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

APPEAL NO. 91/2017
CAZ/08/141/2017

B E T W E E N:

MUTINTA MAZOKA M'MEMBE	**1ST APPELLANT**
FRED M'MEMBE	**2ND APPELLANT**
AND	
THE ATTORNEY GENERAL	**RESPONDENT**

CORAM: Chisanga JP, Chishimba and Kondolo, SC, JJA
On 14th November 2017 and 23rd March 2018

For the Appellants:	*N. Nchito, SC of Messrs Nchito & Nchito*
For the Respondent:	*F. K.Mwale, Acting Principal State Advocate*
	Major F. Chidakwa, Assistant Senior State Advocate

JUDGMENT

CHISANGA JP, delivered the Judgment of the Court

Cases cited:

1. ***Chiluba vs The Attorney General (2003) ZR 153***
2. ***Chitala vs Attorney General (1995-97) ZR 91***
3. ***Council of Civil Service Unions and Others Ministers for the Civil Service (1981) A C 363***
4. ***Attorney General vs Great Eastern Railway Company (1880) AC 473***
5. ***Nyampala Safari Ltd & Others vs Zambia Wildlife Authority and Others Appeal No. 135 of 2003***
6. ***Associated Provincial Picture Houses Limited vs Wednesbury Corporation (1948) 13 I KB 223 CA***
   (1985) AC 374
7. ***R (Mahmood) vs Secretary of State for the Home Department (2001) 1 WLR, 840***

8. ***R (Daly) vs Secretary of State for the Home Department (2001) UKHL 26***
9. ***Attorney General vs Clarke (2003) Vol I ZR 38***
10. ***Chic Fashions/West Wakes Ltd vs Jones (1968) 1 ALL ER P 229***
11. ***Dikon vs O'Brien & Davis (1887) 16 Cox C.C. 245***
12. ***Shaaban Bin Hussein vs Chong Fook Kain (1969) 3 ALL ER 1626 at 1630***
13. ***Mc Ardle vs Eagan and Others (a) Cox's Criminal Law Vol XXX (1933-38), 39***
14. ***Watkins vs Secretary of State for the Home Department and Others (2006) 2 ALL ER 353***
15. ***Three Rivers DC vs Governor and Company of the Bank of England (No. 3) (1996) 3 ALL ER 558***
16. ***Odhavji Estate vs Woodhouse (2003) 3 SCR 263***

The appellants, who were applicants in the court below, moved the High Court for judicial review, following the grant of leave to do so. The decisions on which they sought review were:

1. The decision of the Police Service to illegally occupy Plot Number 7345, Nangwenya Road Lusaka,
2. The decision of the Police Service to assume control of a privately owned printing press located at Plot Number 7345 Nangwenya Road, Lusaka.

The relief sought was an order of certiorari for irrationality and illegality. Additionally, damages for misfeasance in public office were craved.

The facts in support of the application were that the applicants, aside from being private citizens, are media practitioners. On 15th February 2017, the police visited the applicants' home with a search warrant signed by the Magistrate's Court. The police assaulted the 1st applicant and arrested her on the same date. Thereafter, the police occupied the applicant's home, Plot Number 7345 Nangwenya road, and remained in occupation. The said property is owned by the applicants, and has no legal encumbrances. Further, the police had started the process of dismantling a printing press owned by the applicants in their personal capacity.

On the ground of illegality, the applicants contended that it was illegal for the police to occupy their home, which is privately owned. They further contended that the police could not, at law, use their power to take or occupy private property and take steps to dismantle and take a printing press that was privately owned by the applicants.

On the ground of irrationality, it was contended that it was irrational in the Wednesbury sense for the police to occupy plot number 7345, Nangwenya Road, Lusaka, and to attempt to take the applicants' printing press both of which are privately owned by the applicants and unencumbered. Further, that moving the printing press will completely destroy it as it is delicate and requires professional attention to dismantle.

The affidavit verifying facts was sworn by the 1st applicant, and she exhibited a copy of the agreement as proof that the printing press which the police were in the process of dismantling belonged to the 2nd applicant.

The respondent opposed the application by affidavit sworn by a Senior Assistant Commissioner of Police, one Simon Tembo. He deposed that the 2nd applicant, with another, was accused of failing to deliver to the appointed liquidator property believed to belong to the Post Newspaper Ltd, while the other was accused of impersonating a lawyer for the Post Newspaper Ltd. This followed a complaint filed by Mr. Lewis Chisanga Mosho, the Provisional Liquidator of the Post Newspaper Limited, who suspected that there were some properties belonging to the Post Newspaper Limited that had been concealed at Mr. Fred M'membe's house situated at Plot Number 7345 Nangwenya Road, Rhodes Park Lusaka.

He further deposed that the 1st applicant tore the search warrant, and was later charged with the offence of obstructing police officers carrying out lawful instructions and appeared in court on 17th February 2017. On 16th February 2017, fresh warrants were issued and a search conducted on the premises. A printer and a speed boat were seized as they were suspected to be properties belonging to the Post Newspaper Limited. The continued presence of agents of the Police Service at the applicant's residence was meant to secure the printing press which required to be disassembled.

Upon hearing the application, the learned judge dismissed it. Her reasons for doing so were that the root of the occupation and dismantling of the printing press is entrenched in the search warrant, and the provisions pursuant to which it was issued require that the items searched for be seized and taken to the magistrate under whose hand it was issued, or the nearest court. In the instant case, the equipment had not yet been taken to the Magistrate's Court in order for the police officers to be deemed to have fully executed the search warrant. The judge made reference to Article 17 of the Constitution in this regard. She went on to express the view that the continued occupation and dismantling of the printing press was intrinsically tied to the search warrant, incidental to execution thereof.

Turning to the ground of irrationality, the learned judge found that the search warrant was relevant, while the documents exhibited to the affidavits as proof of ownership, after the search had been conducted were not relevant as they did not found, or were not part of the decision making process. She premised her decision on ***Chiluba vs The Attorney General***[1], where the Supreme Court stated the following:

> ***"When the High Court is reviewing a decision of a public body it will not admit evidence which is relevant to whether the decision is a reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it."***

The judge rejected the contention that as proof of ownership had been availed, there was no basis for the Police's continued occupation of the premises. Her reasoning was that it was the subordinate court that had issued the search warrant, and thus, seized with jurisdiction to determine ownership. She equally rejected the argument that providing proof of ownership by the applicants was incidental to the execution of the search warrant as that was not the role of the police.

The applicants were dissatisfied with the judgment of the court below, and now agitate it on three grounds as follows:

1. The court below erred in law and in fact when it found that the continued occupation of the appellants' home by the police is incidental to the powers conferred on the police under section 118 of the Criminal Procedure Code
2. The court below erred in law and fact when it found that the dismantling of the printing press found on the appellants' premises was fairly incidental to the powers conferred on the police under section 118 of the Criminal Procedure Code.
3. The court below erred in law and in fact when it did not give due regard to the evidence of the appellants' regarding ownership of the printing press when it found that the decision to occupy the appellants' premises was not unreasonable in the Wednesbury sense.

Grounds one and two have been argued together in the heads of argument. Our attention has been drawn to a work titled **Judicial Review Proceedings: A Practitioner's Guide, Legal Action Group, 3rd Edition 2013 at page 146** where the learned authors reportedly state:

> ***"A decision maker with statutory powers has of definition, only those powers that parliament has conferred and may only act within the four corners of these powers. Any act done or decision made outside or in excess of such powers will be ultra vires."***

Further reference is made to ***Chitala vs Attorney General***[2] where Lord Diplock's definition of illegality in ***Council of Civil Service Unions and Others vs Ministers for the Civil Service***[3] was expressed as follows:

> ***"by illegality, is meant that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it."***

Section 118 of the Criminal Procedure Code is recited. It is then stated that the appellants do not question the legality of the search warrant, but the occupation by the police after the execution of the search warrant. It is argued that the police may conduct a search and seize property covered by the warrant if found. A legal search allows for the invasion of a person's right to privacy and must therefore be exercised within certain clearly defined limits so as to interfere as little as possible with the rights and liberties of the person.

It is contended that the police, as a public body, have failed to understand section 118 of the Criminal Procedure Code, as it does not provide for the stationing or encampment of officers on private premises to secure the

property. That there is no law that provides for the continued occupation of private property by the police. The lower court's interpretation that the occupation of the appellants' property by the police is incidental to **section 118 of the Criminal Procedure Code** is incorrect and seeks to impose powers that have not been conferred by the 'four corners' of the Act.

Lord Selbourne's words in ***Attorney General vs Great Eastern Railway Company***[4], are cited as having been relied upon by the court below. He said:

> ***"...whatever may fairly be regarded as incidental to or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) be held by judicial construction to be ultra vires."***

Learned counsel then argues that even with a wide interpretation of **section 118 of the Criminal Procedure Code**, the occupation by the police cannot be considered as incidental or as stemming from the search warrant. It is argued that when making laws, the Legislature intends their effect to be clear and consistent. It does not allow arbitrary application especially in instances where the rights of an individual are being infringed.

Similarly, **section 14(3) of the Police Act, and Article 17 of the Constitution**, though allowing for search and seizure, do not provide for the excess of power displayed by the police.

It is further argued that commencing judicial review proceedings does not curtail investigations. It is contended that the continued occupation of the premises by the police is illegal as there is no law that confers this power, and

the police continue to exceed their jurisdiction. We are urged to quash the decision for illegality pursuant to ***Nyampala Safari Ltd & Others vs Zambia Wildlife Authority and Others***[5].

Turning to ground three, it is submitted that the court should have considered and evaluated the evidence of ownership of the property before it, to determine that the police's occupation and continued efforts to dismantle the private printing press were not irrational. Our attention is drawn to Lord Green's words in ***Associated Provincial Picture Houses Limited vs Wednesbury Corporation***[6], where he said the following:

> ***"It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority."***

We have also been referred to Lord Diplock's words in ***Council of Civil Service Unions & Others vs Minister for the Civil Service***[3], where he said:

> ***"By 'irrationality' I mean what can by now be succinctly referred to as wednesbury unreasonableness' (See Associated provincial Picture Houses Ltd vs Wednesbury Corporation (1947) 2 ALL ER 680 (1948) 1 KB 223). 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. Whether a decision falls within this category is a question that judges by their training and experience should be well***

equipped to answer, or else there could be something badly wrong with our judicial system."

Drawing on this authority, it is contended that the court is required to investigate whether the power conferred on an authority has been improperly exercised or insufficiently justified, and the question that arises is whether the decision was within the range of reasonable prospects open to the decision maker. Thus, a rational connection between the decision and the outcome must exist.

It was pointed out that the respondents did not dispute ownership of the property, but merely argued that the dismantling of the printing press required to be done in the presence of the state agents, hence the continued occupation.

It was argued that where a public body infringes on a human right, the courts anxiously scrutinise the decision and apply the principle of proportionality to balance the right with the public body decision. This was done in ***R (Mahmood) vs Secretary of State for the Home Department***[7], where it was held that the intensity of review was greater when a right was in question. Reliance was also placed on ***R (Daly) vs Secretary of State for the Home Department***[8] where it was held that the court is required to ask itself:

"...whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right (ii), the measures designed to meet the legislative imperative are rationally connected to it and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Drawing on this decision, it is argued that the police actions became irrational when they continued to try and seize property whose ownership had been established, and remained in occupation. They have intentionally failed to consider the relevant evidence of ownership in making their decision. Therefore, the unlawful occupation cannot be deemed to be rationally connected to the purpose of the search warrant, which was to seize property of the Post Newspapers (In Liquidation). The police have continued to act for an improper purpose, outside the scope of the search warrant. The oppressive ramifications of the police's unguided actions should be considered. It is submitted that the police actions are so disproportionate to the purpose of the warrant that they are liable to be quashed.

The respondent's arguments as contained in the heads of argument are that ground one is at variance with the holding of the court below. This is because the issue that arose in the court below was the occupation and dismantling of the printing press located at the appellant's residence, and not the appellants' home. It is contended that the court below did not indicate, or hold that there was continued occupation of the appellants' home by the police, a power incidental to the powers conferred under **Section 118 of the Criminal Procedure Code**. The issue before the court was the occupation and dismantling of the printing press.

It is argued that the court below was on firm ground to hold that there was a legal basis for the police to occupy and dismantle the printing press. In order

to comply with the search warrant, the police are entitled to use all lawful means to attain this. On the strength of ***Attorney General vs Great Eastern Railway Co.***[4], the occupation of the printing press is incidental to or consequential on the execution of the lawful order. The presence of the agents of the Zambian Police Service at the applicants' residence was to effect the seizure of the printing press which was found at the applicants' residence and which has not been removed from the premises as it requires to be disassembled. The actions of the respondent are within the powers conferred on it by the court order or search warrant, as well as the provisions of the Police Service Act.

In response to the arguments on ground three, it is contended that proof of ownership of the printing press was a matter to be investigated upon and proved in the court below. This is more so that the search warrant stated clearly that property belonging to the Post Newspaper may have been concealed. The arguments relating to whether ownership of the printing press was for the appellants or not was an issue for investigation by the police, and the subordinate court. The court below could not be expected to override this, and embrace the appellants' opinion regarding ownership.

It is submitted that this was in accord with the decision in ***Chiluba vs Attorney General***[1] where the Supreme Court said the following:

"the court will not on judicial review application act as a 'Court of Appeal' from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision is wednesbury unreasonable."

It is contended that the search warrant clearly indicated that the goods to be seized were not declared to the liquidator and were concealed. Paragraphs 10 and 11 of the opposing affidavit clearly showed that the goods suspected to belong to the Post Newspaper, including motor vehicles and a speed boat were seized. The appellants had not established ownership as claimed. It is argued that the decision of the police could not be considered to be so unreasonable in the wednesbury sense. It is contended that the police acted within the discretion granted to them as an investigative wing and executor of court orders, in accordance with reason, justice, and the law. The actions were not arbitrary, vague or fanciful, but legal and regular.

It is submitted that the ground of proportionality was not raised in the court below. It is nonetheless argued that proportionality demands a reasonable relation between a decision, its objectives, and the circumstances of the case. It requires the pursuit of legitimate ends by means that are not oppressively excessive. It looks to the substance of decisions, rather than the way in which they are reached. These arguments are said to be premised on the holding in ***Attorney General vs Clarke (2003)***[9] on proportionality as a ground.

It is submitted that the appellants had not established grounds entitling them to any of the special remedies under judicial review. We were urged to dismiss the appeal.

At the hearing of the appeal, learned state counsel emphasized and augmented the appellants' submissions. We will not restate the arguments canvassed in the heads of arguments, save to note salient points in his arguments. Learned state counsel argued that the continued occupation was illegal and unreasonable and could not be said to be execution of the search warrant. The court fell into error by saying that it was not concerned with the ownership. A search warrant does not confer a presumptive right on the police to seize whatever they find. They should only seize, in this case, if the property is that of the Post Newspapers. If they seize property not belonging to the Post Newspapers they are acting outside their powers. Thus, the appeal has merit and should be allowed.

In opposition, learned counsel for the respondent equally emphasized some arguments. He argued that dismantling the printing press and being in occupation of it is not tantamount to living in the printing press. The police were on the premises pursuant to a legitimate court order. There was no excess on the part of the police. The issue of ownership of the printing press did not arise in the court below, and the court was right not to investigate the question of ownership. This is because section 118 of the Criminal Procedure Code empowers the police to seize even on reasonable suspicion. The issue of

ownership of the printing press was to be brought before the magistrate who issued the warrant. There was an issue of concealment of properties. The police acted within the confines of the search warrant.

In response, learned state counsel argued that the powers of search cannot reasonably be extended to mean the powers of occupation for more than one month. The reason for the extended stay has been to try and dismantle the printing press. The police are no longer searching. It is unreasonable for them to stay on. The basis of their belief that they should seize the property is unreasonable as they have been shown documents of ownership. It is very unreasonable for them to seize that property without articulating themselves on their belief on those documents.

We have considered the grounds of appeal and the submissions tendered by both sides. We have equally examined the judgment of the court below. The decisions of the police to continue occupying the appellants' premises and to dismantle the printing press are questioned. The issues arising for determination before us are whether it was permissible for the police to occupy the appellants' premises, and to dismantle the printing press.

As earlier observed, the police obtained a search warrant to search the applicants' premises. Page 50 of the record of appeal is a document titled as INFORMATION TO GROUND SEARCH WARRANT. The information contained in the document was that Detective Inspector Mwenya was complaining that the Post Newspapers Limited documents, equipment and others were stolen and

unlawfully carried from and out of Post Newspapers Officers and that he or she had reasonable cause to suspect, and did suspect that these goods or some of them were concealed in House No 7345 Nangwenya Road Lusaka. The said document was signed by the applicant for the search warrant.

The search warrant issued by the magistrate pursuant to the information to ground search warrant recounted that whereas the said officer had made information on oath that Post Newspapers Limited documents, equipment and others were not declared to the liquidator contrary to **section 353(A)(b) CAP 388** and were concealed in House No. 7345 Nangwenya Rhodes Park Lusaka, the said officer was commanded and authorised in the name of the President with proper assistance to enter the said premises, house or vessels aforesaid during anytime and diligently search for the said documents and if the same or any thereof are found on search, bring the proof so found and any person so found before that court to be dealt with according to law.

The search warrant authorized the concerned officer to search for Post Newspapers Limited documents at the named premises. It did not authorise the officer to search for equipment. This authorisation was pursuant to section 118 of the Criminal Procedure Code, which enacts the following:

> ***118. Where it is proved on oath to a magistrate that, in fact or according to reasonable suspicion, anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, vessel, carriage, box, receptacle or place, the magistrate may, by warrant, (called a search warrant),***

authorise a police officer or other person therein named to search the building, vessel, carriage, box, receptacle in the warrant) for any such thing, and if anything searched for be found, to seize it and carry it before the court of the magistrate issuing the warrant or some other court, to be dealt with according to law.

The wording of this section reveals that the warrant issued by the magistrate would authorise the police to search for a named thing. In this instance, the magistrate authorised the police to search for documents and nothing else. This brings us to the argument, and related question, as to whether the police, as decision makers understood correctly the law that regulated their decision making power and gave effect to it as per ***Council of Civil Service Unions and Others vs Minister for the Civil Service***, *supra* referred to by counsel for the appellants.

For present purposes, the application of this authority relates to the search warrant, as that was the legal authority or order on which the search was to be conducted. Thus, the search warrant regulated the decision making power, although not exclusively, as will soon be seen.

It is rendered clear that the police were, in accordance with the search warrant, confined to searching for documents. Those were the terms on which the authorisation to search was given. It did not extend to equipment.

Be that as it may, the police have and did have power to seize anything which they believed on reasonable grounds to have been stolen, and to be material evidence on a charge of stealing. It will be recalled that the information to

ground search warrant alleged that the Post Newspapers Limited documents, equipment and others were stolen, unlawfully carried away and concealed on the premises in question. Therefore, those goods believed on reasonable grounds to have been stolen could be seized as well. This view is supported by ***Chic Fashions/West Wales Ltd vs Jones***[10], where Lord Denning articulated the principle in the following terms, at Page 235:

> ***"This illustrates the proposition that nowadays if a constable lawfully enters a house by virtue of a search warrant, and seizes the goods mentioned in the warrant, his entry does not become unlawful simply because he unjustifiably seizes other goods. He is liable for trespass in respect of other goods, but not for trespass to the house.....I look at it in this way. So far as a man's individual liberty is concerned, the law is settled concerning the powers of arrest. A constable may arrest him and deprive him of his liberty; if he has reasonable grounds for believing that a felony (now an 'arrestable offence') has been committed and that he is the man. I see no reason why goods should be more sacred than persons. In my opinion, when a constable enters a house by virtue of a search warrant for stolen goods, he may seize, not only the goods he reasonably believes to be covered by the warrant, but also any other goods which he believes, on reasonable grounds to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him.***
>
> ***Even if it should turn out that the constable was mistaken and that the other goods were not stolen at all, nonetheless, so long as he acted reasonably and did not retain them longer than necessary, he is protected. The lawfulness of his conduct must be judged at the time and not by what happens afterwards."***

In the same judgment, Lord Diplock at page 239, referred to ***Dikon vs O'Brien & Davis***[11], an Irish case. In that case, the seizure of the goods had been accompanied by the arrest of the person in whose possession the goods were

found. The goods in question were not believed to be stolen but to be material evidence on a charge of conspiracy against the person arrested. In the result, the person arrested was convicted, but Lord Diplock went on to state that the common sense of the reasoning in the said case by Pallis C.B was not so limited in its application. It does not depend for its validity on the contemporaneous arrest of the person in whose possession the goods were found, nor does it depend on his subsequent conviction. The goods of Dillon which were seized were unquestionably his property. The justification of the seizure of the goods was not the *jus tertii*, but their intended production as material evidence on prosecution of a criminal charge against him of conspiracy. Moreover, the same reasoning which leads to the conclusion that in the case of an arrest itself reasonable grounds for belief in guilt at the time of arrest is sufficient justification, though subsequent information or events may show those grounds to be deceptive, leads to the same conclusion in the case of seizure.

In the present case, the belief that equipment belonging to the Post Newspapers Limited had been concealed on the premises in issue was expressed by the applicant in the information to ground search warrant. Therefore, if on reasonable grounds the police could suspect that the printing press had been concealed as alleged, and they came across it, they were, at common law, entitled to seize it, for use as material evidence in a prosecution.

It should also be remembered that this search formed part of investigations. Upon being shown the piece of paper purporting to confide ownership of the printing press in the 2nd applicant, the police were not persuaded accordingly, but decided to seize the printing press, on suspicion. We do not agree with the learned trial judge that the document in question was irrelevant. It was relevant. The issue that fell to be determined by the court was whether the police could ignore that document, and proceed to effect seizure of the printing press.

We should state that the belief that an article has been stolen must be based on reasonable grounds. In other words, it is suspicion, which arises from the circumstances surrounding a matter. Lord Devlin explained the meaning of suspicion in ***Shaaban Bin Hussein vs Chong Fook Kain***[12] in the following terms:

> ***"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking' "I suspect but I cannot prove." Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage."***

Lord Wright aptly explained the function of a police officer in ***Mc Ardle vs Eagan and Others***[13], when he said the following:

> ***"On the other hand, it has got to be remembered that in the public interest, it is very important that police officers should be protected in the reasonable and proper execution of their duty, they should not be hampered or terrified by being unfairly criticized if they act on a reasonable suspicion....Their functions are not judicial but ministerial and it may well be that if they hesitate too long***

when they have a proper and sufficient ground of suspicion against an individual, they may lose an opportunity to arrest him because in many cases steps have to be taken at once in order to preserve evidence....."

This persuasive authority renders it clear that the police do not set out to exercise a judicial function when conducting investigations. Their function being ministerial, it may only be agitated on wednesbury principles. This is in fact what learned counsel for the appellants has set out to do.

We will first deal with grounds 2 and 3 of the appeal. We have stated above that upon reasonable suspicion, an item may be removed from premises being searched, provided the stated conditions are met. And we have alluded to the ministerial function of the police in this regard. The decision to dismantle the printing press can only be reviewed on wednesbury unreasonableness or irrationality. Was the decision to dismantle the printing press 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? Did the police, as decision makers take into account only the relevant considerations, and exercise their discretion to seize and dismantle the printing press reasonably? The inevitable answers to these questions are that the decisions to seize and dismantle the printing press, even in the face of documentary evidence purportedly confiding ownership in the 2nd appellant cannot be said to be wednesbury unreasonable, and or irrational. This is on account of the reasonable suspicion entertained by the police regarding certain Post Newspapers equipment, among which might be a printing press, ferried

from the business conducted by the said Newspaper. It cannot be said that the decision to seize the equipment, given the reasonable suspicion, is defiant of logic. The dismantling of the printing press was fairly incidental to the powers of the police at common law. Had the learned trial judge properly directed herself, she would have so found.

We turn to consider the first ground. We are mindful that the right to privacy has to a certain extent been eroded by statute. This is permitted by the constitution, because public interest requires that evasions of the law be prevented. However, the courts bear the duty to supervise the legality of any purported exercise of these powers. This extends to the power to search for and seize items at common law. In our considered opinion, the law does not confer power on the police to take up residence on the premises to be searched. Their duty is to search. If there is any item to be seized, it should be seized promptly. We are mindful that depending on the item to be seized, it might take a bit longer to dismantle.

In the circumstances of this case, we consider that it was unjustifiable for the police to continue occupying the applicants' premises beyond 72 hours. Our view is that having failed to dismantle the printing press, the police had recourse to other laws pursuant to which they could have secured the printing press. We note that by the time the application for judicial review was being argued, the police had been in occupation of the applicants' premises for several weeks. It cannot be the intention of the applicable law, that police who

conduct a search, and are unable to ferry an item that falls to be seized, should then take up indefinite residence on the premises on which the item was found. This would amount to unjustifiable intrusion on the privacy of an individual, and exceeds the power confided in the police. It is wednesbury unreasonable and irrational to decide to camp at a private residence for a long period.

We thus agree with learned counsel for the appellants that the decision to continue in occupation was irrational, and the learned trial judge should have so found. Having so held, we see no need to examine whether the decision to reside at the appellants' resident was disproportionate.

We move to consider the claim for damages. Order 53 RSC 1999 makes provision for damages. Rule 7 of that order states:

7(1) On an application for judicial review the court may, subject to paragraph (2) award damages to the applicant if -

(a) He had 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 begun by the applicant at the time of making his application, he could have been awarded damages.

(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

De Smith, Woolf and Jowell in ***Judicial Review of Administrative Action fifth Edition 1995 Sweet & Maxwell in para 19 - 008 at page 761*** summarise the position relating to claims for pecuniary remedies as follows:

> ***"It has recently been held that it is neither helpful nor necessary to introduce public law concepts as to the validity of a decision into the question of a public body's liability at common law for negligence. Nevertheless, issues as to the lawful scope of a pubic body's discretion do remain important to questions of tortious liability in relation to negligence, breach of statutory duty, misfeasance in public office and other torts. A duty to care will not be imposed which will be inconsistent with or fetter a statutory duty. Where a state confers a discretion on a public body as to the extent to which, and the methods by which a statutory duty is to be performed, only if the decision complained of is outside the ambit of the lawful discretion may a duty of care be imposed; in relation "to policy" decisions of a public body, a finding that the act or omission was unlawful is normally viewed as a precondition for common law liability in tort. Holding a decision to be unlawful does not involve a finding that it was taken negligently; a decision without legal authority may nevertheless have been the product of very careful consideration by a decision-maker. Unlawfulness (in the judicial review sense) and negligence are conceptually distinct and so negligence cannot be inferred by a process of "relating back" from a finding of invalidity."***

We move to consider the claim for damages for misfeasance in public office. Order 53/14/45 confers power on a court hearing an application for judicial review to award an applicant damages. The provision reads as follows:

> ***".....on an application for judicial review, the court has power to award damages to the applicant, provided (1) he has included in his statement in support of the application for leave, a claim for damages and (2) the court is satisfied that, if the claim had been made in an action begun by the applicant, he could have been awarded damages.... For these purposes, O. 18.12 applies so the applicant must give all necessary particulars relating to any special damages***

claimed or he may be ordered to find such particulars..... The claim to damages in an application of a new substantive right, but must be one which could have been made in an action commenced by writ."

We have, in determining this claim, sought and derived guidance from ***Watkins vs Secretary of State for the Home Department and Others***[14]. The facts were that the claimant was a prisoner serving a sentence of life imprisonment. He was engaged in various legal proceedings. The confidentiality of his legal correspondence was protected by the Prison Rules 1964 and subsequently by the Prison Rules 1999. The claimant complained that the prison staff had breached those rules by opening and reading mail when they were not entitled to do so. He brought an action against the Secretary of State and certain prison officers for damages for misfeasance in public office. The judge found that three of the officers had acted in bad faith but he dismissed the claims against those officers on the ground that misfeasance in public officer was not a tort actionable per se, and that the claimant had failed to prove any financial loss or physical or mental injury of any kind.

The Court of Appeal allowed the claimant's appeal, holding that if there was a right which could be identified as a constitutional right, then there could be a cause of action in misfeasance in public office for infringement of that right without proof of damage. They held that the prison officers had infringed the claimant's constitutional right of unimpeded access to the courts and to legal advice. A nominal award of general damages was made, and the case was

remitted to the county court for determination of whether exemplary damages should be awarded and, if so, in what amount. The defendants appealed.

It was held inter alia, that:

> ***"The tort of misfeasance in public office was never actionable without proof of material damage, which included financial loss, or physical or mental injury and psychiatric illness but not distress, injured feelings, indignation or annoyance."***

Lord Bingham referred to ***Three Rivers DC vs Governor and Company of the Bank of England***[15], where these words were uttered:

> ***"that it is insufficient to show foreseeability of damage caused by a knowing breach of duty by a public officer. The plaintiff in our view, must prove that the official had an actual appreciation of the consequences for the plaintiff, or people in the general position of the plaintiff, of the disregard of duty, or that the official was recklessly indifferent to the consequences and thus can be taken to have been content for them to happen as they would."***

Lord Bingham went on to observe that in ***Odhavji Estate vs Woodhouse***[16], the Court held that while grief or emotional distress were insufficient injury to support a claim, visible and provable illness or recognizable physical or psychological harm were not.

Lord Bingham, after referring to a number of authorities, went on to observe that the authorities presented a remarkably consistent body of law on the point at issue. That the proving of special damage has either been expressly recognized as an essential ingredient, or it has been assumed. None of those

cases, and no authority, judicial or academic, cited to the house, lended support to the proposition that the tort of misfeasance in public office is actionable per se.

The *Watkins* case leaves no doubt that material injury to the applicant is an essential element in a claim for misfeasance in public office. In the present case, no material injury to the applicants was alleged. Here, it should be borne in mind that the court is dealing with the prolonged encampment at the applicants' premises, which was excessive, and not the power to seize the printing press. Material injury should therefore relate to the prolonged stay by the police at the premises in question. It is in that respect that we find that no material injury has been inflicted on the applicants, in line with the cited authorities. The relief claimed in that respect is unawardable, and dismissed as a result.

In the result, we issue an order of certiorati, quashing the decision of the police to encamp at the applicants' residence for the period exceeding 72 hours upon failing to dismantle the printing press. To that extent only, the appeal succeeds. Costs are awarded to the appellants in the court below, and in this court. They will be agreed and in default, taxed.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE