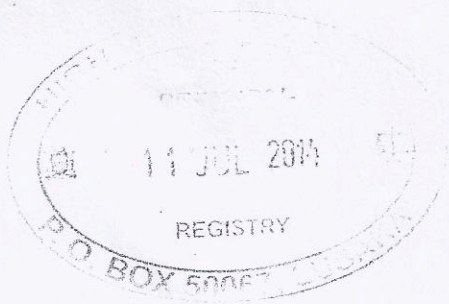
IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HP/1058



BETWEEN:

BREBNER CHANGALA — APPLICANT

AND

THE ATTORNEY GENERAL — RESPONDENT

Before The Honourable Mr. I. C. T. Chali in Cahmber the 11th day of July, 2014.

FOR THE APPLICANT : MAKEBI ZULU ADVOCATES
FOR THE RESPONDENT: THE ATTORNEY GENERAL

RULING

CASES REFERRED TO;

Inland Revenue Commissioners v National Federation of Self Employed and Small Businees LTD (1981) 2 ALL ER 93

LEGISLATION REFERRED TO:

1. Constitution of Zambia.
2. Rules of the Supreme Court (White Book), 199.

The Applicant, by notice filed in Court on 9th July, 2014, applied ex parte for leave to commence proceedings by way of Judicial Review pursuant to Order 53 Rule 3 of the Rules of the Supreme Court (White Book), 1999 Edition. He sought, inter alia,

"an Order of Mandamus to compel cabinet to carry out its statutory function as enshrined in Article 36 of the Constitution of Zambia."

According to the Notice of Application for leave to apply for Judicial Review which was addressed to the Assistant Deputy Registrar, the Applicant is aggrieved at,

"the decision or indecision by cabinet to consider the question of the physical and mental capacity of the Republican President Mr. Micheal Chilufya Sata."

To start with, let me put some matters into perspective.

Firstly, the relevant parts of Order 53 Rule 3 of the Rules of the Supreme Court under which the application was made provide:

(1) No application for Judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) The application for leave must be made ex parte to a Judge by filing in the (Registry) –

(a) A notice in Form No 86A containing a statement of

(i) The name and description of the applicant,

(ii) The relief sought and the grounds upon which it is sought,

(iii) The name and address of the applicant's (Advocates) (if any), and

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(iv) The applicant's address for service; and

(b) An affidavit verifying the facts relied on.

(3) The Judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court ....."

The applicant filed a notice in which he did not request a hearing. And I did not find it necessary to hear either the Applicant or the proposed Respondent. Further, the said notice appeared to have complied in most material respects with the provisions under paragraph (2) of Rule 3. And lastly there was an affidavit filed with the application verifying the facts relied on sworn by the Applicant. I shall briefly refer to the facts relied on later in this ruling.

Secondly, simply defined, an order of mandamus, which the Applicant seeks to apply for once leave is granted is a mandatory order of the Court directed at some person or body to compel the performance of a public duty. Order 53 Rule 14 subrule 42 defines mandams as,

> **"an order requiring an inferior Court or tribunal or a person or body of persons charged with a public duty to carry out its judicial or other public duty .... It will lie against an officer of the (state) who is obliged by statute to do some ministerial or administrative act which affects the right or interest of the applicant...."**

The third aspect is as to who may apply for judicial review. Paragraph (7) of Order 53 Rule 3 of the Rules of the Supreme Court provides thus:

> **"(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates"**

If for example, the applicant has a direct personal interest in the relief which he is seeking, he will very likely be considered as having a sufficient

interest in the matter to which the application relates. If, however, his interest in the matter is not direct or personal, but is a general or public interest, it will be for the Court to determine whether he has the requisite standing to apply for judicial relief. The notes to Order 53 Rule 14 subrule 24 state that the formula "sufficient interest" is not intended to create a class of person, popularly referred to as a " private attorney-general", who seeks to champion public interests in which he is not himself directly or personally concerned, under the quise of applying for judicial review.
In the English House of Lords case of INLAND REVENUE COMMISSIONERS V NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESS LTD (1981) 2 ALL ER 93 it was held, inter alia:

> **"whether an applicant for mandamus had a sufficient interest in the matter to which the application related, for the purposes of Order 53 Rule 3 (7) depended on whether the definition (statutory or otherwise) of the duty alleged to have been breached or not performed expressly or impliedly gave the applicant the right to complaint of the breach or non-performance."**

Briefly in the IRC case cited above, the Respondent had complained and sued over the manner the tax commissioners had been treating them vis-à-vis other tax payers and had applied for judicial review under 53 Rule 3 for an order of mandamus directing the IRC to assess and collect tax on the other tax payers according to law. The issue arose as to whether the applicants had a "sufficient interest in the matter" for the Court to grant leave. Lord Wilberforce said at page 99 of the report:

"As a matter of general principle I would hold that one tax payer has no sufficient interests in asking the Court to investigate the tax affairs of another tax payer or to complaint that the latter has been under assessed or over assessed; indeed there is a strong public interest that he should not. And this principle applies equally to groups of tax payers, an aggregate of individuals each of whom has no interest cannot of itself have an interest."

The IRC case cited above further held that the question what is a "sufficient interest in the matter to which the application relates" appears to be a mixed question of fact and law; a question of fact and degree and the relationship between the applicant and the matter to which the application relates, having regard to all the circumstances of the case. This then takes me to the further aspect, which is as to why there is a requirement for the applicant for judicial review to first seek the leave of the Court before he can proceed to prosecute his grievance. Order 53 Rule 14 subrule 55 provides:

"The purpose of the requirement of 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 substantative hearing if the Court is satisfied that there is a case fit for further consideration."**

In the words of Lord Diplock in the IRC case already cited the requirement that leave must be obtained is designed to;

" prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which pubic officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for

judicial review of it were actually pending even though misconceived (See page 105 of the report).

In both the Notice of Application as well as in his affidavit verifying the facts in the Notice, the Applicant describes himself as a Zambian citizen, a registered voter, and human rights activist. He complains of the Republican President, Mr. Micheal Chilufya Sata's alleged declining health from the robust heath the President appeared to enjoy at the time he was elected and inaugurated in September, 2011. He cites instances during his public appearances when the President has appeared frail and of poor health and when he has sounded incoherent in his speech. On Some occasions the President is alleged to have appeared unkempt and uncontrollable in behavior. The President's condition, the Applicant alleges, has over time deteriorated to the point whereby he has had to cut short several of his public engagements. This, the Applicant states, has given rise to speculation as to the President's mental and physical capacity. He argues that the President's speech and demeanour can only be likened to a person suffering from ill health.

The Applicant exhibited several extracts from the DAILY NATION newspaper as well as a few from the POST newspaper concerning the alleged discussions by members of the public about the President's state of health. However, I found the extracts from the POST newspaper to have been of official Government pronouncements about the President's health, without speculation, compared to the DAILY NATION Newspaper whose "reports" appeared to me to be unguarded to the point of being reckless scandal-mongering.

The Applicant deposed in his affidavit that through his lawyers he wrote to Hon. WYNTER KABIMBA, who was Acting Republican President when the President was out of the country from mid-June to early July, 2014 to, among other things, bring to the Government's attention the Applicant's concerns about the Republican President's health and to demand that Cabinet exercises the duty imposed upon it so that a Medical Board may be set up to inquire into the President's health in accordance with Article 36 of the Constitution of Zambia. However, he has not had any response to his lawyer's letter of 26th June, 2014.

The Applicant has argued for leave for judicial review on two legal grounds which may be summarized as follows:

1. That Article 36 of the Constitution of Zambia provides for a motion to consider the question of the physical and mental capacity of the President to carry out the functions of his office. That it is the duty of Cabinet to move and consider that motion when the question arises. When Cabinet fails, refuses or neglects to carry out that Statutory function, then an order of mandamus may issue to compel them to carry out that duty. That question, the Applicant argues, has now arisen and, having failed to consider it, they ought to be compelled to comply by an order of mandamus;
2. That the failure by Cabinet to consider the question of the President's mental and physical capacity to carry out the functions of his office is unreasonable. That the failure is in defiance of logic or accepted moral standards which no sensible person who has applied his mind to the question to be decided could arrive at.

I must here set out the relevant part of Article 36 of the Constitution of Zambia which the Applicant seeks to have enforced once leave for judicial review is granted. The Article reads in parts:

> **"(1) If it is resolved by a majority of all the members of the Cabinet that the question of the physical or mental capacity of the President to discharge the functions of his office ought to be investigated, and so inform the Chief Justice, then the Chief Justice shall appoint a board consisting of not less than three persons selected by him from among persons who are qualified as medical practitioners under the Law of Zambia or under the Law of any other country in the Commonwealth, and the board shall inquire into the matter and report to the Chief Justice on whether or not the President is, by reason of any infirnity of body or mind, incapable of discharging the functions of his office.**
> **(4)A motion for the purposes of clause (1) may be proposed at any meeting of the Cabinet."**

In my considered opinion, the decision to propose a motion for the purpose of clause (1) of Article 36 of the Constitution is entirely in the discretion of members of the Cabinet. No one member or group among the members of the Cabinet can be compelled to propose that motion. It is entirely up to anyone of them to decide to propose such motion. It is not a statutory duty that they must do so, but only to do so when they think the circumstances requires it. To rule otherwise in a matter of this nature would be to unduly interfere in the functions of the Executive arm of Government. In my opinion, the only person who may be compelled to take action under Article 36 (1) by an Order of the Court is perhaps the Chief Justice once he has been informed of the Cabinet's resolution to have

the matter investigated. That is the inference in the language of Article 36 (1) itself.

Further, I asked myself what rights or interest of the Applicant have been affected by the Cabinet's apparent inaction on the issue. I use the phrase "apparent inaction " deliberately. This is because firstly, the Applicant himself does not appear to be certain whether the Cabinet has considered any motion in that regard. As I have shown at the beginning of this ruling, the Applicant appears to be aggrieved, in his own words in the Notice, at " the "decision or indecision by Cabinet to consider the question of the physical and mental capacity of the President.." (underlining mine for emphasis). That is an expression of uncertainty on the Applicant's part. Secondly, I use that phrase because no one may know the decisions of the Cabinet until these are brought to the fore by an official Public Pronouncement. And Cabinet is not generally obliged to make public every or any decision they make.

Apart from being a Zambian citizen, registered voter and human rights activist, can the Applicant be said to have exhibited a "sufficient interest in the matter to which the application relates"? The matter concerns the perceived ill health of the President. Can the Applicant be said to have a reasonable and sufficient personal interest in the issue? I do not think so. On the contrary, he has impressed me as the kind of "busybody" Lord Diplock spoke of in the IRC case I have cited, one who appears to have a "misguided or trivial complaint of administrative error".

Indeed I find his application to be frivolous, vexatious and hopeless to the extent of not requiring further inquiry at a substantive inquiry.

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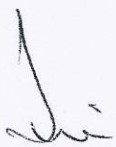
In sum, I find no merit in the application.

Leave is accordingly refused.

DELIVERED IN CHAMBERS THE 11TH DAY OF JULY, 2014



I.C. T CHALI
JUDGE