Department of National Parks and Wildlife as a Department under the Ministry of Tourism as opposed to the Corporation sole that was in existence at the time of the **CK Scientific Group** decision

9.34 In view of the foregoing, we are satisfied that this is a case fit for further investigation. We find merit in the application and

for this reason, we accordingly grant leave to commence Judicial Review proceedings in the High Court.

9.35 The applicants have also applied for an order to stay the invitation for bids by the Ministry of Tourism and Arts dated Wednesday 17th August 2022 and further proceedings in relation to the said Hunting Concessions pending determination of this application.

9.36 Having determined as we have and being mindful that the application for an order for stay was only sought pursuant to determination of the proceedings for leave herein, we are of the firm view that since the decision sought to be impugned relates to Hunting Concessions in the 19 hunting blocks, we feel compelled to exercise our discretion to extend the order to stay further proceedings in relation to only the Hunting Concession in the Chikwa Hunting Block in Musalangu Game Management Area pending the determination of Judicial Review proceedings. We have ordered and directed as we have regarding an application for stay as the applicants have only demonstrated sufficient interest in one hunting block and not the rest of the eighteen hunting blocks. We thus see no basis to extend stay of invitation for bids to the rest of the eighteen hunting blocks in which the applicants have no interest.

9.37 We further direct that the said Judicial Review proceedings must be commenced within 14 days from date of this ruling failure to which the order for stay will stand discharged.

9.38 Costs to the applicants to be taxed in default of agreement.



J. Chashi
COURT OF APPEAL JUDGE



M.J Siavwapa
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE