IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.85/2011**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF	:	The Local Government Act, Chapter 281 of the Laws of Zambia.
IN THE MATTER OF	:	A decision by the Kitwe City Council awarding Stand No. 280 Matuka Avenue Kitwe to Ritas Investments Limited.
IN THE MATTER OF	:	A decision by the Kitwe City Council to refuse to award Stand No. 280 Mutuka Avenue to Messrs Aetos Transfarm Limited.

BETWEEN:

RITAS INVESTMENTS LIMITED **APPELLANT**

AND

AETOS TRANSFARM LIMITED **1ST RESPONDENT**

KITWE CITY COUNCIL **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**
COMMISSIONER OF LANDS **4TH RESPONDENT**
CASH BAZAAR ZAMBIA LIMITED **5TH RESPONDENT**

Coram: Phiri, Musonda and Hamaundu, JJS

On 4th December, 2012 and 4th October, 2018

For the appellant	:	Mr V. B. Malambo, S.C., Messrs Malambo & Co.
For the 1st respondent:		Mr L. Kasula, Messrs Leonard Lane Partners

For the 2nd respondent: No appearance
For the 3rd & 4th respondents: Ms C. Mulenga, Assistant Senior State Advocate
For the 5th respondent: No appearance

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Authorities referred to:

The Rules of the Supreme Court, 1999 edition, Order 53

When we heard this appeal, we sat with Mr Justice Musonda who has since retired. This judgment is therefore by majority.

The appellant appeals against a judgment of the High Court by which the certificate of title relating to stand 280 Matuka Avenue in Kitwe was cancelled. Briefly, the facts of this case are these: In December, 2002, the 2nd respondent, Kitwe City Council, advertised the plot in dispute for lease. A number of interested would-be developers submitted applications for the same. One such applicant was the 1st respondent, Aetos Transfarm Limited. The plot however was awarded to the appellant Ritas Investments Limited, who was subsequently given a letter of offer which eventually gave rise to the

issuance of a certificate of title thereto. Aggrieved by the 2nd respondent's decision, the 1st respondent decided to apply for judicial review. The application for leave was lodged about eight months after the decision had been made. At this point, we wish to pay particular attention to the form of the application which the 1st respondent made. In the application for leave, the 1st respondent stated the relief sought as; an order of certiorari to quash the 2nd respondent's decision. When it came to stating the grounds on which the relief was sought, the respondent simply gave an account of what had transpired during the bidding process. The grounds which are recognized by law for granting judicial review are:

(i) Want or excess of jurisdiction
(ii) Error on the face of the record
(iii) Failure to comply with the rules of natural justice, and
(iv) The Wednesbury Principle, that is, unreasonableness.

The 1st respondent did not state any of these. Surprisingly, the court below granted the 1st respondent leave to apply for judicial review. When the application for judicial review was made, the originating summons was merely accompanied by an affidavit in support. The affidavit itself was again a recount of what had happened during the bidding process. The result then was that the

matter proceeded for hearing without the 2nd respondent and the court below having any knowledge of any ground recognized by law on which the 2nd respondent's decision was being impugned. Along the way the appellant, rightly so, joined the proceedings. Inexplicably, the 1st respondent also successfully applied to join the Attorney General and the Commissioner of Lands to the proceedings. Yet, the two had nothing to do with the decision that was being impugned. Not having the benefit of a precise ground on which the 2nd respondent's decision was being impugned, the court below went at large in search of a suitable ground for quashing the decision. The court found that the 2nd respondent had abused its power by asking the 1st respondent to submit its bank statements twice. The court also found that the 2nd respondent acted *malafides* and against the rules of natural justice when it decided to re-advertise the plot without affording the 1st respondent to be heard. Finally, the court found that the 2nd respondent unfairly treated and discriminated against the 1st respondent by not visiting its business premises. On those grounds, the court below quashed the 2nd respondent's decision. Finding that its order would be ineffective, in view of the fact that a certificate of title had already been issued, the court cancelled the certificate.

Aggrieved by that decision, the appellant appealed and filed four grounds of appeal, as follows;

1. **That the learned trial judge erred in law and fact when she ordered the cancellation of the certificate of title in respect of stand no. 280 Matuka Avenue Kitwe in a Judicial review matter as such remedy was not prayed for or, and in the alternative, is not available in judicial review.**
2. **That the learned trial judge erred in law and fact when she ruled that the judicial review was not time barred in that rules and practice under Order 53 of the Supreme Court Rules must be strictly followed.**
3. **That the learned trial judge erred in law and fact in ruling that there was misrepresentation at the Commissioner of Lands as no such misrepresentation was pleaded or even in evidence as the recommendation was as decided by the council.**
4. **That the learned trial judge erred in law and fact when she ruled that there was unfairness when the evidence on record clearly showed that all the parties were treated in accordance with the procedure adopted by the council.**

In the view that we take of this matter, it is the first two grounds of appeal that we are going to deal with. Among the many valid arguments that Mr Malambo, State Counsel, advanced on behalf of the appellant was the argument that the issues that were before the court below fell outside the field of judicial review. Mr Kasula, counsel for the 1st respondent, while agreeing that judicial review proceedings

are concerned with the decision-making process and not the merits, still argued that his client's case met the requirements of an application for judicial review.

Order 53/3 of the **Rules of the Supreme Court** *(white book)* requires a litigant who seeks relief in judicial review to set out the ground or grounds upon which he seeks such relief. The grounds recognized by law are set out in **Order 53/14** of the said rules. We have already set them out above. The ground relating to want or excess of jurisdiction is concerned with whether or not a public authority or tribunal acts without jurisdiction or, by its actions, exceeds its jurisdiction.

The ground relating to error on the face of the record applies, mainly, to tribunals and inferior courts. The ground relating to compliance with the rules of natural justice is concerned with whether or not a public authority has discharged its duty to act fairly. Finally, the ground relating to the *Wednesbury Principle* is concerned with whether or not a decision is such that no public authority properly directing itself on the relevant law and acting reasonably could have reached that decision.

We have stated that the 1st respondent came to court, seeking judicial review, without citing any of the above grounds. Clearly, the

application was defective and incompetent; and the court below should have dismissed it on that ground. However, the court proceeded to consider the application, whilst being completely in the dark as to what ground the 1st respondent was impugning the decision by the Kitwe City Council. That was wrong.

Coming to the cancellation of the certificate of title we must state that the relief that is available in judicial review is very clear. **Order 53/7** provides:

> **"(1) On an application for judicial review the court may, subject to paragraph (2) award damages to the application if–**
>
> **(a) He has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and**
>
> **(b) The court is satisfied that, if the claim had been made in an action began by the applicant at the time of making his application, he could have been awarded damages"**

There is no provision which gives power to the court to award any claim other than for damages on an application for judicial review. So, in this case, the only award that the court could have made was for damages if the 1st respondent had included it in the statement in support of the application. Cancelling a certificate of

title is outside what is permitted, even if the 1st respondent had included such claim in the statement in support of the application.

We are mindful of the fact that the court below was of the view that, without cancelling the certificate, its order to quash the decision of the Kitwe City Council would be nurgatory. That was a very important consideration which raised the question whether it was appropriate to grant the relief sought at all. **Order 53/14/32** provides:

> **"Even if a case falls into one of the categories where judicial review will lie, the court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case".**

So, the court below having held the view that an order of certiorari without cancelling the certificate of title was nurgatory, it should have exercised its discretion not to grant the order.

The second ground of appeal impugns the lower court's decision that the application for judicial review was not time-barred. Mr Malambo, State Counsel, pointed out that the first judge who dealt with the application made two rulings on the issue of limitation: In the first ruling the judge dismissed the challenge mounted by the 2nd

respondent on the ground that it had waived its right to mount the challenge by taking a step in defending the application. Counsel pointed out again that the appellant mounted the challenge again upon being joined to the proceedings, whereupon the judge ruled that indeed the 1st respondent had not filed the application within the required period. Counsel argued that the second judge should have taken cognizance of what the first judge had said. Mr Kasula, on the other hand, argued that, once leave to apply for judicial review had been granted, the fact that the application was made out of time became immaterial.

Order 53/4 of the **Rules of the Supreme Court** provides:

> **"(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made".**

We have stated that the 1st respondent sought to commence proceedings for judicial review some eight months after the decision was made. The first judge who dealt with the application granted the 1st respondent leave to apply for judicial review, without even considering the fact that the application was being made out of time.

The learned judge subsequently came to acknowledge that the 1st respondent had not filed the application within the time stipulated. The judge, however, merely used it as a ground to set aside his earlier judgment and allow the appellant to be heard. We must state that at no point in the proceedings did the 1st respondent give any explanation for its delay in commencing judicial review proceedings in order to enable the court to determine whether or not there was good reason to extend the period for their commencement.

The explanatory notes to rule (4) are in **Order 53/14/58**. In that order it is provided, inter alia, as follows:

> **"where an application to extend the time is made under r.4 notice thereof must be given to the person who will be respondent to the motion. The court will consider whether the grant of an extension of time for applying for judicial review will be likely to cause substantial hardship, or substantially prejudice the rights of any person or would be detrimental to good administration"**

The rule provides further as follows:

> **"In R v Stratford-on-Avon District Council, Ex p. Jackson [1985] I.W.L.R 319; [1985] 3 All. E.R. 769, the Court of Appeal considered the construction and effect of 0.53, r.4 and s.31(6) of S.C.A. 1981 and held as follows:-.....**
>
> **(iv) whether there has been *'undue delay'* within the meaning of s.31(6) has to be determined objectively. Thus, wherever there is a failure to comply with r.4(1) (i.e a failure to apply for leave**

promptly or within the three month period, as the case may be) there is 'undue delay' for the purposes of s.31(6), even though the court is satisfied that there are good grounds for extending the time under r.4. In such cases the court retains a discretion under s.31(6) to refuse to grant leave, or to refuse the relief sought at the hearing of the substantive application for judicial review, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. Whether the s.31(6) issue should be determined at the leave stage, or whether leave should be given and the s.31(6) issue dealt within the substantive judicial review proceedings depends on the circumstance. If the s.31(6) issue involves going substantially into the merits, the latter is likely to be the more appropriate course".

What is clear from these provisions is that, contrary to Mr Kasula' argument that the question of delay had become immaterial, the delay could still competently be addressed at the substantive hearing. As we have pointed out, the 1st respondent did not give any explanation for its delay. Therefore, no good reason for extending the period of limitation was disclosed. In the circumstances the court below should have refused to grant the relief on this ground as well.

All in all, we think that this application was defective and incompetent; and that, even if it were not so, it is an application for which leave should not have been granted, or for which the relief

sought should have been refused on the ground that there had been undue delay on the 1st respondent's part in bringing the application.

We allow this appeal and quash the decision of the court below. The appellant will have costs of this appeal and of the proceedings in the High Court as against the 1st respondent only.

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G. S. Phiri

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE