

**STATUTORY APPEALS AS A LIMIT TO A LITIGANTS' ELIGIBILITY TO SEEK
JUDICIAL REVIEW.**

By

SWESHA ALFRED MUSONDA

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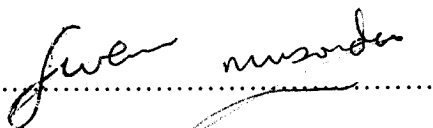
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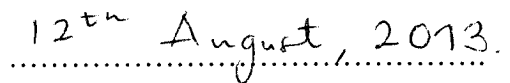
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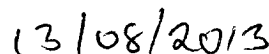
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First and foremost, I thank God for it is only through his Grace that this work has come to completion. Secondly, I also take this opportunity to express my heartfelt gratitude to my Mum and Dad who have not only taught me the values of hard work but have also sacrificed greatly throughout my life in a bid to give me the very best in life. It is therefore my sincere hope that I have fulfilled your expectations of being a good son.

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DEDICATION

I dedicate this dissertation to all my family members and friends. I also devote this work to all the scholars and students in the school of law.

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Zambia.

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The Commission for Investigation Act Chapter 39 of the Laws of Zambia.

The Constitution Chapter 1 of the Laws of Zambia.

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Miyanda v Matthew Chaila (1985) Z.R.193 HC.

NB Mbazima and other (Joint Liquidators of ZIMCO Ltd) v Reuben Vera S.C.Z Judgment No. 6 of 2001.

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R. v. Chief Constable of Merseyside Police, ex p. Calveley [1986] Q.B. 424; [1986] 1 All E.R.
257.

Zambia National Holdings and United National Independence Party v The Attorney S.C.Z
Judgment No.3 of 1994.

3.3 The Importance of Judicial Review..... 25

3.4 Conclusion..... 28

CHAPTER 4: THE MODE OF COMMENCEMENT UNDER A STATUTE AS A BAR TO JUDICIAL REVIEW.

4.0 Introduction 30

4.1 General Rules on Commencement of Actions in the High Court..... 31

4.2 Commencement of an action by way of an Appeal..... 34

4.3 The Approach Taken by the Courts when a Party does not adhere to the Mode of Commencement..... 35

4.4 How Commencing an Action by way of an Appeal Acts as a Bar to Judicial Review..... 37

4.5 How an Appeal Differs from Judicial Review 41

 4.5.1 Advantages of Judicial Review over an Appeal when dealing with challenges on exercise of administrative authority..... 44

4.6 Conclusion..... 46

CHAPTER 5: RECOMMENDATIONS AND GENERAL CONCLUSION

5.0 Introduction..... 47

5.1 Recommendations..... 47

5.2 General Conclusion..... 49

CHAPTER ONE

INTRODUCTORY CHAPTER

1.0 Introduction.

In the case of *Ex-parte Finsbury Investment Limited and Patrick Chamunda*¹, it was held that the correct position to follow is that the mode of commencement of any action is generally provided for by statute. This paper is an analysis of the holding in the case of *Ex-parte Finsbury* with regards to how the mode of commencement as stipulated under a statute acts as a limit on a litigant's eligibility to seek Judicial Review of Administrative actions. This paper shows that Judicial Review is important in controlling administrative actions thus, the mode of commencement under a statute should not act as a bar to a litigant's eligibility to seek Judicial Review. In a quest to illustrate that Judicial Review is the most effective mechanism of controlling administrative actions in Zambia, this paper in Chapter Two has discussed the Non-judicial Mechanisms of controlling administrative actions that are available in Zambia and their short comings. In Chapter three, the concept of Judicial Review is defined. The definition of Judicial Review according to different scholars is accompanied by a discussion on its scope of application and the important role it plays in curbing maladministration.

Furthermore, this paper under Chapter Four shows how the mode of commencing an action before the High Court as provided for under a statute acts as a limit to a litigant's eligibility to seek Judicial Review. The problem faced by litigant's that want to seek Judicial Review in cases where a statute provides a mode of commencement, is illustrated by taking into account statutes that provide an appeal as the mode of commencement against a decision of a public body or officer.

¹ *Ex-parte Finsbury Investment Limited and Patrick Chamunda* (2010) HK/690.

Recommendations that will curb the identified problem and allow litigants to seek Judicial Review of administrative actions are discussed under chapter five. The recommendations are followed by a general conclusion which gives a summation of this research paper

1.1 Statement of the Problem.

In the case of *Ex-parte Finsbury Investment Limited and Patrick Chamunda*², it was held that 'the correct position to follow is that the mode of commencement of any action is generally provided for by statute.' In the light of this holding, this dissertation will critically analyse how in practice, the mode of commencement provided under a statute acts as a bar to making an application for Judicial Review. The analysis is with regards to statutes that require a litigant to move the court by way of an appeal.

1.2 Objectives of the Study

This paper will show the fatality of failing to adhere to a mode of commencement that is contained under a written law or statute and the negative impact it has on making an application for Judicial Review. The following are the objectives of this paper:

1. To analyse the various Non Judicial Mechanisms of controlling administrative actions that are available in Zambia.
2. To highlight the scope, meaning and importance of Judicial Review in controlling administrative actions.

²Ex- parte Finsbury Investment Limited and Patrick Chamunda (2010) HK/690.

3. To illustrate through statutes (which provide an appeal as a mode of commencement) and case authorities how the mode of commencement provided by a statute has acted as a bar to making an application for Judicial Review in Zambia.
4. To show that a party seeking a public law remedy against an administrative officer should be accorded the opportunity to make an application for Judicial Review as it is the most effective mechanism of controlling administrative actions in Zambia.
5. To propose practical solutions that will enable an aggrieved party to commence an action for Judicial Review even in instances where the statute provides the mode of commencement for an aggrieved party to follow.

3 Purpose of the Study.

The purpose of this study is to show the importance of Judicial Review as the most effective mechanism of controlling administrative actions in Zambia. After establishing the importance of Judicial Review in controlling administrative actions, this study also intends to show how the mode of commencement of an action under a statute acts as a limitation to a litigant eligibility to seek Judicial Review of administrative actions.

4 Significance

The importance of this research cannot be overemphasized. Judicial Review has over the years proved to be the most effective *judicial mechanism of controlling administrative actions* in Zambia. This research paper is therefore of great value as it will establish that all decisions that are made by administrative bodies that are tasked with public functions must be amenable to

Judicial Review. Making all decisions of administrative officers amenable to Judicial Review will ensure that public authorities act within the confines of the law. Furthermore, this paper is important because it shows how the mode of commencement under a statute must not limit a litigant's eligibility to seek Judicial Review. This research will therefore provide vital information that will contribute to the justice system, particularly in the field of administrative law.

1.4 Methodology

This study embraces desk research. This research makes reference to literature from national and international sources. The main sources of information are: Law Reports, textbooks, journals, internet and legislation. The research is derived from the analysis of the named sources of information.

1.5 Conclusion

This chapter has given a broad outline and framework of what will be discussed in the subsequent chapters. This chapter has therefore established the statement of the problem, the objectives, purpose, methodology and the significance of the study. The next chapter analyses the Non Judicial Mechanisms of controlling administrative actions that are available in Zambia.

CHAPTER TWO.

NON JUDICIAL MECHANISMS OF CONTROLLING ADMINISTRATIVE ACTIONS.

2.0 Introduction

Judicial Review is not the only mode of controlling administrative actions. There are also Non judicial mechanisms or systems that are used to control administrative power. Several Non Judicial mechanisms that control administrative actions are available in Zambia. This paper in its quest to prove that Judicial Review is the most effective means of keeping the actions of administrative officers in check, will discuss some Non Judicial mechanisms available in Zambia. The following mechanisms will be analysed; the Presidential Parliamentary system, Commission of Enquiry, Administrative Agencies and finally the Commission of Investigation.

2.1 Non-Judicial Mechanism Available in Zambia.

2.1.1 The Presidential Parliamentary System.

The presidential parliamentary system of control serves the purpose of keeping the administrative acts in control. It is founded on the doctrine of separation of powers. Parliament plays the important function of overseeing Government administration and subjecting its activities to detailed scrutiny on behalf of the electorate.³ Under this system, it is the role of parliament to ensure that the acts of the executive which is headed by the president are kept in

³The Zambian Parliament Official Website.<http://www.parliament.gov.zm>(accessed on 6th June 2013).

check. The office of the president is a creation of the constitution. The president is the Head of State and Government, and the Commander-in-Chief of the Defence Force.⁴

The functions of the president are embedded under article 44 of the constitution. The president as the head of the executive branch of government is expected to perform his functions in the best interest of the state.⁵In ensuring that the executive officers use their powers accordingly, parliament plays a very important role by providing checks on the executive.

The main powers of the Executive include the power to formulate policy and implement it. The executive also has the mandate to: initiate legislation, maintain law and order, protect and enhance economic and social welfare of the people and to direct foreign policy. In short, the Executive is tasked with carrying out the general administration of State.⁶

Parliament is therefore tasked with ensuring that the administration of the state is carried out in accordance with its intended purpose and within the confines of the law. Ideally Parliament is supposed to control administrative actions as follows:

The National Assembly has the power to impeach the president for violation of the constitution or any gross misconduct. The procedure to be followed is provided for under article 37. Where a motion for the impeachment of the president is passed, the Chief Justice will appoint a tribunal, which will investigate and determine whether the allegations against the president are substantiated or not.⁷

If the tribunal finds any allegations against the president are validated, it will report to the National Assembly, which in turn can by not less than three quarters of all the members of the National Assembly resolve that the president is guilty and thus determine that; the President is

⁴ Article 33 of the Constitution, Chapter 1 of the Laws of Zambia.

⁵ Article 44 (1) of the Constitution, Chapter 1 of the Laws of Zambia.

⁶ Alfred. Chanda. *Zambian Constitutional Law: Cases and Materials* (Lusaka: UNZA Press, 2001).

⁷ Article 37 (3) (a)-(c).

either guilty of violation of the Constitution or, as the case may be gross misconduct which makes it incompatible with his continuance in office as President.⁸ The power of impeachment therefore keeps the President in check as any violation of the constitution or gross misconduct may lead to impeachment.

Appointments to constitutional offices that are made by the president are ratified by Parliament. For example the appointment of the chief justice and deputy chief justice is subject to ratification by the National Assembly. The same applies to all judges of the Supreme Court.⁹ This process of ratification ensures that the president in his exercise of administrative functions appoints the right people that will carry out their duties with dignity and in accordance with the law.

Members of parliament are tasked with representing their various constituencies in parliament and raising issues that are affecting the constituency with various ministries or government departments. Members of Parliament as representatives of people are therefore mandated to not only lobby for development but to support and protect their constituents from administrative decisions, which may affect them negatively. This therefore acts as a check on the administrative function of the executive.

To enable it to carry out the important function of controlling administrative actions, Parliament has established various parliamentary committees that conduct surveillance on defined areas of Government administration.¹⁰ A parliamentary committee system ensures that the Executive is accountable to Parliament. These committees allow parliament to probe into any maladministration and make recommendations to curb maladministration. Parliamentary committees have been in existence in Zambia prior to independence. The increase in

⁸ Article 37 (5) of the Constitution, Chapter 1 of the Laws of Zambia.

⁹ Article 93 2(1) and (2) of the Constitution, Chapter 1 of the Laws of Zambia.

¹⁰The Zambian Parliament Official Website.<http://www.parliament.gov.zm>(accessed on 6th June 2013).

government responsibilities and activities is one of the core reasons why the committees have undergone growth and procedural changes.¹¹

One such committee is the public accounts committee. The Public Accounts Committee is made up of nine members appointed by the National Assembly at the commencement of every session. The quorum of the Committee is four. The Committee examines the accounts showing the appropriation of sums granted by the National Assembly to meet public expenditure. The committee also examines the Report of the Auditor-General on these accounts and such other accounts.¹²

The Committee plays the following functions.¹³

- (a) It scrutinize the assurances, promises and undertakings and other matters that are given by Ministers from time to time on the floor of the House;
- (b) Comments on delays in implementation of programs and also the satisfactoriness of the action taken;
- (c) Examines annual reports of all Government ministries and departments in the context of the autonomy and efficiency of Government ministries and departments and determines whether the affairs of the said bodies are being managed according to relevant Acts of Parliament, established regulations, rules and general orders.

¹¹The Zambian Parliament Official Website .<http://www.parliament.gov.zm>,(accessed on 6th June 2013).

¹²The Zambian Parliament Official Website .<http://www.parliament.gov.zm>,(accessed on 6th June 2013).

¹³ The Zambian Parliament Official Website .<http://www.parliament.gov.zm>,(accessed on 6th June 2013).

The functions of the committee are not limited to the above outlined; the committee can exercise any other functions as may be allotted to the Committee by the Speaker of the national assembly from time and from reports.¹⁴

2.1.2 Flaws of the Presidential Parliamentary System

Although the presidential parliamentary system has attained some success in controlling administrative actions, it has proved to be ineffective due to the following reasons:

This mechanism of controlling administrative actions cannot be fully utilized due to a lack of proper separation of power between the executive and parliament. This problem arises because parliament consists of the President (head of the executive) and the members of parliament. Article 62 of the constitution states ‘The legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly.’ To make matters worse ministers are appointed from amongst the members of the Parliament¹⁵, thus they have dual membership that is; being members of the Executive as ministers and members of the National Assembly as elected or nominated members.

The other noted problem is the tendency of members of the ruling party to show loyalty to their political parties instead of carrying out their functions as prescribed by the constitution. This has created a big problem because the proper functioning of the presidential parliamentary system as a check on the administration has been compromised. This inclination of members of parliament to show loyalty to their party has created a setback in the ratification of appointments made by

¹⁴TheZambian Parliament official Website.<http://www.parliament.gov.zm>,accessed on 6th June 2013.

¹⁵ Article 46 (2) of the Constitution, Chapter 1 of the Laws of Zambia.

seats were shared with other parties. So he did not have a 'clear majority' of a good Cabinet in his own party, so he 'stole' from other parties and eventually had control of the House, so yes it is unfortunate that democracy works like that but it is also fortunate that the President has flexibility.¹⁷

Therefore, in the event that the ruling party does not have a majority of members in parliament, the president can avoid the possibility of getting impeached by simply appointing ministers from amongst opposition members of parliament. The president can further add to the number of people that will show loyalty to him in parliament through exercising his power to appoint eight nominated members of his choice to become members of the assembly.¹⁸ A further deterrent to impeachment is the tendency of parliamentarians to prioritize their loyalty to their parties over carrying out their national duty.

2.1.3 The Commission of Enquiry.

The Commission of Enquiry is another Non Judicial mechanism that has been employed to control administrative actions over the years. The Commission is appointed by the president in exercise of his power under the Inquiries Act.¹⁹ Under section 2, the president has power to issue a commission by appointing one or more commissioners to inquire into any matter in which an inquiry would in the opinion of the President would be in the interest of the public.²⁰

This contributes to the proper functioning of the administration. The commissions may if issued; provide a check on administrative officers through inquiring into any administrative acts that are not carried out accordingly and to the best interest of the public. There is no limitation as to the type of issues or institution that the president can through the commission have investigated.²¹

¹⁷ The Post News Paper, 3rd October, 2011.

¹⁸ Article 62 of the Constitution, Chapter 1 of the Laws of Zambia.

¹⁹ The Inquiries Act, Chapter 41 of the Laws of Zambia.

²⁰ The Inquiries Act, Chapter 41 of the Laws of Zambia.

²¹ Section 2(1) of The Inquiries Act, Chapter 41 of the Laws of Zambia.

2.1.4 Flaws of the Commission of Enquiry

The commission of Enquiry although very important also has its limitations. The major weakness of the commission is not premised on the fact that it is a Non Judicial mechanism of checking administrative actions but on the short comings of the president. Upon completion of its works, the commission submits its report to the president who is under no obligation to act on the recommendations.

The president has total liberty to accept the recommendations he views as favourable to him and discard the rest. The use of commissions in a bid to come up with a constitution that will stand the test of time in Zambia has proved futile due to the tendency of the presidents to reject recommendations that are beneficial. For example some important recommendations given by the 1972 commission headed by Mainza Chona were rejected. The commission had the mandate to make recommendations on what form the one-party Constitution of 1973 would take. Some recommendations that were rejected include amongst others; the recommendation to reduce executive power²² and to limit tenure of office of the president to be a maximum of two five-year terms for any President.²³

The other weakness is based on the fact that the president appoints the members of the commission. It is argued that as a result of being appointed by the president, members of the commission are likely to show loyalty to the appointing hand. This makes it difficult for them to carry out their work objectively. The president through the power of appointment vested in him, is therefore in a position to influence the decision making of the commission by appointing people that are unlikely to criticize him or the members of his party.

²² Report of the National Commission on *The Establishment of a One Party State in Zambia*. Headed by MainzaChona (15th October, 1972: Lusaka). 11.

²³ Report of the National Commission on *The Establishment of a One Party State in Zambia*. Headed by Mainza Chona.11.

Lastly the inquiries act does not place an obligation on the president to make public the report of the commission. In most cases the reports of the commission take long to be reported to the public and are usually given at a time when public interest in the matter has waned.

2.1.5 The Appeals and Administrative Tribunals.

Apart from the commission of enquiry and presidential parliamentary system, there are internal statutory mechanisms that are used to address problems that may emanate from the implementation of policies by the administrative officers or bodies. These mechanisms fall into two main categories namely Appeals and Administrative Tribunals.

Under the first category, the administration creates a statutory body that has authority to review on appeal any decision of an administrative officer. These statutory bodies are known as an Appeal Boards or Tribunal based on the fact that, the review of a decision by an administrative officer is only done on appeal. The Town and Country Planning Tribunal and the Revenue Appeals Tribunal are examples of appeal tribunals. The Town and Country Planning Tribunal is established under section 6 of the Town and Country Planning Act²⁴. The Act seeks to regulate the development and sub-division of land²⁵. The Revenue tribunal on the other hand is established under section 9 of the Zambia Revenue Authority Act and its main function is to collect revenue on behalf of the Republic.²⁶

The second category relates to administrative agencies that are vested with power to hear and determine any complaint by any aggrieved party. These institutions may operate on a temporary

²⁴ The Town and Country Planning Act, Chapter 283 of the Laws of Zambia.

²⁵ Section 24(4) and 22(3) of The Town and Country Planning Act, Chapter 283 of the Laws of Zambia.

²⁶Section 11 of the Zambia Revenue Authority Act, Chapter 321 of the Laws of Zambia.

or permanent basis. An example of an administrative tribunal that operates on an ad hoc basis is found under the Ministerial and Parliamentary Code of Conduct Act.²⁷ The tribunal is constituted of three persons that are appointed by the Chief Justice pursuant to section 14 of the Parliamentary and Ministerial Code of Conduct Act. The tribunal is only constituted when either a member of the public or parliament lodges a complaint. The complaint must state that a member of parliament or minister has breached the code of conduct. Another example of an administrative tribunal is the Lands Tribunal.

2.1.6 Flaws of the Administrative and Appeals Tribunals.

The above mentioned internal mechanisms of controlling administrative actions although beneficial have proved to be ineffective because of the following weaknesses:

The majority of the appeals and administrative tribunals remain unknown not only amongst the general public but legal practitioners as well. This is due to lack of publicity about the existence of these tribunals and their functions. For this reason most cases that can be settled by the appeal or administrative tribunals are resolved through litigation or through the judicial process.

It is not mandatory for parties to have recourse to the tribunals. The parties to a dispute have an option of either presenting the matter at hand before the tribunals or going to court. In most cases parties prefer to ignore the internal mechanisms of resolving disputes and instead turn to the courts of law. The other serious restraint is that the extent of the jurisdiction of the tribunals is limited. This constraint mainly relates to the appeals tribunal where the grounds upon which an

²⁷ The Parliamentary and Ministerial Code of Conduct Act Chapter 16.

the arrest of a witness who having reasonable notice of the time and place at which he is required to attend to the commission, fails to do so.

2.1.8 Flaws of the Commission of Investigation.

Although the field of investigations by the Commission is wide, it has proved to be ineffective due to the following reasons:

The Commission cannot hear a complaint if it is possible for the aggrieved person to obtain a relief or redress by means of an application, appeal, or review to or before a tribunal established by or under any law. In short, the Commission will not hear a complaint if a party has a chance to obtain redress through the courts of law or any other avenue prescribed by law. This makes the commission unpopular because it is supposed to provide a mechanism that helps deals with complaints against administrative officers in the most expedient and inexpensive way.²⁹

Another limitation, is that Commission cannot move on its own motion. The commission only investigates under two circumstances; that is when directed by the President, or when an allegation of abuse of authority has been made by a member of the public and the Commission is of the view that it ought to be investigated. Therefore a public officer who does not carry out administrative functions accordingly can get away with it, if the commission is not moved in any of the two mentioned ways.

Under section 16 of the Commission of Investigation Act, every investigation is to be conducted in camera. This has raised questions about the transparency of the investigations as they are not

²⁹ Section 10 of the Commission of Investigation Act, Chapter 39 of the Laws of Zambia.

open to the public eye. For a commission that remains unknown amongst many, conducting investigations in camera has not being of any benefit.

The foremost noted weakness of the commission is that it has no power to order remedies once it has investigated and the complaint has being established. After investigating, the commission merely submits a report together with the conclusions and recommendations to the President and the National Assembly.³⁰ The Act places no obligation on the part of the President to act on the recommendations of the Commission thus when the report is submitted to him, he may make a decision that he deems fit.³¹

2.2 Conclusion.

The Non Judicial mechanisms or systems have over the years assisted in controlling administrative power. The formulation of Non Judicial systems to control administrative actions is meant to help to decongest the courts and to provide a cheaper mode of dealing with disputes that arise as a consequence of maladministration. Although the Non Judicial mechanisms are of great importance and have played a vital role in helping to curtail maladministration, their many short comings have made them to be ineffective. For this reason, the majority of people opt to have their matters to be settled by way of litigation or through judicial mechanisms.

³⁰ Section 20 of Commission of Investigation Act, Chapter 39 of the Laws of Zambia.

³¹ Section 21 of Commission of Investigation Act, Chapter 39 of the Laws of Zambia.

CHAPTER THREE.

JUDICIAL REVIEW IN ZAMBIA: ITS MEANING, SCOPE AND IMPORTANCE.

3.0 Introduction.

In the previous Chapter, the Non Judicial systems of administrative control available in Zambia, and the trend by most people to opt to take matters for litigation due to the many flaws of the mechanisms were discussed. This Chapter will therefore introduce Judicial Review as a judicial mechanism that is used to control administrative powers. This Chapter will outline several definitions of Judicial Review as identified by various scholars and cases from different jurisdictions. It will also be established under this head that despite having diverse definitions of Judicial Review, the underlining factor is the power which is vested in the courts to ensure that administrative officers act within the confines of their lawful authority. The scope and importance of Judicial Review in controlling administrative power will also be established.

3.1 Definition of Judicial Review of Administrative Actions.

Judicial Review refers to the power of a court, in appropriate cases before it, to declare a governmental measure either contrary to, or in accordance with, the constitution or any other governing law. The ramification of rendering an action (measure) by a public officer as either invalid or vindicating its validity is that it is put beyond challenge in the future.³²

Judicial Review is therefore the legal process that allows a person to challenge the lawfulness of a decision, action or failure to act of a public body such as a government department. Judicial

³² Alfred. Chanda. *Constitutional Law in Zambia: Cases and Materials* (Lusaka: UNZA Press, 2001).

Blair Maxston³⁷ in his expedition to define Judicial Review takes a similar approach as other scholars and views it as the authority vested in courts to ensure that decision-makers (public officers) have properly acquired legal jurisdiction to act and perform their duties fairly, impartially and do not exceeded their legislated jurisdiction. According to Maxton Judicial review is the re-examination of the validity of actions taken by decision-makers that are public officers.³⁸

The procedure under Judicial Review therefore allows a litigant to challenge administrative actions if they have been adversely affected by an act or omission of a public officer. An aggrieved party can apply for the prerogative orders of mandamus, certiorari or prohibition and in some appropriate cases or circumstances for an injunction or damages.³⁹ Some of the remedies available under Judicial Review are discussed under Chapter Four.

In summary and based on the above outlined definitions, Judicial Review can be defined as the power of the judiciary to correct the acts of the executive or the legislature where it finds them incompatible with the law. The concept of Judicial Review is interpreted differently in different jurisdictions.

3.2 The Scope of Judicial Review.

The courts have the authority to ensure that statutorily created bodies and public decision-makers act within the confines of the law. However to ensure that the courts do not interfere with the daily running of administrative officers, the decisions that are amenable to Judicial Review have

³⁷Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies* (online). Available at <http://www.lawnow.org> (accessed on 28th September 2012).

³⁸Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies*. Available at <http://www.lawnow.org>.

³⁹ Order 53 Rule 1 of the Supreme Court Rules of England 1999.

been defined. In *Council of Civil Service Unions v. Minister for the Civil Service*⁴⁰ Lord Diplock stated;

The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision. Therefore to qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too.

It therefore follows that Judicial Review is only applicable if the person or body of persons that makes a decision or omits to do so is a public officer performing an administrative function. This set the parameters and limits of Judicial Review.

In Zambia, the power of Judicial Review is vested in the High Court. By virtue of article 94 of the Constitution, the High Court is vested with original and unlimited jurisdiction to hear and determine any criminal or civil proceedings under any law. The extent of the power of Judicial Review can therefore be derived from the wording of article 94(1) of the constitution. Article 94 (1) is worded as follows:

There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act [Act No. 27 of 1993], unlimited or original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

It is clear from the above outlined wording of article 94, that the only limitation to the exercise of the power of the High Court is with regards to matters which have been specifically reserved for the Industrial Relations Court⁴¹. Thus, it is clear that any law that would be limiting the power of Judicial Review that is vested in the High Court would be in contravention or ultra vires article 94 of the constitution.

⁴⁰[1985] AC 374, [1984] 3 All ER 935.

⁴¹ Article 94 of the constitution, Chapter 1 of the Laws of Zambia.

In the case of *Zambia National Holdings and United National Independence Party v The Attorney*⁴², the Supreme Court discussed what is meant by the words 'original' and 'unlimited' jurisdiction set out in article 94 of the Constitution. In this case, it was argued and found before the High Court that section 16 of the State Proceedings Act, which prohibited the grant of an injunction against the state, was unconstitutional.

Section 16 was held to be *ultra vires* Article 94 of the Constitution because it was deemed to be limiting the jurisdiction of the High Court. On appeal, the Supreme Court reversed the holding of the High Court and held:

As a general rule, no cause is beyond the competence and authority of the High Court; no restriction applies as to the type of cause and matters as would apply to the lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law.

The holding of the Supreme Court also implies that the High Court must always adjudicate and exercise the powers of Judicial Review in accordance with the rules and procedures stipulated under the law. The rationale behind the holding is that a statutory limitation of the remedies that a Court may grant is different from legislation that limits the actual jurisdiction of the Court to entertain applications. The High Court must therefore in the exercise of the power of Judicial Review comply with the statutory rules and requirements that govern it.

The High Court must comply with procedure on the mode of commencement of an action as stated in a statute. As a general rule, the courts have to give priority to the local statutes over the white book and only resort to the latter if the former is silent or not fully comprehensive.⁴³

⁴²S.C.Z Judgment No.3 of 1994.

⁴³ *New Plast Industries v The Commissioner of Lands and The Attorney-General* .S.C.Z Judgement No.8 of 2001.

Therefore with regards to administrative actions, the High Court has the jurisdiction to check into all actions of administrative or public officers. The power of Judicial Review is vested in the High Court by the constitution so as to ensure that both the legislative and executive organs of government operate within their prescribed authority.

3.2.1 Limitations to the Scope of Judicial Review.

Although the courts are viewed as interpreters of the law, they cannot expand their interpretative powers so as to invalidate a statute that is properly enacted by parliament.⁴⁴ The rationale behind the limitations on the scope of Judicial Review is to prevent a situation in which the court would under the guise of preventing the abuse of power, be guilty itself of usurping power of an administrative body.⁴⁵ For this reason the power of Judicial Review has been subjected to some limitations.

In Zambia, the exercise of the power of Judicial Review over the internal proceedings of parliament is subjected to limitations. This is illustrated in the case of the case *Re Nalumino Munda*⁴⁶ where the petitioner applied to the High Court for an order of certiorari. It was held that the High Court does not have power to interfere with the exercise of the jurisdiction of the National Assembly in the conduct of its own internal proceedings.

Although Parliament in the exercise of its internal proceeding does enjoy some privilege, this does not imply that the officers of the assembly can make administrative decisions that are not in

⁴⁴ Carlson Anyangwe, “Parliamentary Democracy and Constitutional Democracy”, 1027-7862, *Zambia Law Journal*, Volume 31, (1999). 101.

⁴⁵ Chief Constable of North Wales Police v Evans [1982] 1 W.L.R.

⁴⁶ (1971) ZR 70 .H.C.

compliance with the law. In an event that an officer of parliament fails to perform their functions accordingly, they will be subjected to Judicial Review.

In *The People v The Speaker Of The National Assembly The Honourable R.M Nabulyato Ex Parte: Harry Mwaanga Nkumbula*⁴⁷, the question arose as to whether an order of mandamus could be made against the speaker of the National Assembly for failure to comply with the provisions of section 65 (4) of the Constitution. The named section placed a duty on the speaker to inform the assembly of a complaint from a leader of a political party in assembly about defection of a party member upon recognizing the complainant as the leader of a political party. It was held that the remedy of mandamus is available against the speaker of the National Assembly if he fails to comply with statutory obligations.

It must be noted that Judicial Review as a procedure is limited to challenging the decisions, actions or failure to act of a public body that is performing a public law function. Judicial Review does not extend to challenging the decision of a court or bringing an action against a judge. The rationale behind this view is to maintain the autonomy of judges in their quest to carry out their judicial functions.

In *Miyanda v Matthew Chaila*⁴⁸, the question whether a high court judge can be sued for delaying to adjudicate over a case arose. It was held a judge cannot be taken to court for delaying in adjudicating on the case. In support of the holding, the court justified the decision by stating that the public have a right to have the independence of the judiciary preserved, the absolute freedom and independence of judges is imperative and necessary for the better administration of

⁴⁷(1970) Z.R. 97 .H.C.

⁴⁸(1985) ZR 193 H.C.

Judicial Review as such, is of great importance because it helps curb maladministration. The importance of Judicial Review in Zambia can be best qualified by taking into account its rationale. The reasoning behind reviewing administrative acts is that administrative actions or decisions of public authorities often affect the legal rights of citizens. The problem of maladministration has been in existence since the early days of the common law, as a result, the superior courts developed a number of remedies to supervise the decisions, proceedings and other actions of inferior courts.⁵¹

Over the years the growth in bureaucratic power has made the courts to extend their supervisory jurisdiction to public authorities and expanded the remedies available for this purpose. The courts today are thus accustomed to dealing with citizen complaints against public authorities.

Professor Alfred Chanda alludes to the importance of Judicial Review by stating that ‘Public officials must act in accordance with the law and the Constitution, otherwise their actions will be declared invalid or *ultra vires* by the courts.’⁵² He further states that as a result of the vital function it plays, the principle of judicial review of administrative action has firmly been established in Zambia.⁵³

Professor John Francis Garner, an eminent author in his book Administrative Law⁵⁴ shows the importance of Judicial Review by stating that one of the objectives of administrative law is to provide a control over the administration by providing an outside agency that is strong enough to curb injustice to individuals whilst enabling the administration adequate freedom to carry out its mandate. Judicial Review according to Professor Garner is important because it guarantees that

⁵¹Institute of Law Research and Reform, (Edmonton, Alberta: 1984) pg 18 (online). Available at www.law.ualberta.ca/alri/docs/fr46.pdf (accessed on 28th September 2012).

⁵²Alfred Chanda, *Zambian Constitutional Law Cases and Materials* (Lusaka : UNZA Press, 2001) . 32.

⁵³ Alfred Chanda, *Zambian Constitutional Law Cases and Materials*. 484.

⁵⁴ Garner, *Administrative Law*, 5thed, (London: Butterworths 1979) .122.

the administrative officers do not abuse their powers whilst giving them the liberty to exercise the power vested in them.⁵⁵

In Zambia, the Constitution is the supreme law of the Land, from which all laws derive their validity. Article 1(3) of the constitution declares that the constitution is the supreme law of Zambia and any law that is inconsistent with it shall to the extent of its inconsistency be rendered void.⁵⁶

The Supremacy of the constitution is further reinforced by Article 1(4) which states that ‘the constitution shall bind all persons in the Republic of Zambia and all legislative, executive and judicial organs of the state’. Judicial Review therefore plays a very vital role of ensuring that all the public officers under the three organs of government do not exercise their administrative powers in an arbitrary way.

Judicial Review is the best method of reviewing administrative decisions because it is not concerned with the merits of the case at hand but rather it focuses on whether or not the person or institution made a decision that is in compliance with the law. A review on the merits generally means that the court will look again at a decision that has been made and make out what it thinks is the correct and preferable decision instead (discussed under Chapter Four).⁵⁷

By not reviewing the merits of the case but the decision making process in light of the law, Judicial Review has proved to be of great importance and effectual in controlling administrative actions. By not substituting the decision of the public body or officer with its own, a court

⁵⁵ Garner, *Administrative Law*, 5thed. 122.

⁵⁶ Article 1(3) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

⁵⁷ L. McKenzie. *What is Administrative Law?* Available at <http://www.lawhandbook.org.au/handbook> (accessed on 2nd October, 2012). 1.

through Judicial Review allows the autonomy of administrative bodies in their decision making, for the reason that they do so without the fear of interference from courts.⁵⁸

Judicial Review has over the years gained prominence as the discretionary power vested in administrative officers has increased. The vesting of wide discretionary powers in the administration has brought forth its own problems and challenges. It has been shown over the years that there are two possible dangers that may arise from the exercise of administrative powers by public officers. Firstly, there is the inherent tendency of power to expand itself, this implies that the power availed to the officer may be used to do other acts that may seem in line with the original power. Secondly, there exists the ever-present danger that an administrative officer vested with vast powers may lose sight of the objective or essence of power vested in him and become tyrannical. Judicial Review helps to curb these dangers.

Judicial Review is important in Zambia, because it serves as a check on the other branches of government by making them accountable for all acts or omissions. Judicial Review ensures that all tasks undertaken are within the confines of the law.

3.4 Conclusion

This Chapter has outlined different definitions of Judicial Review and how the supervisory power vested in the courts of law is of great importance in preventing abuse of power by public officers. Judicial Review is therefore viewed as a mechanism through which citizens are protected against the abuse of power by public bodies. Although this chapter has shown that Judicial Review is very important in controlling administrative actions, it must be noted that it

⁵⁸ Chief Constable of North Wales Police v Evans [1982] 1 W.L.R

also has its weaknesses. The following are some of the noted flaws: it is often cumbersome and expensive and can only be undertaken with the help of a legal practitioner. Further, certain decisions or acts of the administration are not amenable to judicial review and as such Judicial Review is founded on very well defined and limited grounds.

The next chapter will show how Judicial Review differs from an appeal as a mode of commencement and why all litigants that are challenging administrative actions must not be barred from doing so by way of Judicial Review.

CHAPTER FOUR

THE MODE OF COMMENCEMENT UNDER A STATUTE AS A BAR TO JUDICIAL REVIEW.

4.0 Introduction.

In the case of *Ex-parte Finsbury Investment Limited and Patrick Chamunda*,⁵⁹ it was held that the correct position to follow is that the mode of commencement of any action is generally provided for by statute. In the light of this holding this chapter will critically analyse how in practice, an appeal as a mode of commencement provided for under various statutes acts as a bar to making an application for Judicial Review.

This chapter will therefore discuss the predicament that litigants face with regards to making an application for Judicial Review. The discussion will be relation to circumstances where a statute provides an appeal as the mode of moving the court. Prior to divulging into the problem that arises as a result of adhering to the mode of commencement stipulated under a statute, it is imperative that the rules governing the modes of commencing an action before the High Court are discussed. It is from this discourse that the predicament faced by litigants will be established. Furthermore, it will be shown under this head how challenging an administrative action under Judicial Review differs from challenging an administrative action by way of appeal.

⁵⁹Ex- parte Finsbury Investment Limited and Patrick Chamunda (2010). HK/690.

4.1 General Rules on Commencement of Actions in the High Court.

The general rule with regards to commencement of proceedings is that the procedure for commencement of a case is provided for under the regulating statute.⁶⁰ The practice and procedure in the High Court is laid down in the High Court Rules.⁶¹ The procedure is embedded under Section 10, which states:

The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.⁶²

The cut-off date for the extension of application of the rules of practice in England is 1999; this is pursuant to High Court (Amendment) Act No. 16 of 2002.

The rules on procedure are strict, as such parties that bring an action must adhere to the rules or risk having the matter not entertained by the High Court. The starting point before commencing a matter in the High Court is Order 6, rule 1 (1) of the High Court Act,⁶³ which states that every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules.⁶⁴

It can be seen from rule 1 of order 6 that the only exception to commencing an action by writ is where a statute provides the procedure to be followed or where the High Court Rules provide for a different procedure. It therefore follows that the procedure must be strictly followed and complied with by all litigants. This position was aptly stated in the case of *Godfrey Miyanda v*

⁶⁰New Plast Industries v The Commissioner of Lands and the Attorney General, S.C.Z Judgment No 8 of 2001.

⁶¹ High Court Act, Chapter. 27 of the Laws of Zambia.

⁶²Section 10 of High Court Act Chapter. 27 of the Laws of Zambia.

⁶³High Court Act, Chapter 27 of the Laws of Zambia.

⁶⁴Order 6, Rule (1) of High Court Act, Chapter 27 of the Laws of Zambia.

The above position was stated in the case of *Appollo Refrigeration Services Company Ltd v Farmers House Ltd*⁶⁹; it was held that an originating notice of motion was not the proper process for a landlord's claim for possession of business premises, since all the applications which can be made by an originating notice of motion under the Landlord and Tenant (Business Premises) Act are specified in the various sections. The holding was based on the rationale that the Landlord's action for possession was not so specified under the Act thus, an amendment was allowed and the action was commenced by writ in accordance with Order 6 of the High Court Rule.

It was clearly shown by the court that the application to make amendments was granted because no prejudice would have resulted to the appellant since both parties had every opportunity to be heard on the merits.⁷⁰

Where a case falls outside the jurisdiction of a court, the implication is that the case in question should not be entertained until it is presented before the right court. For example the High Court cannot hear and determine a matter that is reserved for the Industrial Labour Relations Court and vice versa.⁷¹

In the case of *NB Mbazima and other (Joint Liquidators of ZIMCO Ltd) v Reuben Vera*⁷², the Industrial Relations Court (IRC) had determined a matter that involved conveyancing and thereby declared the sale of a flat to the appellant as null and void. On appeal it was held by the Supreme Court that the law allows only the High Court to entertain issues relating to impugning certificate of land. It was also held that where there is uncertainty as to whether the issues to

⁶⁹ Z Judgment No 19 of 1985 ZR 182.

⁷⁰ *Appollo Refrigeration Services* (1985) ZR 182.

⁷¹ Article 94 (1) of the Constitution Chapter 1 of the Laws of Zambia.

⁷² Z Judgment No. 6 of 2001 ZR 43.

be decided are of a conveyancing nature or labour disputes, it is advisable that the parties proceed before the High Court which court would deal with these issues at the same time.

From the above outlined analysis, it can be seen that failure to comply with provisions of a statute is fatal. A party cannot be granted the relief sought as the court will not hear or determine a matter which has been commenced without adhering to the procedural requirements contained in a statute. When commencing an action before the High Court, the litigants have no option but to follow the laid down procedure.

4.2 Commencement of an action by way of an Appeal.

For a party to move the court or commence an action by way of an appeal, the statutes will provide for an appeal to the High Court as a mode of commencement (as an originating process).

There are many statutes in Zambia that stipulate an appeal as a mode of commencement. The following are some examples of statutes which have such provisions:

Under section 15 of the Competition and Fair Trading Act⁷³ any person who is aggrieved by a decision of the Commission made under the Act or under any regulations made, may within thirty days after the date on which a notice of that decision is served on him, appeal to the High Court.

The Telecommunications Act⁷⁴ provides the appeal procedure in Section 13(1) which states ‘Any person aggrieved by the revocation of his licence or by the Authority’s refusal to renew his license, may appeal to the High Court.’ Under section 13(2) the lodgment of an appeal has the following effect; it stays any revocation against which the appeal is brought, pending the

⁷³ Competition and Fair Trading Act, Chapter 417 of the Laws of Zambia

⁷⁴ Telecommunications Act, Chapter 469 of the Laws of Zambia

outcome of the appeal and in the case of a refusal of renewal, the licence if expired shall be deemed to have been renewed on the same terms and conditions pending the outcome.

The Information and Communication Technologies Act⁷⁵ has similar provisions, in section 73(1) it stipulates that a person who is aggrieved with any decision of the Authority may appeal to the Tribunal within thirty days of such decision. The Mines and Minerals Development Act⁷⁶ has similar provisions like the other named acts. Under section 152(1) any person aggrieved by the decision of the Director may appeal to the Minister who shall determine the appeal, consistent with the provisions of this Act in the circumstance of the case. By virtue of section 153(1) any person aggrieved by the decision of the Minister may appeal to the High Court which shall determine the appeal.

Under the Information and Communication Technologies Act, the lodgment of an appeal stays the decision of a public officer. It is clear from the above outlined statutes that a party that is aggrieved by the decision of a public body or officer must move the High Court may way of an appeal.

4.3 The Approach Taken by the Courts when a Party does not adhere to the Mode of Commencement.

The rules of the commencing an action are strict. As such, parties are obligated to follow the mode of commencement under the statute by appealing to the High Court. In *New Plast Industries v The Commissioner of Land and The Attorney General*⁷⁷, the appellant moved the court by way of Judicial Review instead of an appeal as provided for under the Lands and Deeds Registry Act. The Supreme Court affirmed the judgement of the High Court by stating that

⁷⁵Information and Communication Technologies Act No 15 of 2009.

⁷⁶ The Mines and Minerals Development Act No. 7 of 2008.

⁷⁷S.C.Z Judgement No.8 of 2000.

‘where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of Judicial Review when it should have been brought by way of an appeal, the court has no jurisdiction to grant the remedies sought’. The court also stated that the mode of commencement is not determined by the relief or remedies sought but by the governing statute. The court further stated that the appellant was at liberty to commence the proceedings afresh following the procedure under the Act.⁷⁸

This position was affirmed in the case of *Access Financial Servicers Limited, Access Leasing v Bank of Zambia*⁷⁹, in which the Supreme Court held ‘the correct position is that the mode of commencement of any action is generally provided for by statute.’ Therefore, if an aggrieved party makes an application for Judicial Review instead of appealing against the decision of a public body or officer, the court will not entertain the matter because the procedure followed is rendered to be either improper or irregular.

However in the case of *Kasai Mining and Exploration Limited v Attorney General & Others*⁸⁰, the Supreme allowed an appeal against the High Court’s refusal to grant leave to the appellant to commence Judicial Review proceedings. In this case the applicant, after getting approval for a prospecting licence of a concession area, later discovered that two respondents had been granted a licence over the same area. The Supreme Court noted that the High Court judge had accepted that Judicial Review was the appropriate method for commencing the proceedings and after considering the grounds of appeal allowed the Applicant’s appeal. However, the Mines and Minerals Act provides an appeal against the decisions of the Minister as the way to move the High Court and not Judicial Review. The Court accepted Judicial Review as an originating process without considering section 153 of the Mines and Minerals Act. By not taking into

⁷⁸ S.C.Z Judgment No.8 of 2001.

⁷⁹S.C.Z Judgment No. 7 of 2005.

⁸⁰S.C.Z Judgment No. 195 of 2006.

account section 153 of the Mines and Minerals Act, the Supreme Court therefore created a precedence that is contradictory to its earlier decisions.

Despite the ruling in the *Kasai* case, the Supreme Court nonetheless in a more recent case of *Bank of Zambia v Access Leasing Limited; Access Financial Services Limited*⁸¹ reverted to its initial position and held ‘It is not 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 for by statute.’

From the above analysis, it is clear that a party must strictly comply with the mode of commencement as provided for under the statute. A party can therefore only move the court by way of an appeal.

4.4 How Commencing an Action by way of an Appeal Acts as a Bar to Judicial Review.

As stated in the introduction, litigants who wish to challenge an administrative body by way of Judicial Review face a predicament as a result of complying with a mode of commencement provided for under a statute. This is evident when the mode of commencing an action stipulated under a statute is an appeal.

The above stated problem can be well understood by analysing the mode of commencement stipulated under any statute that requires a party that is dissatisfied with a decision of a public officer to move the court by way of an appeal. This view is best illustrated by taking into account section 87 and the appeal procedure under section 89 of the Lands and Deeds Registry Act. This Act is used here as a case study to demonstrate how the mode of commencement of an action by

⁸¹ S.C.Z Judgment No. 15 of 2008.

appeal may act as a bar to judicial review. The named sections were the bone of contention in the case of *New Plast Industries v The Commissioner of Land and The Attorney General*⁸², in which it was held that, the mode of commencement of proceedings is to be determined by the relevant statute that is providing the procedure to be undertaken by an aggrieved party.

The Lands and Deeds Registry Act under section 87 provides an appeal as a procedure to be followed by a party that is aggrieved by a decision that is undertaken by the Lands Registrar.⁸³

On appeal, the same rules that apply in ordinary appeals from the Subordinate Court to the High Court are applied.⁸⁴Section 89 states that on appeal the same rules shall apply as are in force or exist for the time being in respect of ordinary appeals to the Court from a subordinate court.

On a critical analysis the mode of commencement by way of appeal acts as a bar to Judicial Review in the following three ways:

Firstly it is almost impossible for an aggrieved party to act promptly so as to make an application for Judicial Review before the High Court because the aggrieved party has to appeal to the High Court as required by statute. Where the appeal is unsuccessful, the aggrieved party must then appeal to the Supreme Court. The process of appeal is not only time consuming but long because the courts are more often than not overwhelmed with cases.

In most cases, determination of a matter on appeal and exhausting the appeal procedure takes more than one year. As such the aggrieved party cannot make an application for leave in due time to meet the requirement of Order 53.⁸⁵ Under Rule 4(1) an application for leave to move for judicial review must be made promptly and in any case within 3 months of the date when

⁸² S.C.Z Judgement No.8 of 2001.

⁸³The Lands and Deeds Registry Acts, Chapter 185 Section 87 of the Laws of Zambia.

⁸⁴Section 89 and 87 of The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

⁸⁵Rule 4(1) of Order 53 of the Supreme Court of England 1999.

grounds for the application first arose. Promptly in this context implies making the application as soon as practicable or as soon as the circumstances of the case allow.

Additionally, the application must be made within three months from the date when the grounds for the application first arose. It therefore follows that even though an application for leave was made within the three-month period, leave might be refused because the application had not been made promptly.⁸⁶

The court has power to extend time for applying for leave to move for judicial review, however before granting the extension the court must consider if there is "good reason" for doing so.⁸⁷In *R v. Stratford-On-Avon D.C Ex parte Jackson*⁸⁸, the Court of Appeal granted an extension of time notwithstanding nine months' delay. The delay arose from the applicant's attempt to secure the assistance of the Secretary of State in a planning dispute. The Court of Appeal refused to criticise the applicant for this delay since the applicant had been following the advice of experienced counsel. A further delay was occasioned as the applicant applied for legal aid. It was therefore determined by the court in this case there was good reason to grant the extension.

With regards to the delay that may arise from the applicant exhausting the appeal procedure, the court is not likely to give an extension of time. The reason for the refusal to extend time by the court is based on the fact that the matter would have already been determined through the appeal avenue. The applicant will therefore not be allowed to re litigate the matter. Besides this, courts

⁸⁶ *R. v. Independent Television Commission, ex p. TV NI Ltd* [1991] *The Times*, December 30, CA.

⁸⁷ Rule 4(1) of Order 53 of the Supreme Court of England 1999.

⁸⁸ [1985] 1 WLR 1319.

will not normally grant Judicial Review, if there is an alternative avenue of challenging a decision.⁸⁹

Secondly, when a matter is determined through the exhaustion of an appeal avenue, the matter will be considered to be *res judicata*. *Res judicata* refers to a principle which states that when a matter has been finally adjudicated upon by a court of competent jurisdiction, it may not be reopened or challenged by the original parties or their successors in interest. *Res judicata* is known as action estoppel. It does not preclude an appeal or a challenge to the jurisdiction of the court. The justification for *res judicata* is the need for finality in litigation. It therefore follows that once matter is determined through the avenue of an appeal, the case will not be reopened for Judicial Review.⁹⁰

Subjecting public officers to Judicial Review after the appeal procedure is exhausted would have an adverse effect on the work of the administration. It would lead to a situation where the work of the public officers or bodies would be adversely affected as a result of the adjudication processes. Public officer's officers will have to attend to the courts matters that are firstly brought by way of an appeal then later on under Judicial Review. This would lead to undue delays in carrying out decisions of administrative offices.⁹¹

The proper function of the central and local government should not be disrupted by having public officers contesting court proceedings that are brought on appeal and by way of Judicial Review. The courts must therefore reserve their power to interfere with the working of government.

⁸⁹R. v. Epping and Harlow General Commissioners, ex p. Goldstraw [1983] 3 All E.R. 257.

⁹⁰Oxford Dictionary of Law: *A Dictionary of Law* 5th edited by Elizabeth A. Martin. (New York: Oxford University Press,2003).220.

⁹¹Blair E. Maxston.*Government Agencies, Boards and Committees: Your Rights and Remedies* (online). Available at <http://www.lawnow.org>(accessed on 28th September 2012).

Thirdly, where an aggrieved party moves promptly and makes an application for Judicial Review before the High Court without exhausting or following the mode of commencement contained under the regulating statute, the matter will not be entertained and will be rendered as falling outside the jurisdiction of the court as the mode of commencement is rendered erroneous.⁹² The aggrieved party therefore has no option in such an instance because making an application promptly without exhausting the mechanism under the act will render the procedure to be erroneous.

4.5 How an Appeal Differs from Judicial Review.

According to Blair Maxston⁹³, the starting point of the right to appeal is that it must be expressly provided for in legislation and as such it does not exist as an automatic right. Furthermore, a person on appeal usually has the choice of appealing all aspects of a decision or simply certain parts of it. The reasons or grounds for an appeal that a party wishes to rely on can be almost limitless but will depend on the facts and law of each situation.⁹⁴

An appeal can relate to a question of law, a question of fact or both. Appeals that are based on a question of law generally relate to the interpretation or application of legislation or relate to matters such as procedural fairness and jurisdictional issues.⁹⁵ Typically, an appeal based on a question of fact relates to concerns that the decision-maker misapplied or failed to consider

⁹²New plast Industries v The Commissioner of Lands and the Attorney General. (S.C.Z Judgment No 8 of 2001).

⁹³Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies* (online). Available at <http://www.lawnow.org> (accessed on 28th September 2012).

⁹⁴Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies*. (online). Available at <http://www.lawnow.org> (accessed on 28th September 2012).

⁹⁵Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies*.

certain facts .The requirement in all cases is that the notice of appeal must be in writing, identify the decision which is the subject of the appeal and state the reasons for the appeal.

On appeal the court can dismiss the case or consequently allow the appeal and make a new finding or decision.⁹⁶

Notably, a judicial review application is distinct from an appeal because it does not involve a review "on the merits". This generally means that the court will look again at a decision that has been made and make out what it thinks is the "correct and preferable" decision instead.⁹⁷ In contrast to an appeal, in judicial review proceedings, the court cannot review the merits of a decision or the appropriateness of the result.

A court exercising the power of Judicial Review therefore cannot second-guess or substitute its views for those of the original decision-maker. In the same vein it was held in *Fredrick Jacob Titus Chiluba v The Attorney General* that⁹⁸:

The purpose of Judicial Review is to ensure that an individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

Consequently, the court can only review if the due process as regulated by law was followed accordingly by the public officer or body when making a decision. For this reason, the court will take into account if there are any errors of law, jurisdiction, or fairness which occurred during that process.⁹⁹

⁹⁶Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies.2.*

⁹⁷ L. McKenzie. *What is Administrative Law?* Available at <http://www.lawhandbook.org.au/handbook> (accessed on 2nd October, 2012).

⁹⁸S.C.Z Judgment No. 125 of 2002.

⁹⁹Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies.2.*

On the one hand, an appeal involves the rehearing of all or part of an issue that has already been dealt with and results in the substitution of the original decision with a new one upon all or part of the merits of the case. Judicial Review on the other hand, only takes into account some aspects of the original proceedings which may rob it of any validity in the light of the law.¹⁰⁰

In the event that an appeal is successful, it usually results in a decision being substituted with a new one. In some instances, a new trial may be ordered for a fresh decision to be reached. In the case of review, a successful case will result in the previous decision being nullified or quashed but no new decision will be put in its place, instead the body in relation to which a successful application has been made will be directed to pre-determine the case according to the correct rules and procedure. It is therefore inevitable that the decision arrived at in accordance with the lawful procedure will be more favorable to the individual than the original decision.¹⁰¹

As a result of the nature of Judicial Review being distinct from an appeal, the court in an application for Judicial Review will neither 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.¹⁰²

The only circumstance in which the court will interfere with the power or discretion of a public body or officer is if it is exercised in a way which is not within that body’s jurisdiction or the decision is *Wednesbury* unreasonable.¹⁰³ Even under that ground, the standard used by the court is whether a decision maker similarly placed as the one under review would have arrived at a different decision and not whether the court would have decided differently.

¹⁰⁰Blair E. Maxston. *Government Agencies, Boards and Committees: Your Rights and Remedies*. 2.

¹⁰¹Stanley S and Rodney. *Constitutional and Administrative Law*. 2nded (London: Cavendish publishing Ltd, 1998). 913.

¹⁰²Fredrick Jacob Titus Chiluba v The Attorney General, (S.C.Z No Judgment No. 125 Of 2002).

¹⁰³Fredrick Jacob Titus Chiluba v The Attorney General (S.C.Z No. Judgment 125 Of 2002).

Therefore to ensure that in an application for Judicial Review the court does not delve into the merits of the case, the High Court during the process of review does not admit evidence which is of relevance as to whether the decision is reasonable one. Instead the High Court permits evidence which is relevant to determine if the decision made, 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.¹⁰⁴

4.5.1 Advantages of Judicial Review over an Appeal when dealing with challenges on exercise of administrative authority.

It must therefore be emphasised that judicial review is limited to the decision making process with regards to the law. Judicial review as a supervisory jurisdiction does not permit the court to usurp the function of the decision-maker by making a substantive decision of its own.¹⁰⁵

In a summary, in a review on the merits, the court may affirm or vary the decision under review, or set the decision aside and either make a substitute decision or remit the decision to the primary decision-maker for reconsideration. In practice, the typical merits review remedy is to set the decision aside and make a substitute decision. Merits reviewers rarely remit decisions for reconsideration by the decision maker.

By not substituting the decision of the public body or officer with its own, a court through Judicial Review allows the autonomy of administrative bodies in their decision making, for the reason that they do so without the fear of interference from courts.¹⁰⁶ It is argued that when a court reviews a decision on the merits and replaces it with what it thinks is correct and suitable; it is interfering with the powers of the administrative body. Lord Brightman summed it up as follows ‘ If the court were to attempt itself the task entrusted to that authority by the law, the

¹⁰⁴Fredrick Jacob Titus Chiluba v The Attorney General (S.C.Z Judgment No. 125 Of 2002)

¹⁰⁵ Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141 at 154

¹⁰⁶ Chief Constable of North Wales Police v Evans [1982] 1 W.L.R

court would, under the guise of preventing the abuse of power, be guilty itself of usurping power.¹⁰⁷

As a result of the court not reviewing the decision of a public officer based on its merits in Judicial Review, the nature of the remedies that can be granted under Judicial Review are inclined towards making the decision maker to comply with the law rather than interfering with decision itself. Below are the three mainstream remedies that can only be obtained under Judicial Review and how they function:

The first remedy available is Certiorari. This remedy quashes a decision, which has already been made and as such it does not apply to potential decisions that may be made by public bodies. Certiorari will therefore only be granted if an administrative officer has taken an action which can be quashed by the court.¹⁰⁸ Certiorari as a judicial review remedy does not only apply to a decision which is *ultra vires* but also where an error of law exists upon the face of the record.¹⁰⁹

The second remedy is Prohibition. As the name implies, prohibition executes the function of ordering a public body to refrain from the illegal actions.¹¹⁰ As a result of its function, Prohibition is only available to restrain illegal actions thus it is not available in correcting errors of law within jurisdiction for which certiorari is the only remedy.¹¹¹ Prohibition therefore prevents a public body from exceeding its jurisdiction.¹¹²

¹⁰⁷ Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141 at 154

¹⁰⁸ David Pollard, Neil Parpworth and David Hughes, *Constitutional and Administrative Law*, 4th ed. (New York: Oxford University Press, 2007).478.

¹⁰⁹ Grahame Aldous and John Alder, *Application for Judicial Review: Law and Practice* (London: Butterworths, 1985). 36.

¹¹⁰ Peter Cane, *An Introduction to Administrative Law* (Oxford: Clarendon Press, 1987). 146.

¹¹¹ Peter Cane, *An Introduction to Administrative Law*.

¹¹² Grahame Aldous and John Alder, *Application for Judicial Review: Law and Practice* (London: Butterworths, 1985). 51.

Lastly, the remedy of Mandamus can also be obtained. Mandamus is a remedy that commands an inferior body to perform a duty as stipulated by law.¹¹³ The mandatory order (mandamus) therefore compels a public body to carry out a duty in accordance with the law.¹¹⁴

It must be noted that these are not the only available remedies under Judicial Review. The following remedies are also available; an injunction, a declaration, a stay of proceedings and damages. All the remedies available under Judicial Review are inclined towards making the decision maker to comply with the law rather than interfering with the decision itself.

4.6 Conclusion

The procedure to be undertaken for commencement of an action before a court is provided for under the regulating statute. Parties to a matter are therefore obligated to abide to the mode of commencement as provided by various statutes or risk the matter not being entertained. In Zambia, many statutes provide an appeal as a mode of commencement. Litigants that seek to challenge an action by way of Judicial Review as a result of the appeal procedure are unable to seek Judicial Review. Challenging an administrative action by way of Judicial Review is better than on appeal as the former does not delve on the merits of the case but the decision making process in light of the law. The next chapter will give recommendations that can help to curb the predicament that litigants who wish to commence Judicial Review proceedings face as a result of the appeal procedure as provided for by various statutes.

¹¹³ David Pollard, Neil Parpworth and David Hughes, *Constitutional and Administrative Law*, 4th ed. (New York: Oxford University Press, 2007).479.

¹¹⁴ Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law*, 6th ed. (London: Penguin Books, 1989). 586.

CHAPTER FIVE

RECOMMENDATIONS AND GENERAL CONCLUSION.

5.0 Introduction.

After having established in the preceding chapters that Judicial Review is the most effective mechanism of controlling administrative actions in Zambia, this chapter will discuss recommendations on how the mode of commencement should not act as a bar to commencing Judicial Review proceedings. The recommendations under this head will discuss the approach that must be taken by courts when an applicant seeks to move the court by way of Judicial Review despite the statute providing an appeal as a mode of commencement. This chapter will also give a general conclusion of the research paper.

5.1 Recommendations.

The mode of commencement as stipulated must not be a bar to Judicial Review, because Judicial Review has proved to be an effective means of controlling administrative actions in Zambia. Therefore where an appeal procedure is available to an aggrieved party and the party opts to move the High Court by way of Judicial Review, the court must take into account if the applicant's case requires a fuller determination at a hearing for Judicial Review. The court must firstly determine if the applicants have sufficient interest in the matter and an arguable case¹¹⁵. If the determination is in the affirmative, the court must then consider whether the decision that is

¹¹⁵Order 53 rule 8(3) of the Supreme Court Rules of England 1999.

the subject matter of Judicial Review can be remedied fully and appropriately through the remedies which are available under Judicial Review than through an appeal.

For example if one sought the prerogative remedies in public law, such as certiorari, mandamus or prohibition, such remedies which can only be obtained in an action for Judicial Review, the court must take into consideration if the decision of an administrative body can be rectified appropriately and fully in light of the law through the court granting of one or a combination of the main stream remedies in Judicial Review. The remedies under Judicial Review are best suited to remedy or curb administrative malfunctions in light of the law as they do not interfere with the decision making of the public body or officer.

Where the court is satisfied that the matter can be best resolved through Judicial Review than on appeal, the court must allow an applicant to move the court by way of Judicial Review without resorting to the appeal avenue that is provided for under the statute.

Alternatively, if a party makes an application for Judicial Review and the statute provides an appeal to the High Court as the mode of commencement, the court must not refuse to hear the matter based on the mode of commencement. Instead the court must stay the application for Judicial Review. This approach is embedded under Order 53 rule 3(8), in cases where the order sought by a party is an order of certiorari but an avenue of appeal is available to the party. The wording of the rule¹¹⁶ is as follows:

Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

¹¹⁶Order 53 rule 8(3) of the Supreme Court Rules of England 1999.

The Courts in Zambia must in such cases therefore adjourn the application for Judicial Review until the appeal is determined or the time for appealing has expired. This will therefore allow applicants to challenge administrative actions through Judicial Review which has proved to be the most effective mechanism of challenging administrative actions in Zambia.

The main argument against this alternative approach is that allowing parties to move the court by way of Judicial Review instead of an appeal will open the floodgates to parties bringing actions against administrative bodies. This will in turn waste the courts time through trivial complaints and affect the day to day running of the administration. This argument holds no water because the administrative officers and bodies are protected with the requirement for an applicant to obtain leave of the court before proceeding to a substantive hearing.

To this effect leave is obtained in order to:

Prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove uncertainty in which public officers and authorities might be left as to whether they can safely proceed with administrative action while proceedings for Judicial Review were actually pending even though misconceived.¹¹⁷

Premised on these recommendations, the mode of commencement must not be a bar to parties challenging administrative actions by way of Judicial Review.

5.2 General Conclusion

This paper has analysed the Non-Judicial Mechanisms and Judicial Review as the two mechanisms that are used to control administrative actions in Zambia. The many short comings of the Non-Judicial Mechanisms have made them to be ineffective in their quest to control

¹¹⁷ Ex- parte Finsbury Investment Limited and Patrick Chamunda 2010/ HK/690.

administrative actions and curb maladministration. Judicial Review on the other hand has proved to be the most effective mechanism of controlling administrative actions. The meaning, importance and scope of Judicial Review have also been discussed. This paper has through critical analysis shown how the mode of commencement as provided for under various statutes may act as a bar to a litigants' eligibility to seek Judicial Review of Administrative actions. Recommendations that will curb this problem and allow an applicant to seek Judicial Review of administrative actions even in instances where the statute provides a mode of commencement have also been stated.

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