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The People v The Patents and Companies Registration Agency Ex-Partes Finsbury Investment Limited and Zambezi Portland Cement Limited 2017/CCZ/R003 Selected Judgment No. 28 of 2018

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The People v The Patents and Companies Registration Agency Ex-Partes Finsbury Investment Limited and Zambezi Portland Cement Limited 2017/CCZ/R003 Selected Judgment No. 28 of 2018

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Facts

The dispute related to how to commence judicial review proceedings in Zambia. The applicant in this matter commenced judicial review proceedings in the High Court of Zambia by way of applying for leave. In between the period after the High Court granted leave to hear the merits of the judicial review and the hearing date, the Patents and Companies Registration Agency (PACRA), the Respondent filed an application to discharge the leave granted. It was at this point that the Applicants filed summons, to have the matter referred to the Constitutional Court to determine whether or not the requirement for leave is consistent with Article 118(2)(e) of the Constitution, which came into force in 2016, which provides that justice in all courts of law shall be administered without undue regard to procedural technicalities.

On the one hand, the applicant in this matter contended that whereas Order 53 of the Rules of the Supreme Court of England, which regulate judicial review proceedings, provided for the need for leave before commencing judicial review, this requirement is no longer consistent with the aforesaid constitutional provision. It was contended that the requirement for leave is a procedural technicality that hinders access to justice and hence should no longer be required. The Applicants also argued that the requirement for leave should only survive under the new constitutional dispensation if the requirement was backed up by a specific statute, like it is in England or Kenya. In the absence of a specific statute requiring leave in Zambia, the Applicants opined that this further underscored the view that there is no need for leave of court. The Applicants further argued that even if leave is still necessary, the other party cannot apply to discharge the leave because this too would be contrary to Article 118(2)(e) of the Constitution.

The respondent, on the other hand, argued that the requirement to institute judicial review by way of obtaining leave of court is a substantive legal requirement. Therefore, even though Article 118(2)(e) provided that procedures should not impede a matter being heard on its merits, the requirement for leave cannot be dispensed with because this requirement relates to substantive law, not procedure.

The Holding

The Constitutional Court held that the requirement for leave to issue judicial review is a procedural requirement because it is a necessary condition that is required before judicial review matters can be heard. The court went further by holding that it is also a substantive requirement of the law because the leave allows the court to decide whether the matter is worth delving into the merits of the main matter. For these reasons the court held that the need to obtain permission of the court by applying for leave before the court can hear the merits of a judicial review matter is both a procedural and substantive requirement of the law. As the court put it, the requirement to first obtain leave, is part and parcel of the application for judicial review.

In relation to whether the requirement for leave to issue judicial review offends Article 118(2)(e) of the Constitution, the court reasoned that the requirement for leave is not an undue regard for procedural technicalities. The court referred to the earlier Constitutional Court case of *The People v. Henry Kapoko*,¹ which provided that the new provision in the Constitution does not intend to trump the primary object of any procedural requirement but that it will always be necessary to look at the circumstances of a particular case to determine if the procedure impedes justice or not.

¹ Selected Judgment no. 43 of 2016

It has been held in several cases such as the *Dean Namulya Mung'omba and Others v Machungwa and Others*² and *Attorney General v Nigel Kalonde Mutuna and 2 Others*³ that the need for leave is essential for filtering out cases that are not worth the court's further interrogation. The Constitutional Court thereby emphasized and underscored the point that Article 118(2)(e) is critical but should be applied with caution to avoid jeopardizing or overruling legal principles established in the past. Therefore, whereas the broad objective is to ensure that matters are heard on their merits, the court should not readily do away with established procedures, unless it would be just to do so. In the circumstances of judicial review, the Constitutional Court in this case held that the need for leave is a fair procedural and substantive requirement that boosts the attainment of justice. For this reason, the Court held that leave is still required in judicial review proceedings.

The Significance

The first case to consider and interpret the meaning of Article 118(2)(e) of the Constitution was the decision in *Henry Kapoko*. In that case, the Court had to consider whether or not sections 207 and 208 of the Criminal Procedure Code which provide that the accused person's testimony must come before their witness should not be strictly adhered to. The accused person in that case did not view the rule as critical and opined that Article 118(2)(e) of the Constitution permitted the rule to be circumvented as it was a mere procedural rule. In that case, the Court held that Article 118(2)(e) is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality. This reasoning was further underscored in this case where the court provided that the need for leave does not manifest injustice and should therefore not be done away with.

For this reason, the Court in that case held that the relevant provisions of the Criminal Procedure Code should not be viewed in isolation from the rest of the Act. Therefore, viewing the two provisions against the backdrop of the entire Act is necessary and in that case it was held that that procedural requirement is necessary to ensure the establishment of the trust and testing the cogency of the accused person's testimony.

The style of reasoning in the *Henry Kapoko* case was adopted in this case dealing with judicial review. The court looked at the provisions of Order 53 of the Rules of the Supreme Court of England as well as the seminal judgments on judicial review holistically. Rather than looking at the requirement for leave in isolation, the Court looked at both the rationale for leave against the backdrop of the broad framework for judicial review to determine that it is a necessary step.

Article 118(2)(e) is not intended to completely do away with all laid down rules of procedure but seeks to ensure that any procedures that manifest injustice should be avoided to ensure that justice is done in the circumstances of each other. In this regard, the requirement for leave in judicial review proceedings does not manifest any injustice but is a necessary step for the court to ensure the court is able to determine if a matter is worth being dealt with on the merits.

The Constitutional Court in this case, like in *Henry Kapoko*, emphasised that if a rule is substantive in nature, it should not be dispensed with. In some cases, certain rules may appear to be merely technical or procedural steps. However, the Court here, clarified, as in *Henry Kapoko*, that there is need to determine if certain rules are substantive rules. Determining if a provision or rule is substantive can only be determined by looking at the relevant provision widely and within the context of its legislative framework. Following from *Henry Kapoko*, this case emphasised that certain procedural rules may also be substantive in nature and in such a case, they can never be dispensed with, unless they manifest injustice in some way. Determining whether the rule is substantive requires a careful exercise of in-depth analysis against the framework that governs a particular rule.

Once it is determined that a rule is substantive and not merely procedural, Article 118(2) (e) of the Constitution can never be used to do away with such a requirement. This point was also underlined by

² (2003) Z.R. 17.

³ SCZ/8/185/2012.

the recent Supreme Court decision of *GDC Logistics Zambia Limited v Joseph Kanyata and 13 others*.⁴ In such circumstances, the rules, which are also substantive in nature, should guide the court, as these rules are not merely procedural technicalities. In the *Henry Kapoko* case, the need for an accused to testify before witnesses was held to be substantive in nature because it regulated the rights and duties of witnesses to establish the truth of the accused's testimony. In the same vein, the requirement for leave is substantive in nature because it is necessary for the court to determine the likelihood of the proceedings succeeding and establishment of a case requiring further interrogation. In other words, the Court here retained the requirement for leave because this requirement allows the Court to delve into the merits at a preliminary stage and hence there is no prejudice or injustice because the Court is in fact considering the substance of the case, albeit in a manner to determine if the matter on the merits should be entertained.

Therefore the applicant's argument, challenging the validity of the requirement of leave because it would detract from hearing the main case on its merits if leave is not granted, or subsequently discharged was untenable given that Article 118(2)(e) is actually being fulfilled because the procedural rule of leave also entails the court interrogating the substance of the matter.

In the earlier Constitutional Court case of *Sunday Chitungu Malaba v. Rodgers Mwewa and the Attorney General*,⁵ the Court held that Article 118(2)(e) cannot be invoked to avoid the operation of an established rule merely because a party is anxious that a particular rule of procedure will be decided against them. Such a claim is sustainable and was reiterated by the Constitutional Court in this case. Here, the Court also emphasised that if a rule is substantive in nature and does not manifest injustice when applied, the court will be bound to apply it and it will not be a sufficient defence to argue that the application of the procedure will lead to a matter not being heard on its merits.

What emanates from this case, as well as the earlier decisions that considered Article 118(2)(e) of the Constitution, is that this provision should not be applied by rote, but rather applied depending on the circumstances of each case and the particular procedural rule in question. The rule is not intended to do away with trite principles of procedure that have been laid down in statute or established by precedent, but where it is determined in the circumstances of a case that upholding the procedure will be unjust, the courts should not apply the rule – but this will depend on the factual matrix and specific provisions of a particular case. The overriding principle that should guide the courts is whether or not the application of procedural rule in question is also substantive in nature and will lead to injustice being carried out if applied.

⁴ Selected Judgment No. 17 of 2017.

⁵ 2016/CC/A040.