library

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 13/2012**
HOLDEN AT KABWE **SCZ/8/227/2011**
(Civil Jurisdiction)

BETWEEN:

KAFUE HORSE SAFARIS LIMITED **APPELLANT**

AND

ZAMBIA WILDLIFE AUTHORITY **1ST RESPONDENT**

ATTORNEY GENERAL **2ND RESPONDENT**

CORAM: Mwanamwambwa Ag/DCJ, Kaoma JS, Lisimba Ag/JS.

On 8th April, 2014 and 19th January, 2015.

For the Appellant: Mrs. A. D. Theotis–Messrs. Theotis Mataka & Sampa Legal Practitioners.

For the 1st Respondent: Mr. I. Kombe– In house Counsel, ZAWA.

For the 2nd Respondent: Mr. F. Imasiku– Attorney General's Chambers.

JUDGMENT

Mwanamwambwa J.S., delivered the Judgment of the Court.

CASES REFERRED TO:

(1) **ASSOCIATED PROVINCIAL PICTURE HOUSES V WEDNESBURY CORPORATION (1948) KB 223**

(2) **ZAMBIA CONSOLIDATED COPPER MINES LIMITED V GOODWARD ENTERPRISES LIMITED (2000) ZR 48**

(3) **MUSUSU KALENGA BUILDING LIMITED AND WINNIE KALENGA V RICHMAN'S MONEY LENDERS ENTERPRISES (1999) Z.R. 27**

(4) **SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY (2005) ZR 109.**

(5) **ZULU V AVONDALE HOUSING PROJECT (1982) ZR 172**

(6) **NEW PLAST INDUSTRIES LIMITED V COMMISSIONER OF LANDS AND THE ATTORNEY GENERAL (2001) Z.R. 51**

(7) **CHIKUTA V CHIPATA RURAL COUNCIL (1974) Z.R. 241.**

LEGISLATION REFERRED TO:

(1) **SECTION 5(1), 34, 52(1), 55(1), 56(1), (2) AND 57 OF THE ZAMBIA WILDLIFE ACT NO. 12 OF 1998**

(2) **SECTION 16 (2) OF THE ZAMBIA WILDLIFE (LICENCE AND FEES) REGULATIONS, S.I. NUMBER 60 OF 2007**

WORKS REFERRED TO:

(1) **PARAGRAPH 81 OF HALSBURY'S LAWS OF ENGLAND, (1989), VOL. 1(1), 4TH EDITION REISSUE, LONDON: BUTTERWORTHS. PAGE 151, PARAGRAPH 81.**

For convenience we shall refer to the appellant as the applicant and we will continue to refer to the respondents as such, for that is what they were in the court below.

This is an appeal against the High Court's refusal to grant the applicant all, but one of the Judicial Review remedies it was seeking against the respondents. This case is not without a history. On 22nd July, 2008, the applicant and the 1st respondent executed a memorandum of understanding (MOU). According to the MOU, the applicant had approached the 1st respondent, with a proposal to

conduct Horse Back safaris in the Kafue National Park and to assist in the development of tourism in the park. The MOU had three objectives. The first was to provide time for the applicant to show proof of financing and capacity to implement the proposed project. The second was to allow for the preparation of an Environmental Impact Assessment and obtain approval by the Environment Council of Zambia. The third one was to allow the feasibility of the implementation of the project. Further, clause 2 of the MOU provided that the MOU was going to be in force for a period not exceeding six months, from the date of signing. Thereafter, it was going to either be replaced by the Tourism Concession Agreement (TCA) or the negotiations were going to be discontinued. Then the execution of the TCA was in turn going to facilitate for the granting of a Photographic Tour Operators Licence, authorizing the applicant to operate Horse Safaris business.

However, the MOU was not replaced by the TCA after its expiration to the disappointment of the applicant. This was because, the 1st respondent had refused to sign it. The 1st respondent had refused to execute it despite them having prepared a draft TCA. The 1st respondent informed the applicant of its decision not sign the TCA

by email. Aggrieved by the decision of the 1st respondent, the applicant then sought the intervention of the Minister of Tourism, who instituted an inquiry over the matter. The inquiry revealed that there were a number of concerns. Among them was the failure by the applicant to meet its obligations under the MOU. The second one was the investigations, against the applicant's alleged fraud, by law enforcement agencies. There was also an objection by a concerned community member that the proposed site for the applicant's project was an active animal corridor contrary to the conditions set by the Environmental Council of Zambia. In this regard, the Minister of Tourism wrote to the applicant advising that they were willing to consider executing the TCA on condition that the applicant relocated to another site.

It was against this background that the applicant filed an application before the High Court, for the judicial review of the respondents' decisions. Firstly, it was challenging the 1st respondent's alleged refusal to comply with its obligations under the MOU executed in July 2008, between the applicant and the 1st respondent. Secondly, the applicant was challenging the 1st respondent's alleged refusal to execute a TCA with the applicant, which was consequently

going to grant the applicant a Photographic Tour Operators Licence, authorizing it to operate Horse Safaris business in the Namitwe, Nkala GMA areas of the Kafue National Park. Thirdly, the applicant was challenging the 1st respondent's alleged failure to notify the applicant of the grounds for its refusal, to grant the applicant with a licence contrary to **section 56(2) of the Zambia Wildlife Act No. 12 of 1998 and section 16 (2) of the Zambia Wildlife (Licence and fees) Regulations, S.I. number 60** of 2007. In so doing, the applicant sought a total of twelve reliefs, which included mandamus, certiorari, a declaration, damages, and directives. The trial judge dismissed all these claims but granted mandamus compelling the respondents to notify the applicant, in a prescribed form, the reasons for its refusal to execute a TCA. She granted mandamus after finding that there was procedural impropriety on the part of the 1st respondent.

On the law and the evidence adduced before her, the trial judge declined to grant the other reliefs, because she found that there was no illegality or irrationality on the part of the respondents. She also dismissed the claim for damages because the applicant was not given a licence for Safari Photographic Tours and as such, it did not suffer

any damages, since it was not doing any business operations. Being dissatisfied with the decision of the trial court, the applicant appealed to this court and filed a memorandum of appeal containing six grounds of appeal.

In the first ground, it is argued that the learned trial judge erred in law and fact when she failed to consider that the power to execute the Tourism Concession Agreement (TCA) lies with the Director General of the 1st respondent and not the Minister of Tourism, who had no authority to execute the TCA on condition that the applicant relocated from the area.

The second ground of appeal is that the learned trial judge erred in law and fact when she held that the decision of the Director General of ZAWA was not irrational or unreasonable, on the ground that there was no application for a Photographic Tour Operator's Licence (PTOL) on account of the TCA without consideration of the fact that the PTOL was one of the intended consequences of the TCA.

Ground three was that the learned trial judge erred in law and fact when she failed to consider that the applicant legitimately expected the 1st respondent to execute the TCA as evidenced from the draft TCA which was forwarded to the appellant.

On the fourth ground of appeal, it is contended that the learned trial judge erred in fact when she failed to consider that the applicant was given authority under the Memorandum of Understanding, made between the applicant and the respondent, to conduct Horse Back Safaris in Kafue National Park and to assist in the development and promotion of tourism for a period of 6 months, to assess the applicant's suitability to be granted a TCA.

The fifth ground of appeal is that the learned trial judge erred in law when failed to find that failure to give reasons for the refusal to grant a photographic Tour Operator's Licence (PTOL) by the 1st respondent in the prescribed manner, amounted to a breach of statutory duty and misfeasance of public office and thus, the applicant was entitled to damages.

In the sixth and final ground, the applicant argues is that the learned trial judge erred in law and fact when she failed to consider that grounds for judicial review are cumulative and thus, success on any ground thereof will entitle the appellant to the reliefs sought.

The applicant and the 1st respondent filed written heads of arguments based on all the six grounds of appeal but the 2nd respondent only filed heads of arguments based on grounds one and five. Counsel for all the parties relied on their heads of arguments when we heard this appeal in Kabwe. We anxiously considered them. We also considered the evidence on record together with the Judgment which is subject of this appeal. Counsel for the 1st respondent argued grounds two and five together and we will accordingly address the two grounds together because they raise similar issues. We however intend to deal with the rest of the grounds of appeal in the order that they were argued.

On ground one, Mrs. Theotis, on behalf of the applicant, submitted that the trial judge erred when she failed to consider that the power to execute the TCA lies with the Director General of the 1st respondent and not the Minister of Tourism. She argued that the 1st respondent is mandated under **section 5(1) (a) and (d) of the Zambia Wildlife Act No. 12 of** 1998 to control, conserve, promote and administer National Parks and Game Management areas and coordinate activities in such areas and do such things as are necessary to further the objectives of the Act. As such, the granting of a TCA to

the applicant was a function exercisable by the 1st respondent and not the Minister of Tourism. She argued that the Minister of Tourism had no authority to execute the TCA, on condition that the applicant relocates from the area. She stated that the powers exercisable by the Minister of Tourism under **section 34 of Zambia Wildlife Act**, were regulatory. In this regard, the execution of the TCA was not a regulatory function exercisable by the Minister of Tourism. Mrs. Theotis contended that the Director General of the 1st respondent was the one with the authority to issue a PTOL and to execute a TCA, as provided for under **section 52 (1) of the Zambia Wildlife Act**.

In response to ground one, learned counsel for the 1st respondent submitted that the trial judge did not fail to consider that the power to execute the TCA lies with the Director General of the 1st Respondent and not the Minister of Tourism. He argued that the 1st respondent was a statutory corporation, which was subject to the supervision of the Ministry of Tourism. The supervisory powers of the Ministry under **section 34 of the Zambia Wildlife Act,** include the power to issue Statutory Instruments. Mr. Kombe agreed with Mrs. Theotis that the Director General of the 1st respondent had power under **section 52 (1) of the Zambia Wildlife Act**, to grant

a PTOL. He pointed out that the applicant had failed to comply with the conditions precedent for the granting of the TCA and the 1st respondent declined to execute it. He stated that the applicant had sought the Minister's intervention when the 1st respondent refused to grant the TCA. The Minister did not interfere with the matter but only came at the instigation of the applicant, in order to aid the parties to resolve the matter after the 1st respondent declined to execute the TCA. The applicant could not now be heard to question the Minister's involvement in the matter. He submitted that all the three grounds for judicial review had failed in ground one because there was no decision which was in fact made by the Minister of Tourism.

Submitting for the 2nd respondent, Mr. Imasiku argued that it was important to consider the facts and evidence that led to the non-execution of the TCA and how the Minister of Tourism got involved. He stated that the refusal by the 1st respondent to execute the TCA led the applicant to lodge a complaint to the Minister of Tourism. The complaint was made after the expiry of the MOU. This led the Minister to institute an inquiry which revealed some concerns. Among them was an objection by a concerned community member that the proposed site for the applicant's project was an active animal

corridor, contrary to the conditions set by the Environmental Council of Zambia. Therefore, the Minister was simply offering some guidance in response to the applicant's complaint when she brought out the issue of the applicant relocating to another site. Counsel contended that the trial judge was on firm ground when she held that there was no illegality in the action taken by the Minister of Tourism, when she intervened after the applicant complained to her.

We took time to analyze the arguments advanced by the parties on this ground. It is clear to us that the applicant wants us to overturn the trial judge on an issue which is not in dispute. In essence, the applicant is asking us to determine who has the power to execute a TCA between the Director of the 1st respondent and the Minister of Tourism. The evidence on record shows that indeed the Director General of the 1st respondent was the one with the power to execute the TCA on behalf of the 1st respondent. Neither Mr. Kombe nor Mr. Imasiku disputed this. The applicant is clearly pushing an open door. The parties to the draft TCA, as shown at pages 91 to 106 of the record, are the applicant and the 1st respondent. It follows that the parties to the TCA should have executed it. In our view, this was a straight forward issue which did not require any consideration by the

trial judge because it was not in dispute. We must state that the duty of a trial court is to resolve issues that are in dispute. It would be a waste of time for the court to purport to be resolving an issue which is common cause. In this case, the Director General of the 1st respondent, who had the power to execute the TCA had refused to do so and as a result the negotiations were discontinued. The applicant then decided to seek the intervention of the Minister of Tourism.

The Minister advised the applicant to relocate to another site in order to resolve the matter. This did not imply that the Minister was the one with the power to execute the TCA. We hold the view that the applicant misapprehended the advice to relocate to another site as meaning that the Minister, had assumed the power to execute a TCA. As rightly pointed out by the trial judge, the 1st respondent had sought the advice of the Minister, with the full knowledge that she did not have the power to execute the TCA. It sought the Minister's intervention because the 1st respondent is supervised by the Ministry of Tourism. We agree with the trial judge that the Minister did not interfere but was approached to intervene in order to convince the 1st respondent to reverse its decision not to execute the TCA. We also agree with the trial judge that there was no illegality because the

Minister acted within her mandate. For these reasons, we find no merit in ground one and it accordingly fails. We will now deal with grounds two and five.

On ground two, Mrs. Theotis submitted that the trial judge erred when she held that the decision of the Director General of the 1st respondent was not irrational because there was no application for a PTOL due to the TCA without her considering the fact that the PTOL was one of the intended consequences of the TCA. She drew our attention to the various authorities that discuss the standard for determining irrationality. One of the authorities she cited was the case of **Associated Provincial Picture Houses v Wednesbury Corporation**(1), in which Lord Green stated that:

> **"…….By irrationality, I mean what can now be succinctly be referred to as Wednesbury Unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."**

It was her argument that since the execution of the Tourism Concession Agreement was intended to issue the applicant with a PTOL, the Director-General of the 1st respondent should have had regard to the relevant considerations set out in **section 56 (1) of the**

Zambia Wildlife Act. She stated that the Director-General of the 1st respondent had refused to execute the TCA on account of the investigations of fraud that were being conducted against the applicant. She pointed out that the reason advanced by the Director-General, did not fall within any of the reasons under Section 56 (1) of the Zambia Wildlife Act. She added that there was evidence on record showing that the applicant had been cleared from those allegations twice and the Director-General himself had confirmed to the applicant. The Director-General's decision was not rationally connected to **section 56 (1) of the Zambia Wildlife Act**. Therefore, no reasonable authority directing itself to the relevant law and facts, could have come to his conclusion.

On ground five, Mrs. Theotis contended that the trial judge erred when she failed to find that the applicant was entitled to damages, due to the 1st applicant's failure to give a reason in a prescribed manner, for its refusal to grant the applicant a PTOL, as it amounted to a breach of statutory duty and a misfeasance of public office. She stated that **section 56 (2) of the Zambia Wildlife Act,** as read with **section 16 (2) of the Zambia Wildlife** (License and fees) Regulations, Statutory Instrument number 60 of 2007, requires the

Director General of the 1st respondent to notify the applicant in writing, on Form XXVII of the refusal to grant an applicant with a PTOL and the grounds for such refusal. However, the Director-General of the 1st respondent communicated the grounds for his refusal in an email contrary to the above provisions. It was her argument that the Director-General breached his statutory duty in communicating his refusal by email. This caused the applicant damage because it was denied its right to exhaust administrative remedies and to appeal to the High Court against the 1st respondent's decision.

In response, Mr. Kombe argued grounds two and five together. He argued that the trial Judge properly held that there was no irrationality on the part of the 1st respondent's Director General, since there was no application for a PTOL on account of the TCA not having been executed. He submitted that the 1st respondent did not engage in any breach of statutory duty or misfeasance of public office. The power of the 1st respondent to grant a commercial photographic license was found under **section 55 (1) of the Zambia Wildlife Act**. The Director General of the 1st respondent could issue the licence on application by any person. The Director General has the discretion

to refuse to grant a license under **section 56 (1) of the Zambia Wildlife Act.** Counsel submitted that even though the applicant had argued that the 1st respondent's refusal to grant the TCA on account of investigations of fraud was not covered by **section 56 (1) of the Zambia Wildlife Act,** this provision had no direct bearing on the refusal by the 1st respondent to grant a TCA. Instead the provision relates to the power of the Director-General to grant a commercial photographic license. Even assuming that **section 56(1) of the Zambia Wildlife Act** had a bearing, the reason of fraud would have been covered **section 56 (1) (f) of the ZAWA Act**, which allows the Director-General to refuse granting a license, if he is satisfied that it is in the interest of good game management.

That there was no need for the Director General decision to be rationally connected to **section 56 (1) of the ZAWA Act** as there was no application for a commercial photographic license before it. On the need to communicate the reasons for the refusal in writing, it was submitted that the email by the 1st respondent was a response to the applicant's email correspondence. In that email, the applicant was pushing for the execution of the TCA and the Director General was merely informing the applicant that 1st respondent could not execute

because the matter was with the Police. He submitted that the trial court had properly made its findings and, therefore, grounds two and five are without merit.

Mr. Imasiku also made submissions in response to ground five. He argued that the claim for damages could not arise because the applicant was not granted the authority to commence business operations. He pointed out that the MOU was to pave way for the execution of a TCA, which would in turn authorize the applicant to commence business operations. Since the TCA never came into existence, the applicant was not legally authorized to conduct any business. Therefore, loss suffered by the applicant could not be attributed to the respondents under the provisions of the MOU. The applicant in this case failed to prove any illegality in the position taken by Minister of Tourism on the execution of the TCA.

We have considered the arguments in both grounds two and five. In ground two, the applicant argues that the trial judge did not consider the fact that the PTOL was one of the intended consequences of the TCA and the Director-General of the 1st respondent should have had regard to the relevant considerations set out in **section 56 (1) of the Zambia Wildlife Act**. These arguments are closely linked to

ground five. In ground five the applicant contends that it is entitled to damages due to the 1st applicant's failure to give a reason in a prescribed manner for its refusal to grant the applicant a Photographic Tour Operators License.

The record shows that the 1st respondent only refused to execute the TCA. As a consequence, the applicant could not be granted a PTOL which would have authorized it to commence business operations. In our view, the issue of the 1st respondent refusing to grant the PTOL did not arise because the TCA was not executed. **Section 56 (1) of the Zambia Wildlife Act,** which the applicant has relied on, provides for the grounds upon which the Director General may refuse to grant the PTOL. The provision does not relate to the execution of the TCA. It does not, therefore, help the applicant. In any event, the granting of a licence to the applicant to run Safari Photographic Tours was subject to the applicant meeting a number of requirements, which it failed to meet. There had to be a valid MOU with the 1st respondent for a period of six months. The MOU had expired. The applicant was supposed to have signed a TCA with the 1st respondent. It was not signed because of the objection that the area was an animal corridor. The applicant needed a PTOL and it was not

granted. In view of these issues, the arguments in ground two are without any merit. And they are hereby dismissed.

Coming to the issue of damages which the applicant claims to be entitled, we have noted with keen interest that in fact there was no application by the applicant for a Photographic Tour Operator's Licence. Therefore, we do not think that the applicant would be entitled to damages in the absence of a PTOL, authorizing it to commence its business operations. We say so because a claim for damages should always be readily apparent in order for the court to award it. There must be proof of actual loss. In the case of **Zambia Consolidated Copper Mines Limited v Goodward Enterprises Limited**[2] we held as follows at page 54:

> **"Thus, we do not see how loss of anticipated profits and general damages which were based on a measure which is not readily apparent could be awarded in one breath."**

In other words, damages must be proved. In the case before us, we do not think that the applicant suffered any loss to entitle it to damages. The PTOL was never granted to it because the TCA was not signed. The TCA was also not executed by the 1st respondent because of the concerns which were raised. Regard must also be had to the fact that the MOU made provision for the discontinuance of the

negotiations if it was not replaced by the TCA after six months. In effect, the negotiations were discontinued after the MOU expired because the TCA was not executed. On the evidence on record, there is no proof that the applicant suffered any loss and we hereby dismiss the claim for damages. Grounds two and five have no merit. And we hereby dismiss them. We will now turn to ground three.

On ground three, Mrs. Theotis submitted that the trial Judge erred when she failed to consider that the applicant had a legitimate expectation that the 1st respondent was going to execute the TCA, as evidenced from the draft TCA, which the 1st respondent had forwarded to the applicant and also because the 1st respondent, through its Director-General, had written to the applicant's director welcoming him to their offices for the signing of the TCA on 31st October 2007. She cited many authorities on legitimate expectation in judicial review. Among the authorities she cited on legitimate expectation was **paragraph 81 of Halsbury's Laws of England 4th edition reissue, Volume 1, (London: Butterworths) 1989**. Mrs. Theotis argued that the Director-General of 1st respondent had made a representation, through the MOU and the draft TCA, that the TCA would be signed. Further, that the Director-General had

represented to the applicant, in a statement contained in an email, that the TCA was going to be signed on 31st October, 2007. Therefore, the applicant had a legitimate expectation that the Director-General was going to execute the TCA.

In response to ground three, Mr. Kombe submitted that the applicant in the court below did not raise the issue of legitimate expectation, as a ground upon which it sought judicial review against the 1st respondent. Therefore, it could not raise it on appeal. He cited the case of **Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Lenders Enterprises**[3], in which we held that where an issue was not raised in the trial court, it was not competent for any party to raise it on appeal. The ground of legitimate expectation was never raised and it ought not to be considered on appeal. In the alternative, he argued that the MOU which the applicant relied on, as a basis for the legitimate expectation, had conditions precedent which the applicant needed to comply with before the TCA could be signed. He pointed out that the duration of the MOU was for a period of 6 months, which showed that the parties intended that it would come to an end. Further, that the TCA would only be signed once the applicant had complied with the

conditions precedent, which it lamentably failed to do. It was his submission that ground three lacks merit.

From the outset we must state that we have no qualms with the authorities Mrs. Theotis cited on the concept of legitimate expectation. We have perused through the record of proceedings from the court below. And we note that the issue of legitimate expectation was not raised in the court below. We agree with Mr. Kombe that the issue cannot be raised at this stage because it was never pleaded in the court below: See **Mususu Kalenga Building Limited and Winnie Kalenga v Richman's Money Lenders Enterprises**(3),

Since the issue of legitimate expectation was not raised in the court below, the trial judge did not rule on it. We do not see how she would have considered an issue that was not pleaded. In our view, the arguments in ground three are an attempt to make us re-try this matter on the merits. We decline to do so. The arguments on legitimate expectation have no place in this appeal and we hereby reject them. Ground three also fails. We will move to ground four.

In ground four, counsel for the applicant argued that the trial judge erred when she failed to consider that the applicant was given authority under the MOU between the applicant and the 1st

record shows that the parties executed the MOU on 22nd July, 2008. It had a lifespan of six months from the date of signing. The parties had agreed that after the expiration of the MOU, it was going to either be replaced by the TCA or the negotiations were going to be discontinued. It is noteworthy that the current proceedings were triggered by the 1st respondent's refusal to execute the TCA, after the MOU had expired. We are taken aback that the applicant now seeks to rely on the MOU which had expired at the material time. This meant that whatever authority the applicant had under the MOU, it had ceased after the MOU expired. The 1st respondent had valid reasons for refusing to execute the TCA. As a result, the applicant could not be granted a Photographic Tour Operators Licence authorizing it to operate. We, therefore, hold the view that the applicant had absolutely no authority to operate or to assist in the development and promotion of tourism after the MOU expired. There is no substance in ground four. And it is hereby dismissed. We will now proceed to deal with ground six.

On ground six, Mrs. Theotis argued that the trial judge erred when she failed to consider that grounds for judicial review are cumulative in that success on any ground would entitle the applicant to the reliefs

sought. For this proposition, counsel heavily relied on the case of **Sablehand Zambia Limited v Zambia Revenue Authority**(4). She stated that the finding by the trial judge that there was procedural impropriety on the part of the 1st respondent in refusing the applicant's application for a PTOL, warranted the quashing of the decision by the Director-General of the 1st respondent. It should have also warranted the granting of other reliefs sought for damages for misfeasance in public office and breach of statutory duty. She summed up her submissions by stating that this was a proper case for reversing the findings of fact made by the trial court. For this argument she relied on the case of **Zulu v Avondale Housing Project** (5).

In response to ground six, Mr. Kombe submitted that the argument advanced by the applicant, that judicial review reliefs are cumulative and success on any ground would entitle the applicant to the reliefs sought, had no basis in law. He distinguished the case of **Sablehand Zambia Limited v Zambia Revenue Authority**(4), from the case at hand. He stated that in that case, only one of the three grounds for judicial review was advanced and the court did not pronounce itself on the other grounds which were not pleaded.

Therefore, the applicant's understanding of the case was misconceived. He further argued that there was nothing to warrant the reversal of the findings of fact as was held in the case of **Zulu v Avondale Housing Project**(5). Counsel urged us to dismiss this appeal with costs.

We took time to read the Sablehand case in view of Mrs. Theotis's argument that grounds for Judicial Review are cumulative in that success on any ground would entitle the applicant to the reliefs sought. Her argument is not only novel but misleading. In that case, two grounds of appeal were advanced and they both succeeded resulting in the whole appeal being allowed. It is not correct to say that the appellant in that case had only succeeded on one ground of judicial review which cumulatively led to the granting of all the reliefs sought. We have looked at the available authorities and there was no single authority to support that argument by Mrs. Theotis. Ground six is hereby dismissed.

On a procedural note, it appears to us that the applicant did not comply with the statutory procedure when it commenced the current proceedings. This action was commenced in disregard of Section 57 of the Zambia Wildlife Act which provides as follows:

"57. (1) Where the Director-General refuses to issue a licence, the applicant may, not later than one month after the receipt by the applicant of the notice given under subsection (2) of section fifty-six, appeal in writing to the authority against such refusal.

(2) In determining any appeal, the Authority may uphold the decision of the Director-General or may instruct the Director-General to issue the licence as applied for.

(3) The decision of the Authority on any appeal under this section shall be subject to appeal to the High Court."

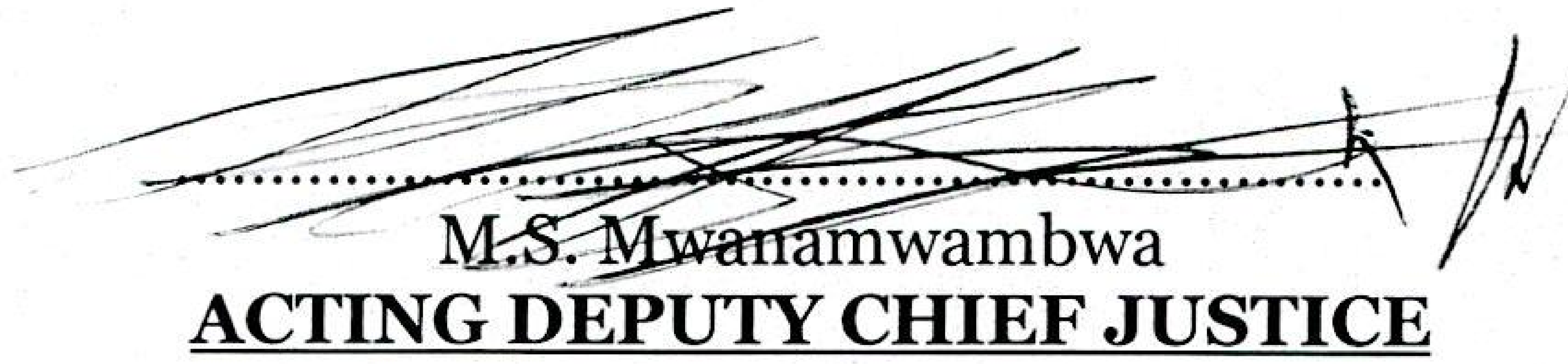
From the record, it is clear to us that, the applicant is ultimately challenging the refusal by the 1st respondent to grant it a Photographic Tour Operators' Licence because the 1st respondent had refused to execute the TCA. **Section 57** cited above outlines the procedure that the applicant should have followed. This provision requires an applicant to appeal to the 1st respondent where the Director General refuses to issue a licence. Then, the decision of the 1st respondent on any appeal is also subject to appeal to the High Court. In our view, that is the correct procedure. The applicant had no option to proceed by way of judicial review like it did. We repeat what we stated in the case of **New Plast Industries v Attorney General**[(6)], where we held as follows:

"It is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the mode of commencement of any action is generally provided by the relevant Statute. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure.....

There is no choice between commencing an action by an application for judicial review or by an appeal."

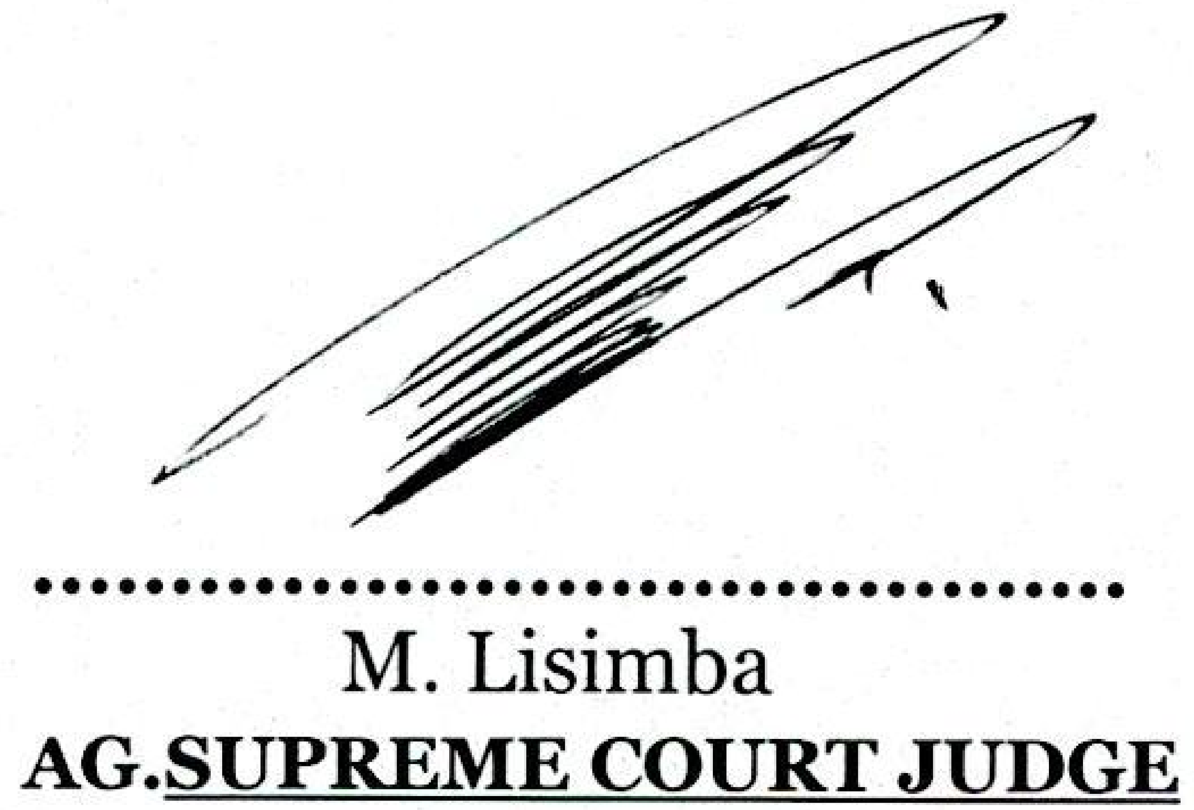
The effect of the wrong procedure is that, the trial judge had no jurisdiction to hear this matter. The position at law is that, where a party commences an action by a wrong mode, the action will fail because, the court will have no jurisdiction to grant the reliefs sought: See **Chikuta v Chipata Rural Council**[7] **.**

The foregoing demonstrates that even assuming that all the grounds of appeal had merit, we would have still dismissed this appeal, because the applicant adopted a wrong mode in commencing these proceedings. We have not found any basis for upsetting the judgment of the learned trial judge. This appeal has absolutely no merit. And we hereby dismiss it with costs. The costs are to be taxed, in default of agreement.



M.S. Mwanamwambwa

ACTING DEPUTY CHIEF JUSTICE



R. M. C. Kaoma

SUPREME COURT JUDGE

M. Lisimba

AG.SUPREME COURT JUDGE