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THE UNIVERSITY ZAMBIA
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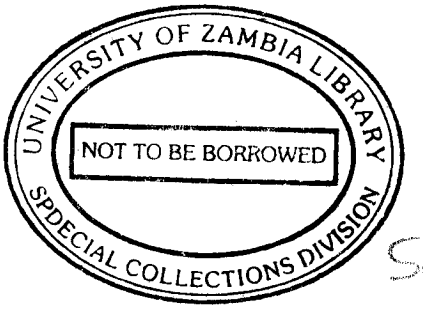
THE RULES OF NATURAL JUSTICE WITHIN THE ZAMBIAN LEGAL SYSTEM



BY

CHARLES THOMAS SINKALA

UNZA

FEBRUARY
~~**DECEMBER**~~**, 2008**

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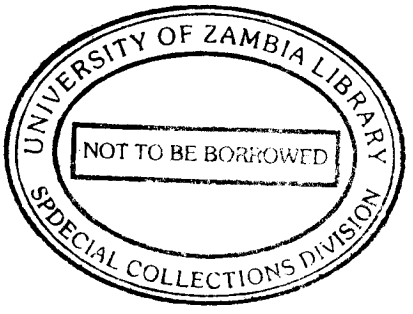

THE RULES OF NATURAL JUSTICE WITHIN THE ZAMBIAN LEGAL SYSTEM

BY

CHARLES THOMAS SINKALA

Being a Paper Submitted in Partial Fulfillment of the Examination Requirements for the Degree of Bachelor of Laws of the University of Zambia

THE UNIVERSITY OF ZAMBIA
SCHOOL LAW

I RECOMMEND THAT THIS DIRECTED RESEARCH UNDER MY SUPERVION

BY
CHARLES THOMAS SINKALA

ENTITLED

THE RULES OF NATURAL JUSTICE WITHIN THE ZAMBIAN LEGAL SYSTEM

BE ACCEPTED FOR EXAMINATION. I HAVE CHECKED IT CAREFULLY AND I AM SATISFIED THAT IT FULFILLS THE REQUIREMENTS RELATING TO THE FORMAT AS LAID DOWN IN THE REGULATIONS GOVERNING DIRECTED RESEARCH.

Date 07/02/08

Supervisor.....Prof. MVUNGA, (SC)

DECLARATION

I, **CHARLES THOMAS SINKALA, DO HEREBY** declare that this Directed Research Paper is a result of my finding and I have not used any person's work without acknowledging it.

Signature.....
Charles Thomas Sinkala

Date..06/02/08

ABSTRACT

The Directed Research I have embarked on addresses the rules of Natural Justice within the Zambian legal system. In this essay, attempt has been made to ascertain what constitutes the Rules of Natural justice. The essay focuses the subject of the rules of natural justice within the Zambian justice system particularly in the area of deportation and labour matters. The essay focus on deportation and labour matters because it has been observed that there is abuse of the said rules in these two areas and the position of the Zambian law leaves much to be desired.

Of great concern in this paper is the position of the Zambian Deportation and Labour laws with regard to the rules of Natural Justice. Could it be said that the Zambian laws on the said two areas have incorporated the application of the rules of natural justice? If yes, is the scope of application sufficient to meet the challenge of administering fair justice? Does it conform to international standards? The essay attempts to answer such and many other questions.

Finally, the paper makes recommendations for reform so that the Zambian law in the respective areas conforms to international standards.

DEDICATION

To my late mother, Anna Namteka Sinkala, for giving me life and the early pillars upon which my future life has flourished. Her wise counsel is unequalled and forever will I be indebted to her for teaching me the art of living.

ACKNOWLEDGEMENTS

This work is undoubtedly as a result of various contributions from different scholars. Much gratitude to my supervisor, Professor M.P. Mvunga for his wise counsel and guidance during the preparation of the paper. A big debt of gratitude is also owed to my friends, too numerous to mention, both in and out of school for the encouragement and inspiration through all the toils of academic advancement.

I also take this opportunity to express a deep sense of appreciation to my parents, father Slawek and other people who in various ways ensured that I received the education I so much value. Indeed, my own parents gave me life but they, have given me the art of living.

Finally, I also wish to accept full responsibility for any errors and omission in this work.

STATUTES

The Constitution of Zambia, Cap One

The Immigration And Deportation Act, Cap 123

The Employment Act, Cap 268

The Industrial and Labour Relations Act, Cap 269

The International Covenant on Civil and Political Rights

The African Charter On Human and Peoples Rights

TABLE OF CASES

Board of Education V. Rice (1911) AC 179 at 182

Mwenya V. The People (1973) ZR 261
Rainee Engineering Co. Ltd V. Baker (1972) Z.R 156

R V. Home Secretary (1984) 1 WLR 1337

R V Gaming Board, Ex parte Benaim (1970) 2 QB 417

Agholor V Cheese borough Ponds (1976) Z.R H.C

Zambia National Provident Fund V. Yekweniya Mbiniwa Chirwa (1986) ZR 70

Sata V Post Newspaper Limited 1992/HP/1399

Ian R V Immigration Appeal Tribunal Ex parte Khan (1982) 2 AU CR 470

Roy Clarke V The Attorney General (2004) HP/003

Sharp V. Wakefield (1891) AC 173

Amnesty International V Zambia N.212/98

TABLE OF CONTENTS

INTRODUCTION:

There has been a great deal of talk with regard to the rules of natural justice. Different scholars of varying standing have opined on the topic of natural justice. The debate and controversy surrounding the rules of natural justice just goes to show the importance of these rules in the modern day administration of justice. It is in view of the above that this essay will basically concern itself with the study of the rules of natural justice. The study will try to ascertain to what extent the rules of natural justice have been incorporated in the Zambian legal system.

The essay will attempt to discover who in the Zambian legal system is amenable to the rules of natural justice and to what extent are such persons or bodies amenable to the said rules. Is it every decision making body or persons that is required to adhere to the principles of natural justice or there are exceptions? If there are exceptions, what then are the exceptions? Could the Zambian situation with regard to the principles of natural justice be said to reflect the position in **Board of Education V. Rice**[1] where it was stated that the duty to observe the rules of natural justice is "a duty lying upon anyone who decides anything."

Furthermore, the essay will endeavor to narrow down the discussion to specific areas, namely; deportation and labour matters and find out the degree to which the rules of natural justice have been applied in the said respective areas. The essay will focus on labour and deportation cases because the application of the rules of natural justice in these two areas appears to have raised controversy. The said two areas appear to be open

[1] (1911)AC 179 at 182

to abuse and disregard for the rules of natural justice is common. This has raised questions as to the suitability of our laws in the two respective areas in as far as the rules of natural justice are concerned. Relevant statutes will be analyzed and looked at so that in the final analysis, a clear picture of what really the position of the rules of natural justice is within the Zambian context emerges.

The study will in the first place focus attention on the historical development of the rules of natural justice in the administration of justice. The essay will then analyze the extent to which the rules of natural justice have been applied in Zambia and in doing so, reference to decided cases and statutes and other works of relevance will be made. Moreover, attempts will be made to establish when, why, who and which bodies are required to observe the rules of natural justice and circumstances and characteristics of proceedings that attract the observance of the rules.

In addition, the study, being an elaborative analysis of the law relating to the rules of natural justice will mainly be based on secondary information and this will include cases, statutes and textbooks. In addition, personal interviews will be conducted with persons vested with knowledge on the matter and such persons will include judges, practicing lawyers and lecturers in the school of law.

Therefore, the essay will be divided into five chapters. In Chapter One, the paper will delve into the historical development of the rules of natural justice and provide definitions of what these rules are and the elements of the said rules. Chapter Two will

focus attention on the characteristics of proceedings and the circumstances that would attract the observance of the rules of natural justice. Questions as to when and which bodies and persons are required to adhere to the rules of natural justice will be answered. The Third chapter will narrow down the discussion to a specific area, the area of labour relations and ascertain the position of the rules of natural justice especially in instances of dismissal and in doing so reference to decided cases will be made. Apart from that, Chapter Four will focus attention on the rules of natural justice in the area of deportation and decided cases will be highlighted .Finally, Chapter Five will provide a summary and recommendations for reform of the law.

CHAPTER ONE

THE RULES OF NATURAL JUSTICE

There is no concrete and specific definition encompassing natural justice as to provide a clear guideline. Nevertheless, it is universally acknowledged that natural justice is made up of "the rules of fair play originally developed by the courts of equity to control the decisions of inferior courts."[2] It refers to certain unwritten rules of law. Basically, the rules of natural justice are made up of two fundamental elements.

The first element is well captured in the Latin maxim *nemo judex in causa sua* which translates as *no man shall be judge in his own cause.* Simply put, this element entails that the adjudicator must have no interest whatsoever in the outcome of the proceedings. As it was established in the renowned case of **Dimes V. Grand Junction Canal**[3], "it is of the least importance that the maxim no man shall be judge in his own cause should be held sacred, and that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." In the above case, the Lord Chancellor sat as an adjudicating judge in a matter where one of the parties to the case was a company where he held several pounds worth of shares. The court held that there was a breach of the *nemo judex in causa sua* rule.

The second element is that every man should be given an opportunity to make representation before judgment is passed on him. This principle is summed up in the

[2] Padfield, Elements Of Public Law, Butterworths, 1980, P252
[3] (1852) 3HLC 759

Latin maxim *Audi alteram partem* rule and literally translates as let the other side be heard. This gives rise to a duty to act fairly, to listen to arguments, and to reach a decision in a manner that is untainted by bias. Thus, before judgment is passed on anyone it is required that such a person be given the opportunity to present his case and make representations and arguments for his case. Failure to adhere to this principle will render the judgment or outcome of the case invalid regardless of how legally sound such a decision could be.

A classical Zambian case in which this principle was highlighted is **Kang'ombe V. Attorney General**[4], where a letter which highly incriminated Kang'ombe was not exposed to him and it was held that that amounted to a breach of natural justice. In that case, the respondent was a teacher under the Teaching Service Commission. The Permanent Secretary in the Ministry of Education had recommended the dismissal of Kang'ombe but the Commission declined to effect the direction as it did not find Kang'ombe with any case to answer. Kang'ombe was however subsequently dismissed after the Secretary General to the government recommended his dismissal to the President. He appealed against that action and the Court found that he had not been given an opportunity to be heard. It was argued that the dismissal had not been done following correct procedures.The decision was held to be invalid as being in violation of natural justice.

It would therefore not be too far-fetched to assert that the rules of natural justice, also known as procedural fairness have developed to ensure that decision making is fair and

[4] (1973)SJZ 7

reasonable. Natural justice involves decision makers informing people of the case against them or their interests, giving them a right to be heard and ensuring that the decision maker has no interest whatsoever in the outcome of the case. In addition, the decision maker must ensure that he acts on the basis of probative evidence.

At any rate, the rules of natural justice have been held to be so sacred and cardinal that some scholars assert that the rules have been in existence since time immemorial. Indeed, as observed by Fortesque J in the case of **R V. Chancellor of the University of Cambridge** "even God did not pass sentence upon Adam before he was called upon to make his defence."[5] Thus, as early as the days of Adam in the Garden of Eden, the rules existed and their importance was recognized. Over the years, the rules and their application have developed to almost exhaustive limits and they have been redefined to meet the challenges of modern day justice administration.

1.1 HISTORICAL DEVELOPMENT

Broadly speaking, before 1964, the status of natural justice was not really clear in most common law as well as civil law jurisdiction. It was uncertain in the sense that courts of law were of different views as to what extent the rules of natural justice ought to apply. Some argued that these rules were and ought to be restricted to judicial decisions while others asserted that these rules ought to apply even in administrative adjudication. Natural justice was seen to be more or less a matter of fact to be proved in a case.

[5] (1723) 1 Str 557

However, the case of **Dimes V Grand Junction Canal**[6] eased the controversy and the period between 1852 and about 1924 during which the case held much sway, natural justice was considered sacred. This position was well rooted such that in those instances in which particular statutes did not refer to the rules of natural justice, courts maintained that natural justice had to be adhered to, arguing that "the justice of the common law would supply the omission of the legislature."[7]

As years unfolded, and by the year 1911 the position in **Dimes V Grand Junction Canal**[8] was reaffirmed in the case of **Board Of Education V. Rice**[9]. It was held in that case that acting in good faith and giving a fair hearing to both sides of a case was "a duty lying upon everyone who decides anything." This position meant that anyone who was in a position to decide on anything that would affect the interests and rights of other people had to observe the rules of natural justice. But this position was slightly disputed and departed from in 1924 in cases such as **R V. Electricity Commissioners Ex parte London Electricity Joint Committee**[10] as well as **R V. Legislative Committee Of Church Assembly**[11] where the judges were of the view that for the rules of natural justice to apply the adjudicating body or authority now had to have not only the power to decide but also the duty to act judicially or indeed quasi-judicially.

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[6] (1852) 3HLC 759
[7] Cooper Vs. Wandsworth Board Of Works (1863) CB (NS) 180
[8] (1852)3HLC 759
[9] (1911) AC 179
[10] (1924) 1 KB 171
[11] (1928) 1KB 411

It seems that controversy as to when, who and which bodies were required to observe the rules of natural justice continued for a number of years until 1964 when the famous case of **Ridge V Baldwin**[12] appeared to settle the air of confusion. In that case, Ridge was a chief constable of Brighton. He had been tried and acquitted on a charge of conspiracy to obstruct the course of justice. Ridge had been properly suspended from duty when first arrested and charged, but after his acquittal the Brighton watch committee, which was then the Police Authority for Brighton, in a unanimous decision dismissed Ridge from office without giving him any prior notice or according him a hearing. His solicitor then applied for a hearing and was allowed to appear before a later committee meeting but the committee confirmed their decision.

Determined to protect his police pension rights Ridge brought action seeking a declaration that he had been wrongly dismissed from office. It was held that the rules of natural justice were applicable to Ridge's case and that Ridge had no adequate opportunity to know what charges he faced before the committee and thus his side of the case was not heard. The court declared that natural justice was "insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances."

The springing of the reasonable man's conception of fair procedure in particular circumstances meant going back to the position in **Board of Education V. Rice**[13] where the rules of natural justice applied in any case in which a person's rights would be

[12] (1964) AC 40
[13](1911) AC 179

affected by the decision. Any decision that would affect the rights and status of an individual had to take into account the rules of natural justice.

Consequently, **Ridge V. Baldwin**[14] was the turning point in as far as the rules of natural justice were concerned and settled the dispute once and for all. The position in **Ridge V. Baldwin** was further clarified in the case of **Re Hk**[15] where an immigration officer refused an infant immigrant admission into England. He did not give the immigrant an opportunity to be heard and it was held that the officer had breached the rules of natural justice.

The **Re HK** case implied that it did not matter how clear the case was but the rules of natural justice had to be observed to clear any doubt even where it was not disputed as to their application. The application of the rules of natural justice was extended and expanded by Sachs LJ in **Re Pergamon Press** in which he declared that "as regards natural justice being insusceptible of exact definition but what a reasonable man would regard as fair procedure, there was no need to label the proceedings 'judicial'. It is the characteristics of the proceedings that matter."[16]

Following this, it became immaterial to refer to the label of a body as criteria to determine whether or not the rules of natural justice would apply. What was now important was whether the decision in question would affect the rights, interests, or position and the livelihood of the person in question. This was a landmark development

[14] (1964) AC 40
[15](1970) 2 QB 417
[16] (1971) CH 388

because it ensured that the rights of individuals, especially those perceived to be in vulnerable position in comparison to the deciding authority would be protected.

1.2 WHAT CONSTITUTES THE RULES OF NATURAL JUSTICE

As earlier noted, the rules of natural justice consist of two fundamental elements and these are that no man shall be judge in his own cause as well as the one that requires an opportunity to be heard to be given to a person before a case is decided against him or her. The first principle, that no man shall be judge in his own cause has two aspects. These relate to interest and bias. With regard to the element of interest, it denotes that a person with an interest in a cause of action, whether that interest be monetary or propriety or indeed any other interest that might incapacitate his or her ability to make a fair decision should not sit as a judge in the matter. This is simply because it is perceived that such a person is interested in the outcome of the case and when he sits as a judge in the same cause where he is a party, he would not be able to reach a fair decision. Common law has always held that if such a person adjudicates his decision will be void notwithstanding that it might be correct in law.

A classical case in point that has already been referred to is that of **Dimes V. Grand Junction Canal**[17] where a statutory company purchased land part of which was used for the canal. The whole land was the subject of litigation between the canal proprietors and the Lord Dimes of Manor. The Lord Chancellor issued decrees restraining Dimes and committing him to prison in contempt of them. Dimes discovered that for more than ten years the Lord Chancellor had held several thousand pounds worth of shares in the canal

[17] (1852) 3HLC 759

company, and appealed to the House of Lords. It was held that "it is of the last importance that the maxim that no man shall be judge in his own cause should be held sacred, and that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."

As to bias, it is settled that a person sitting as judge in a cause must not be biased or show any slightest signs of bias. As a matter of fact, as far as this aspect is concerned, the issue is not whether or not there was real and actual bias but whether there was a likelihood or possibility of bias. In **Mwenya V. The People**[18], it was held that it is not necessary to prove actual bias but it will suffice to show that one of the parties to a case might have reasonably formed the impression that the judge was incapacitated in his ability to give the case an unbiased hearing.

In the Mwenya case, the appellant was charged with official corruption contrary to section 94 (a) of the Penal Code. He was convicted of obtaining money by false pretences contrary to section 309 of the Penal Code. A plea had been taken to this amended charge but the appellant was not asked if he wished to cross-examine the witnesses who had given evidence nor was he asked if he required an adjournment to meet the new charge. The magistrate in that case had taken it upon himself to direct investigations into a criminal matter and to have the result of the investigation reported to him and then finally hear the case himself. This was a clear violation of natural justice as there was likelihood of bias.

[18] (1973) ZR 261

This principle was further articulated in the case of **Lusaka City Council V Mumba.**[19] In this case, the Lusaka City Council, the appellant, appealed from a decision of the Local Government Service Commission whereby the Commission set aside the decision of the appellant council to dismiss the respondents. The Commission in its judgment had held that the charge against the respondent was too wide, uncertain and vague and that as such the appellant was not given a fair opportunity to prepare a defence for himself and to be heard on specific charges resulting in a failure to comply with the rules of natural justice.

The appellant appealed mainly on the ground that the Commission had erred in holding that the appellant had not followed the rules of natural justice and that the Commission itself failed to observe one of the cardinal rules of natural justice by allowing one of its members who had heard the matter before to sit as its chairman. It was held, inter alia that "an administrator.....cannot in any circumstances take part or appear to take part in hearing an appeal against his own decision." A justice should refrain from taking part in any matter in which he is individually interested, or where he is nearly related to either party, or where he had advised upon the matter unless the objection is expressly waived by the parties. The administration of justice should be free from suspicion.

Indeed, Lord Denning noted when he, in the case of **Metropolitan Properties V. Lannon**[20] stated that: "in considering whether there was a real likelihood of bias the court does not look at the mind of the justice himself or at the mind of the Chairman of the

[19](1976) ZR 53
[20] (1969) 1Q.B. 577

Tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that in the circumstances, there was a real likelihood of bias on his part, then he should not sit."

Case law has indicated that as much importance is attached to the possibility of bias as to real bias and the interests of the adjudicator must be taken into account. Why this is so was properly stated in the famous case of **R V. Sussex Justice Exparte Mc Carthy** where Lord Herwart established that "it is not only of some importance but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[21] It would be fatal to the confidence and trust placed in the justice system and administration if right minded people would form an impression that the judge or the adjudicator was biased or unjustly interested in the outcome of the proceedings.

The second fundamental element of the rules of natural justice is that which requires an adjudicator to afford a hearing to either party to the case. This rule, like the first element of natural justice earlier stated is also made up of two components. The composite elements are that the person complained against has to have notice of what is complained against him and also that the person complained against must be given an opportunity to state his side of the case before a decision is made. With regard to the first element, there

[21] (1924) 1 KB 256

are a number of cases that have emphasized and asserted the fact that a person must be given notice of what is complained against him or her.

The case in point is the famous Zambian case of **Kang'ombe V Attorney General**[22], in which a letter which highly incriminated Kang'ombe was not exposed to him and it was held that, that amounted to a breach of the rules of natural justice. In that case, Kang'ombe was a teacher under the Teaching Service Commission which had the power to appoint, confirm and discipline any members of the teaching profession. The Permanent Secretary in the Ministry of Education had recommended the dismissal of Kang'ombe but the Commission declined to effect the direction as it did not find Kang'ombe with any case to answer. Kang'ombe was however subsequently dismissed after the Secretary General to the government recommended his dismissal to the President. The Court held that he had been improperly dismissed.

It is however important to bear in mind that the need for notice has been over the years refined and redefined so that notice has come to mean only clear and specific notice. Therefore, notice which is wide, uncertain, ambiguous, and vague will not suffice and this applies in every case where notice is necessary and required. For instance, in the case of **Kaira V. Attorney General**[23], the applicant was detained under the Preservation of Public Security Regulations, reg. 33 (1). He was served with two grounds of detention namely that he externalised vast sums of money on different dates. It was alleged that these activities were prejudicial to public security. At a later date the President of the

[22] (1973) SJZ 7
[23]

Republic in a television and radio interview alleged that the applicant has been unlawfully paid K200, 000 by ROP and that he was being detained for that matter. However the applicant was not served with this ground of detention.

In his application, the applicant contended that he had not been furnished with all the grounds for his detention, namely that the statement of those grounds made no mention of the allegation concerning the payment by ROP to him of K200, 000. The court held that the grounds were vague, wide and uncertain and that all grounds of detention must have been communicated to the detainee and where there is an additional ground of detention that must also be communicated to the detainee.

At any rate, the second aspect of the rule that either side to a case should be given an opportunity to be heard is that a person should be allowed to state his defence before a decision is made against him. This was properly stated in the case of **Chendaeka V. Luanshya Municipal Council**[24], where the Council in denying the applicant's application for a trading license did not give any official reason. The decision was quashed because it was in violation of the principle that the other side must be heard. A hearing, according to **Kang'ombe vs. Attorney General**[25], does not necessarily have to be oral but could also be in form of an exculpatory letter.

[24](1969) ZR 69
[25] (1973) SJZ 7

1.3 CONCLUSION

The two basic rules of natural justice form an important aspect of fair justice. They highlight the guidelines and course that natural justice ought to take. Having shown what Natural Justice is and its development over the years, it now remains to show who and which bodies must adhere to the rules of natural justice. It will also be shown as to when the principles of Natural Justice must be observed as well as the categories of proceedings that would attract Natural Justice in Zambia and other common law countries. This is what the next Chapter will attempt to show.

CHAPTER TWO

BACKGROUND

It is indeed indisputable that in modern times the idea of justice demands that there should be an independent and impartial judge whose basis for his decisions is reason and evidence and should be free of personal interest in the outcome of the proceedings. There are two sides to every case and as such it is important that every party to a case should be given a chance to be heard. Without any doubt, no man is a better judge of himself.

As earlier pointed out in the previous Chapter, over the years, the rules of natural justice have been modified and redefined. Several factors have been pointed out as being part and parcel of the whole concept of natural justice. The rules of natural justice are no longer confined to the need to give an individual an opportunity to be heard and not be judge in ones own cause. Some scholars have asserted that the rules of natural justice include providing an individual notice in sufficient detail as to the scope of the hearing and the nature of allegations against such an individual. They also assert that it also involves ensuring that the hearing is held within a reasonable period after the notice is served on the accused individual.[26] Thus undue delays in conducting a hearing after notice of allegations is served upon the individual would run counter to the spirit of the rules of natural justice.

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[26] Reginald A. Haney, Q.C, Http:/www.adm.uwaterloo.cal.infoprov

In addition, it is also argued that the rules of natural justice also include enabling the accused person to have a reasonable chance to question and cross examine witnesses especially those tendering evidence against him. This is in addition to giving the individual a chance to respond to the allegations and making representations in his or her defence. Apart from that, the individual should be afforded an opportunity to call his own witness likely to tender evidence in his favour.

Furthermore, the rules of natural justice have been extended as to even include the fact that the individual should be entitled to request an adjournment or postponement for a reasonable period of time, especially if the individual or one of the individual's witnesses is legitimately unable to attend. Where need arises, the individual should be entitled to reasonably request an adjournment and the authorities ought to grant the permission so long as it is not unreasonable. By so doing, the net of natural justice has been cast so wide as to cater for unforeseen circumstances that might defeat the whole purpose of the rules.

Moreover, persons hearing the matter should be possessed of a reasonable level of expertise relating to the matters being dealt with. This would ensure proper justice because when people well versed with the knowledge and expertise of issues in a particular case are mandated to handle it; they would be in a better position to understand how far they should go and the limitations at hand. It is unlikely that such persons would mishandle the case unlike when the proceedings or case is handled by anyone else.

Furthermore, in order to safeguard the sanctity of the rules of natural justice, it is important that persons are liberal enough. Such persons when hearing the matter have a

duty to approach the hearing with an open mind, listen fairly to both sides, and to reach a decision untainted by bias; They should attempt as much as possible to make sure that no element of bias that would render the decision unfair are present. Logically then, it follows that members of the hearing panel should ensure that grounds for setting aside the hearing on a reasonable apprehension of bias do not exist, and they, therefore, should recuse themselves if there is a special relationship or association with the individual appearing before the hearing.

2.1 WHO SHOULD OBSERVE THE RULES OF NATURAL JUSTICE

Observance of the rules of natural justice assists in the dispensation of justice in a manner that accords fairness and satisfaction to all parties to a case. It is therefore incumbent upon the courts to uphold these principles where there is a need to adhere to them. Indeed, the principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where the application of these rules is excluded or by necessary implication are not applicable.[27]

However, that is not to say that the observance of the rules of natural justice is confined to the courts of law or to individuals tasked with judicial duties only. The duty extends to other bodies or individuals deciding matters whose decisions might have far reaching consequences. Indeed, as pointed out in the famous Zambian case of **Shilling Bob Zinka V The Attorney General**[28], "in order to establish that a duty to act judicially applies to the performance of a particular function, it is now unnecessary to show that the function is analytically of a judicial character or that it involves the determination of a *lis inter*

[27] Halsbury's Laws of England, 4th edition, paragraph 64
[28] (1991) S.J (S.C)

partes; however, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where a decision entails the determination of disputed questions of law and fact." Prima facie, however, a duty to act judicially will arise in the exercise of a power to deprive a person of his livelihood; or of his legal status where that status is not merely terminable at pleasure; or to deprive a person of liberty or property rights or any other legitimate interests or expectations or to impose a penalty.[29]

Consequently, it is no longer significant to indicate that a duty should be of a judicial character for the rules of natural justice to apply. So long as a case involves making a decision after a hearing is conducted, so long as the decision is intended to settle disputed questions of law, there is a presumption that a duty to observe the rules of natural justice exists. This extends to cases where a person's livelihood is threatened or indeed where his legal status would be altered by the decision.

Natural justice would also apply where a person's liberty is deprived. For instance, in the case of **William Musala Chipango V The Attorney General** [30]where the Constitution provided that a detainee was to be furnished with grounds of his detention within fourteen days but Chipango was given the grounds after sixteen days, it was held that the detention was rendered invalid because the accused was not given notice of the charges within the prescribed period. His rights were violated and this was unconstitutional as the constitution guaranteed the right in question.

[29] Http/www. Cricket.Nw-sports.com
[30] (1970) ZR 13

2.2 THE ZAMBIAN CONSTITUTION AND THE RULES OF NATURAL JUSTICE

In most democracies, constitutions are considered to be the supreme law of the land. They are the fundamental documents that form the basis of the structure and functions of governments. Like most emerging democracies, Zambia has a Constitution as its supreme law of the land. Zambia, unlike Britain has a written Constitution and as such all laws must conform to the Constitution otherwise such laws will be null and void if found to be inconsistency with the Constitution.[31] In our study, it is important to ascertain to what extent the rules of natural justice have been incorporated within the Zambian Constitution which is the fundamental law of the land.

Our current Constitution in its present form has put up safeguards to ensure that the rules of natural justice are not disregarded. Article 26 of the Constitution[32] stipulates that;

Where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in Article 22 or 25, as the case may be, the following provisions shall apply-

(a) he shall, as soon as reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained;

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[31] Article 3 Of The Constitution Of Zambia
[32] CAP One Of The Laws Of Zambia.

(b) not more than fourteen days after the commencement of his restriction or detention a notification shall be published in the Gazette stating that be has been restricted or detained and giving particulars of the place of detention and the provision of law under which his restriction or detention is authorized;

(c) if he so requests at any time during the period of such restriction or detention not earlier than three months after the commencement thereof or after he last made such a request during that period, as the case may be, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person, appointed by the Chief Justice who is or is qualified to be a judge of the High Court;

(d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the authority by which the restriction or detention was ordered or to any tribunal established for the review of his case; and

(e) at the hearing of his case by such tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

These provisions of the Constitution of Zambia show that the constitution embraces the two cardinal elements of the rules of natural justice. They are part of the principles forming the basic structure of the constitution. The Constitution is cognizant of the need to afford an individual the right to be heard and make representations when it provides that a detainee must be furnished with the grounds of his detention in a language that he

understands. This is to ensure that the detainee knows why he is detained and therefore be put in a better position to question and challenge the legality of his detention. In cases where these provisions are not complied with the detention would be declared invalid.

For example, in the case of **Kaira V Attorney General**[33], the applicant was detained under reg.33(1) of the Preservation of Public Security Regulations. He was served with two grounds of detention namely that he externalised vast sums of money on different dates. It was alleged that these activities were prejudicial to public security. However the applicant was not served with this ground of detention.

He contended that he had not been furnished with all the grounds for his detention. It was held that all grounds of detention must be communicated to the detainee and where there is an additional ground of detention, it is necessary that communication is made to the detainee. Thus, the detention was declared invalid because all the grounds of detention were not availed to the detainee. There was violation of the rules of natural justice because the detainee was not informed of the other charge.

In addition, the Constitution in article 18 provides safeguards for the rules of natural justice. The said article in section 1 states that "*If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.* As such, it is true to say that the Constitution embraces the concepts of impartiality and independence of a court which are fundamental elements in as far as the rules of natural justice are concerned.

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[33] (1980) ZR 65

Moreover, the Constitution also recognizes the importance of informing a person of the charge against them when it provides in section 2 that "*every person who is charged with a criminal offence shall*

(b) Shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;

The Constitution further in the same article provides that such a person

(c) *Shall be given adequate time and facilities for the preparation of his defence;*

(d) shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the court in person, or at his own expense, by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

From the above provisions of the Constitution, it is clear that the Constitution has recognized and incorporated the constituent elements of the principles of natural justice. The Supreme law of the land recognizes the need for representation as well as conditions necessary for the preparation and presentation of the case.

Furthermore, the Constitution also recognizes the need for an impartial and independent tribunal when determining such matters. The Constitution is in effect reinforcing the well

known principle of natural justice that no man shall be judge in his own cause. It emphasizes that a detainee has a right to have his detention reviewed by an independent and impartial tribunal. Indeed, realizing that in such circumstances there is likelihood of loss of freedom and fundamental rights, the Constitution saw the need to have regard to the rules of natural justice as a safeguard to detainees and would be detainees.

Violation of the principles of natural justice will render the decision invalid. This is so despite that the same decision would have been arrived at had the rules of natural justice not been departed from. As Lord Wright noted in the case of **General Medical Council V Spackman**[34], "if the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision." Therefore, the important thing is that there should be observance of the rules of natural justice regardless of the circumstances of the case otherwise non-observance of the rules renders the decision null and void.

2.3 THE DOCTRINE OF LEGITIMATE EXPECTATION AS A COMPONENT OF THE RULES OF NATURAL JUSTICE

The doctrine of legitimate expectation has been developed in the previous years to protect individuals who might have acted with an anticipated expectation that they would be entitled to certain rights or interests. It is intended to safeguard the future interests of

[34] (1943) A. C. 62

those persons that act in anticipation that something will be granted to them as a matter of course basing their expectation on the previous actions of the granting authority.

Consequently, in circumstances where citizens legitimately expect to be treated fairly, a doctrine of legitimate expectation has been developed both in the context of reasonableness and natural justice.[35]The concept of legitimate expectation was initially considered in the case of **Schmidt V Secretary of State**[36] where it was held that an alien who was granted leave to enter the United Kingdom for a limited period had legitimate expectation of being allowed to stay for the permitted period. The doctrine was reaffirmed in the case of **R V. Home Secretary**[37] were alien students were refused extension of their permits as an act of policy by the Home Secretary. It was held by the Court of Appeal that although the students had no right of extension, revocation of permits would be contrary to 'legitimate expectation' and consequently against the rules of natural justice.

A legitimate expectation arises where the citizen has been led to believe by a statement or other conduct of the government that he is singled out for some benefit or advantage of which it would be unfair to deprive him. The expectation could be as a result of a promise or assurance either announced generally or given specifically to an individual.[38]

In an attempt to illustrate the doctrine of legitimate expectations, Tackwani has highlighted a number of instances to illustrate the doctrine.[39] The promise of a hearing

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[35] Takwani, C.K. Lectures on Administrative Law, P.278
[36] 1969 1 ALL ER 904
[37] 1984 1 WLR 1337
[38] Alder. Constitutional and Administrative Law,p. 373
[39] Takwani,C.K. Lectures on Administrative Law,p278

before a decision is taken may give rise to a legitimate expectation that a hearing will be given. In the same vein, a past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. Furthermore, the actual enjoyment of a benefit may create a legitimate expectation that the benefit will not be renewed without the individual being given a hearing.

As it has been shown, natural justice is important in decision making. However, it is still difficult to determine the scope and extent of application of the rules of natural justice. Lord Denning, in the case of **R V Gaming Board, Ex parte Benaim**[40], rightly poited out that "it is not possible to lay down rigid rules as to when the principles of natural justice are to apply or as to their extent and scope. Everything depends on the subject matter. At one time, it was said that the principles only apply to judicial proceedings. That heresy was scotched in **Ridge V Baldwin**[41]**.** At another time it was said that the principles do not apply to the grant and revocation of licences. That too is wrong."

2.4 WHY OBSERVE THE RULES OF NATURAL JUSTICE

Questions might be asked as to what is the importance of observing the rules of natural justice. Why must a decision maker take into account the principles of natural justice when he or she might as well proceed with making the decision without taking into account the principles of natural justice? Is there any benefit to the decision maker in

[40] (1970) 2 QB 417
[41] (1964)AC 40

observing the rules of natural justice? If so, what are the benefits of observing the rules of natural justice?

As earlier pointed out, natural justice is an important element of the whole concept of justice. The rules of natural justice ensure fairness and proper administration of justice. Natural justice affords an opportunity to a person to put forward arguments in their favour, especially those likely to be negatively affected by the decision. It also allows persons to show cause as to why a certain decision should not be taken against them.

The rules of natural justice furthermore give an opportunity to a person to deny allegations against them as well as to call evidence to rebut allegations or claims against them. Apart from that, the rules of natural justice afford a chance to explain allegations or indeed present an innocent explanation as to why a certain action was taken and thereby provides a chance to highlight mitigating factors which might help in understanding why a certain action was taken.

Nonetheless, it would be wrong to consider that the rules of natural are only beneficial to a person whose rights are to be affected. Even decision makers are beneficiaries of the rules of natural justice in one way or the other. Indeed, "while natural justice is, at law, a safeguard applying to the individual whose rights or interests are being affected, an investigator or decision-maker should not regard such obligations as a burden or impediment to an investigation or decision-making process."[42]

Natural justice is as much helpful to a person likely to be affected by the decision as it is to the decision maker himself. They afford a decision maker important means of checking

[42] http: www.Ombo.nsw.gov.au

facts and of identifying major issues in a matter. As a result, a decision maker will understand the facts upon which his or her decision will be based and embarrassment that might result from a wrong decision will be avoided. This ensures that decisions made are a product of professionalism and meet the standards of a proper decision. Natural justice thus benefits both the decision maker and the person to be affected by the decision.

2.5 CONCLUSION

Having endeavored in this Chapter to show who, when and which bodies are called upon to adhere to the principles of natural justice and the circumstances under which such principles would be said to apply, it now remains to narrow down the discussion to specific areas of the law. The next Chapter will try to discuss the whole concept of the rules of natural justice within the context of labour matters. The Chapter will attempt to ascertain the position of the rules of natural justice in labour matters especially when there is a dismissal. Are employees upon termination of their employment entitled to be heard? To what extent can it be said that the employer is obliged to have regard to the rules of natural justice especially in terminating the employee's employment. What does the law say about natural justice in labour matters? The next Chapter will attempt to answer these questions.

CHAPTER THREE

3.0 INTRODUCTION

It has been observed from the previous Chapters that the rules of natural justice are cardinal in enhancing the dispensation of justice. Everywhere and without any dispute, it is admitted that giving a man a chance to explain his side of the case before he is punished constitutes a great aspect of justice. This also includes the fact that no man should be judge in his own cause. These two principles are, as has been earlier noted been regarded as forming the fundamental basis of natural justice.

Indeed, the previous Chapter has attempted to highlight circumstances under which the rules of natural justice could apply. The chapter has also tried to show which bodies and who if any is required to observe the rules of natural justice in common law jurisdiction with particular emphasis being focused on the Zambian situation. This chapter will attempt to focus and narrow down the discussion to the Zambian specific area of labour matters. How far have the rules of natural justice been observed in as far as labour matters especially in dismissal cases are concerned? What is the position of the current labour laws with regard to the rules of natural justice in labour matters? These and other related questions will be tackled in this Chapter.

3.1 THE RULES OF NATURAL JUSTICE IN LABOUR MATTERS

On the face of it all, it appears that the position of the rules of natural justice in labour matters is that in a pure master and servant relationship, there is no duty on the employer to have regard to the rules of natural justice when dismissing an employee. So long as the employer has dismissed the employee in a manner laid down in the contract he is not bound to accord the employee a chance to be heard. In the case of **Rainee Engineering Co. Ltd V Baker**[43] it was held that "the law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract."

Upon termination of the employee's employment, the important aspect to take into account is not whether the rules of natural justice were complied with or not. This is so because in a pure master and servant relationship, it is of no consequence whether the rules of natural justice have been observed or not but the important question is whether there is breach of contract in the manner in which the contract of employment has been ended. If there is breach of contract then the defaulting party will pay damages.

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[43] (1972)Z.R 156

Indeed, in the Zambian case of **Contract Haulage V Mumbuwa Kamayoyo**[44], it was reaffirmed that "in a pure master and servant relationship there cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none; if he does so in a manner not warranted by the contract he must pay damages for breach of contract. Therefore, the position is that the master is empowered to terminate the employee's services and in doing so, there is no duty on him to give the dismissed employee the reasons for his dismissal. In case the employer effects the dismissal in a manner not in line with the prescribed procedure, he is only required to pay damages.

However, in that same case, it was held that " where there is a statute which specifically provides that an employee may only be dismissed if certain procedures are followed, then an improper dismissal is null and void: and where there is some statutory authority for certain procedure relating to dismissal a failure to give an employee an opportunity to answer charges against him or any other unfairness is contrary to natural justice and a dismissal in those circumstances is null and void."[45]

Therefore where there is a statute providing that an employee can only be dismissed if certain proceedings are followed, it would be a breach of the rules of natural justice if such procedure is not adhered to. For example, the Zambian Constitution has provided a procedure for the removal of High Court and Supreme Court judges so that if such

[44] (1982) ZR 13
[45] Contract Haulage Vs. Mumbuwa Kamayoyo

procedure is not adhered to, that would be a departure from what the rules of natural justice and the laws profess.[46]

In addition, even in the case of **Kang'ombe V Attorney General** [47] Silungwe J, (as he then was) held that the dismissal of an employee contrary to the statutory provisions of the Teaching Service Commission Regulations was null and void. In that case, there was a statute that provided the manner in which an employee could be dismissed but that procedure was disregarded and that rendered the decision null and void. A clear statement of that position was properly stated by Lord Wilberforce in the case of **Mallock Vs. Aberdeen.** [48]

In the Mallock case, the learned judge had occasion to outline what he considered instances when the rules of natural justice would apply in employment cases. He asserted that "one may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment of service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter-partes aspects of the relationship may be called that of master and servant, there may be essential procedural

[46] Cap One, The Constitution Of Zambia, Art 98(3)
[47] (1973)SJZ 7
[48] (1971) 1 W.L.R 487

requirements to be observed, and failure to observe them may result in dismissal being declared to be void."[49]

In a pure master and servant relationship, the law has always been that there is no requirement to observe the rules of natural justice. It is only in those instances where it could be said that the employment in question is embodied in a statute or is of a public nature or at least that the nature of the office is such that it is capable of protection that it could be said that the rules of natural justice would apply.

3.2 THE EMPLOYMENT ACT AND THE RULES OF NATURAL JUSTICE

Under Common law, an employer has a right to terminate a contract of employment for any reason or for none and without applying the rules of natural justice.[50] However, this position of common law has been modified in Zambia by section 26A of the Employment Act.[51] The said section provides that "*An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him.*"

The above position was only introduced in Zambia in 1997 when there was an amendment with regard to the rules of natural justice in employment matters in the Employment Act. Where the employee has been dismissed and the basis for his dismissal is grounded in misconduct then such a dismissed employee has to be accorded a

[49] Ibid
[50] Banda, Darlington.A, A Guide To Employment Law In Zambia, p 43.
[51] Cap 268 of the Laws Of Zambia

chance to possibly exculpate himself and explain his side of the case. It would be a departure from the rules of natural justice if such an employee is not accorded a chance to be heard.

The position of common law that the employer has a right to terminate a contract of service for any reason or for none and need not apply the rules of natural justice has been substantially altered. As noted by Mwenda, "section 26A is important because an employee whose contract has been terminated may challenge such termination on the ground that the real reason for such termination was his conduct or performance and that therefore the rules of natural justice should have been applied."[52]

For instance, in the case of **Gerald Musonda Lumpa V Maamba Collieries Limited**[53], the appellant who was employed in the Accounts Department of the respondent company had in November 1981 differed with his superior as to who should be sent to collect money from Choma. There was evidence that the appellant had used abusive language against his superior and he was therefore dismissed. He was paid terminal benefits due to him but he instituted proceedings against the respondent claiming a declaration that his dismissal was null and void and that the real reason behind his dismissal was disciplinary and he should have therefore been accorded a chance to be heard in line with the disciplinary code.

[52] Employment Law In Zambia, p 35
[53] (1986) Z.R

The court, though alive to the fact that a dismissed employee can go as far as establishing the real reason behind the termination of employment other than the apparent reason on paper found in favour of the respondent. The court furthermore stated that "it is the giving of notice that terminates the employment. A reason is only necessary to justify the dismissal without notice or pay in lieu of notice."[54]

A dismissal that is effected without regard to the rules of natural justice where such rules are applicable will be null and void. Indeed, the position of the law is that the word dismissal implies misconduct on the part of the employee and as such, an employee who is so dismissed must be given an opportunity to exculpate himself. In the case of **Agholor V Cheese borough Ponds**[55] it was noted that the word "dismissal conjures a picture of wrongdoing on the part of the employee because of its punitive connotations." Being punitive, the law has provided that a reason or disciplinary cause must always support a dismissal and the employee given the right to exculpate himself. An employer who does not follow this procedure exposes himself to challenge in the courts of law for wrongful dismissal.[56]

A dismissed employee is therefore entitled to be heard in situations where he has been dismissed so that he could explain and clear himself of the negative image of being dismissed. The courts will always come in where a dismissal has been effected without regard to the laid down procedure. Failure to comply with the requisite procedure in dismissing the employee will render the dismissal wrongful. Mwenda notes that "where

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[54] Ibid
[55] (1976) Z.R H.C
[56] Mwenda, S.W, Employment Law In Zambia, p 41

the right procedure in effecting a dismissal has not been followed, the employee may challenge the said procedure with the intention of asking the court to declare the whole dismissal null and void in which case the employee may be entitled to damages as well as 'reinstatement'."[57]

Notwithstanding the above, in a situation where it is not in dispute that the employee has committed a wrong and as a result he is dismissed without following the laid down procedure, no injustice will arise. This position of the law was established in **Zambia National Provident Fund V. Yekweniya Mbiniwa Chirwa**[58] where the respondent, as the personal representative of one Godwin J Kamanga (deceased), who was dismissed by ZNPF, his employers, upon his admitted dishonest conduct brought a successful action in a lower court to nullify the dismissal due to non-compliance with ZNPF disciplinary rules. The employers appealed and the Supreme court upheld the appeal holding that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is so dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is nullity.

The above position was also reaffirmed in the case of **Glynn V. Keele University and Another** [59]where a student was disciplined by the Vice Chancellor of the University without compliance with the procedure laid down by the University statute before imposing such discipline. It was held that the rules of natural justice were not complied

[57] Mwenda, S.W, Employment Law In Zambia, p28
[58] (1986) ZR 70
[59] (1971) 1 W. L.R

with in that the student had not been given a chance to be heard before the decision was reached to inflict the penalty upon him. However, the plaintiff in that case suffered no injustice in that it was not disputed that he had committed an offence and as such, no redress was granted to him.

It is also important to bear in mind that complying with the rules of natural justice does not necessarily imply that a person should be present in person to put up his case. It will be sufficient for the purposes of natural justice that the person was heard even in form of an exculpatory letter. In **ZCF Finance Services Limited V. Happy Edubert Phiri**[60] , the court was of the view that although on the face of it the rules of natural justice were not complied with, looking at the details of the exculpatory letter, the rules of natural justice were observed. Although the plaintiff was not called in person to present his case, his exculpatory letter was sufficient to meet the need to observe the rules of natural justice.

It is also worth noting that the rules of natural justice would not be observed in the removal of persons serving at the pleasure of the appointing authority such as at the pleasure of say, the President. In this realm of employment, there is no requirement to observe the rules of natural justice. Therefore, ministers and other public servants serving at the pleasure of the President have no recourse to the rules of natural justice should they be dismissed. Even in elective offices such as that of members of parliament, there is no requirement to have regard to the rules of natural justice.

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[60] SCZ Appeal No.93 of 2001(Unreported)

3.3 CONCLUSION

The Chapter has attempted to ascertain the position of natural justice in employment cases. It has shown that at common law, it is regarded that in a pure master and servant relationship, there is no requirement to observe the rules of natural justice and that a master can terminate the services of an employee without even having regard to such rules at any time if he so wishes. Case law also seems to agree with that position of the common law. However, the essay has also shown that in Zambia there has been a modification to that law in that Section 26A of the Employment Act[61] requires that in case an employee has been dismissed on grounds of misconduct; such an employee must be accorded an opportunity to be heard.

The essay has also highlighted through various authorities that where the employment is supported by statute or where the employment is such that the rights are protected and dismissal can only be effected after a certain procedure is adhered to, it would be a breach of the rules of natural justice should they be disregarded. Nevertheless, where it is not disputed that the person has committed an offence there would be no remedy even if the rules of natural justice have been disregarded.

Having established the position of natural justice in labour and employment matters, it now remains to see what the position of the rules of natural justice is in deportation cases.

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Should a prospective deportee be accorded a chance to be heard before his pending deportation is effected? Does the law accommodate natural justice in deportation cases? These and other questions will be dealt with in the coming Chapter where the discussion will be narrowed down to natural justice in deportation cases.

CHAPTER FOUR

4.0 The Rules of Natural Justice In Deportation Cases In Zambia

This Chapter will try to focus the discussion on the rules of natural justice in Zambia to deportation cases. When a person is deported they forfeit their status accorded to them in a country. But to what extent does our current deportation law permit the application of the rules of natural justice? Are the principles of natural justice encompassed in our current deportation law? The chapter will attempt to investigate the above issues and other related questions.

4.1 The English Position

Before proceeding with the discussion, it will be helpful to consider the position in England in as far as deportation and the rules of natural justice are concerned since most of our laws including those with regard to deportation are imported from England. In the famous case of **R V. Secretary of State For Home Affairs, Ex parte Hosenball**[62], Hosenball, during the period he was working in London was deported on the ground of national security. In making his decision, the Secretary for Home Affairs had taken into account advice given to him by an advisory panel within the Home Office and some other submissions made to him on behalf of Hosenball.

[62] (1971) 3 ALL ER 452

Hosenball argued and stated that since the secretary had failed to give reasons for his decision he had therefore been unable to respond to them. As such, the secretary had acted contrary to the rules of natural justice. The Court held that questions of drawing a line between national security interest and individual liberty was for the Home Secretary to decide and he is answerable to Parliament and that was not for the courts to decide. The court suggested that modifications with regard to the rules of natural justice in deportation matters had to be made. Lord Denning stated in the following terms;

"The Home secretary had a good deal of information before him of which Hosenball knew nothing and was not told anything. He had no opportunity of correcting and contradicting ....He was not given sufficient information on the charges against him so as to be able effectively to answer them. All this could be argued as a good ground for upsetting an ordinary decision of a court of law, or any tribunal statutory or domestic. But this is no ordinary case.... [in that] security was involved and when the state itself is endangered our cherished freedoms may have to take second place."

Indeed, there were sufficient reasons to warrant the observance of the rules of natural justice. Had it been under normal circumstances the fact that the Home Secretary had enough information at his disposal and also in a position to make a decision that would adversely affect Hosenball, there would have been need to observe the rules of natural justice. But it appears that since there was the question of national security, such rights as are given by the rules of natural justice had to be forfeited. The interests of national security had to override individual interests and the observance of natural justice.

Therefore, in spite of the fact that Hosenball was not given reasons as to his deportation there was no violation of the rules of natural justice because circumstances where such that such rights as a right to be heard had to be forfeited. Thus, in England, where there are overriding interests such as national security and the interests of the state due regard would not be paid to the rules of natural justice.

4.3 The Zambian Position

In Zambia, the position of the law with regard to the rules of natural justice in deportation matters is somewhat uncertain. However, as far as issues of national interest and security are concerned, the position is not really different from the one in England. In a similar fashion as in the case of **Re V. Secretary Of State Of State For Home Affairs , Ex parte Hosenball,**[63] the court in Zambia in the case of **Jackson V Attorney General** [64] , held that it is not for the courts to decide what is inimical to public interest, but for the Minister and when making such an order, he is not a judicial officer but acts administratively. He is an executive officer bound to act in the public interest and it is left to his judgement whether upon the facts a non Zambian may be declared inimical to public interest.

Therefore, even in our Zambian situation, it is clear that it is the Minister who has the power to decide and it is in his subjective determination as to who is inimical to national security. Indeed, the Immigration And Deportation Act[65], in section 26(2) states that "*any person who in the opinion of the Minister is by his presence or his conduct likely to be a danger to peace and good order in Zambia may be deported from Zambia pursuant*

[63] (1971) 3 ALL ER 452
[64] (1979) ZR 169
[65] Cap 123 of the Laws Of Zambia

to a warrant under the hand of the Minister." It is the Minister that determines who is to be deported if in his judgment such a person is a danger to public order and peace in the country. The question that arises is whether such deported person is entitled to a hearing?

On the face of it, it would be said that there is a place for the rules of natural justice in the Immigration And Deportation Act. Section 24 (1) of the Act provides that "*Any person required by notice under section twenty-three to leave Zambia who on receipt of such notice has lawfully remained in Zambia longer than seven days may, within forty-eight hours of receiving such notice, deliver to any immigration officer, police officer or prison officer written representations to the Minister against such requirement and such representations shall be placed before the Minister without delay.*"[66]

The foregoing section seemingly safeguards the cardinal element of the rules of natural justice, namely according a man a right to be heard. It is however important to note that the section only permits written representations and says nothing about oral representations. This however does not negative the fact that it provides for a right to be heard. What raises particular interest however is subsection 2 of the same section. Subsection 2 of section 24 provides that:

If, after considering such representations, the Minister does not think fit to exercise his powers in relation to the issue of permits or the exemption of persons from the classes set out in the Second Schedule, the person who made such representations shall be notified that his representations have been unsuccessful[67]. This section brings to light one fact. It

[66] Cap 123, The Laws of Zambia
[67] Ibid

means that a person that has been deported by the Minister has to make representations to the same minister who has to sentence. This brings to the fore the significant principle of the rules of natural justice which is that no man shall be judge in his own cause. The same Minister who made the decision to deport a person is the same Minister that must sit and deliberate and decide on the representations of a person disputing a deportation. This directly flies in the teeth of the rules of natural justice which require that no man shall be judge in his own cause.

As it was pointed out in the earlier Chapters, the rules of natural justice require that no man shall be judge in his own cause. It is a serious violation of the rules of natural justice to have the same man acting in his own cause as a judge. The minister acts as a judge in the case where someone affected by his decision appeals against his own decision. It is unfortunate that even the courts have seemingly been reluctant to emphasise the need to observe the rules of natural justice in deportation cases. A case in point to illustrate how disappointing the courts have been is **Jackson V Attorney General**[68].

In that case, the facts are that the applicant had been deported under the Immigration and Deportation Act. He then applied for certiorari to remove in the High court and quash the decision of the minister by which he issued the applicant with a deportation order on the ground that his presence in Zambia was inimical to the public interest. The applicant appealed to the Minister and his appeal was accordingly rejected by the minister. In his appeal, the applicant argued that he should have been given a right to be heard and also that the minister in throwing out his appeal had acted arbitrary and contrary to the rules of

[68] (1979) ZR 167

natural justice. In response, the respondent contended that under the section the minister was not required to offer any reasons for his decision and neither was he obliged to accord the applicant a hearing.

After considering the matter, the court stated that it is not for the courts to decide what is inimical to public interest but for the minister and when making an order under the Immigration and Deportation Act, he is not a judicial officer but he acts administratively. He is an executive officer bound to act in the public interest and it is incumbent on him alone to decide whether on the facts in question a non-Zambian may be declared inimical to public interest. Therefore, there is no question of granting a person a right to be heard.

The above case raises interesting points and the decision of the court leaves much to be desired. It is important to bear in mind that the courts in deciding emphasised the fact that the Minister was not acting in his judicial capacity and as such there was no need to observe the rules of natural justice. In doing so, the courts were going back to the position that prevailed before the landmark decision in **Board of Education V Rice**[69] that only bodies or persons acting in their judicial capacity were amenable to natural justice. The court emphasized the labels of judicial or administrative and in doing so was giving the impression that before knowing whether the rules of natural justice applied or not, regard had to paid to the labels of the body.

Furthermore, the decision of the court implies that a person deported is not entitled to know the reasons for his deportation. The Minister can deport you for whatsoever reason

[69] (1911) AC 179

and in doing so he is not obliged to give any reasons at all. This leaves room for abuse because the power granted to the minister is too wide and is no doubt unfettered discretion. The Minister is liable to abuse the powers by exercising the same, motivated by irrelevant considerations.

At this point, it is worth noting that Zambia is a signatory to the International Covenant on Civil and Political Rights which in article 13 provides, with regard to deportation that; *An alien lawfully in the territory of any state party to the present covenant may be expelled therefore only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by and be represented for the purpose before the competent authority or persons especially designated by the competent authority.*

It can thus be noted that our deportation law flies in the teeth of not only the principles of natural justice but also in the provisions of the International Covenant on Civil and Political Rights which require a hearing to be accorded to the deportee before his deportation is effected. It is only in exceptional instances of national security that requirement for a hearing would be dispensed with. One might argue that there is no need to consider an international instrument; that instead prominence must be given to domestic laws. But as Chief Justice Ngulube as he then was noted in the case of **Sata V Post Newspaper Limited**, "I make reference to the international instruments because I am aware of a growing movement towards acceptance of the domestic application of

international human rights norms not only to assist the interpretation of domestic law in domestic litigation, but also because the opinion of other senior courts in various jurisdiction clearly with a similar problem tend to have a persuasive value."[70]

Indeed, it is necessary that the deportation laws in Zambia should be harmonized with provisions of international covenants to which she is a party. Admittedly, there would be instances such as those of national security in which the need for a hearing can be dispensed with but provisions embracing the rules of natural justice must be expanded. Besides, provisions must be incorporated for a reason to be granted in the event of deportation. This will reduce the abuse of the law and the power under such laws and it will be easy to tell whether there has been abuse of the law or not. As Lord Lane in the case of **Ian R V Immigration Appeal Tribunal Ex parte Khan** [71]observed "the basis of the proposition that in absence of reasons, it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and itself an error of law"

It is clear that the minister's judgment is subject to abuse. He makes a decision without offering reasons. The Act assumes that the Minister is capable of being impartial and unbiased but that might not really be so as it has been shown by experience. A case in point is the recent case of **Roy Clarke V The Attorney General**[72] . The facts were that Mr. Clarke was a regular contributor to the Post Newspapers Limited under the column called the "spectator". On 1st January 2004, he submitted a satirical article entitled

[70] 1992/HP/1399
[71] (1982) 2 AU CR 470
[72] (2004)HP/003

"Mfuwe". As a result of this satirical article, the Permanent Secretary in the Ministry of Home Affairs issued a statement that he had recommended to the Minister that Mr. Clarke be deported. While addressing party cadres of the Movement for Multi-Party Democracy, the Minister for Home Affairs said that the respondent would not have more than twenty-four hours in the country.

The respondent then applied for Judicial Review. He sought an order of certiorari to remove into the High Court for the purpose of quashing the decision of the Minister of Home Affairs to deport him. He also sought an order of mandamus to oblige the Minister of Home Affairs to reconsider the decision to deport the applicant. Furthermore, he sought a declaration that the respondent was obliged under the rules of natural justice to afford the applicant an opportunity to be heard.

The respondent succeeded on all the three grounds under Order 53 of the Supreme Court and the High Court nullified the decision to have him deported. The Minister, through the Attorney General then appealed against that decision to the Supreme Court. But the Supreme Court after considering the facts of the case found the deportation of the respondent disproportionate and for that reason the appeal was dismissed. The Supreme Court however did not agree with the trial judge that there was procedural impropriety but maintained that the respondent was not entitled to a hearing before being deported.

The above decision of the Supreme Court highlights the need to have the law of deportation reformed so that a deportee would be entitled to a hearing before he is

deported. The law should be brought in conformity with international instruments such as the International Covenant on Civil and Political Rights that require a hearing to be accorded to a prospective deportee. The law as it stands now is likely to further injustice as experience has shown that there is a tendency by the powers that be to abuse the said laws. This is so especially because of the ambiguity accompanying the said laws. Admittedly, in instances of national security, the need for a hearing could be dispensed with but such security reasons must be compelling ones and not merely inconsequential.

4.4 Conclusion

This Chapter has attempted to show to what extent the rules of natural justice are applicable in deportation cases. The law is still unclear but at the same time there is need to modify the laws so that the rules of natural justice could be properly encompassed and ensure that fair justice is administered. It is only when the rules have been firmly embodied in the laws that fairness and speed delivery of justice will be ensured.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS.

5.1Conclusion

The essay has attempted to clearly show the significance of the rules of natural justice. A precise definition of what the rules of natural justice are has been provided. An attempt to highlight the two cardinal elements of the rules of natural justice has been made. The paper has shown that the rules of natural justice constitute the principle that no man shall be judge in his own cause (nemo judex in causa sua) and also that no person shall be condemned unheard (auldi alteram partem rule).

The rule that no man shall be judge in his own cause stems from the need to ensure that an adjudicator should be impartial and unbiased. It is indisputable that there are two sides to every case and in order to arrive at a fair decision, all sides of the case must be taken into account. Natural justice thus entails that a person sitting as an adjudicator must have no interest in the matter being adjudicated upon whether pecuniary or otherwise.

In addition, natural justice also entails that no man shall be condemned unheard. The significance of this principle cannot be emphasized as it is widely acknowledged around the world that a man must explain and exculpate himself before he is punished. That principle also entails that a man should be given notice of what he is accused of so that he

will know what to do. Indeed, in almost all advanced and civilized legal regimes that is a well founded and rooted principle of justice.

The essay has earnestly endeavored to illustrate the position of the rules of natural justice within the Zambian situation and the extent to which these principles have been applied. It has shown how the courts of law have emphasized the need to have regard to the rules of natural justice in making decisions that affect other people's rights and status and livelihood. The application of the rules of natural justice in certain circumstances that warrant their application has also been shown. It is not in doubt that it is not in all circumstances that the rules of natural justice apply but in certain instances only and those instances have been shown.

In particular, the essay has explored the degree to which the rules of natural justice have been applied in employment cases and how the law has attempted to come in and make the law in tandem with the rules of natural justice. In Zambia, there is provision in the law, the Employment Act, section 26A for the application of the rules of natural justice but only when the employee is dismissed for reasons of indiscipline. Short of that an employer is at liberty to dismiss an employee at any time and for no reason at all without even taking into account the application of the rules of natural justice. Case law has exemplified how the courts have attempted to differentiate different types of employment and how some categories of employment do not warrant the application of the rules of natural justice. Apparently, domestic servants, their relationship being that of master and

servant and those serving at the pleasure of the appointing authority are not entitled to the rules of natural justice.

In addition, the paper has shown how the rules of natural justice have been applied in the area of deportation and to what extent the law on deportation embraces the rules of natural justice. It has been shown how, the same minister who deports a person comes in to sit and consider an appeal against his own decision. This has been pointed out to be a serious flaw in the law in that it violates the principle that no man should be judge in his own case.

It has also been indicated that in instances where there are considerations for the interests of the country such as public peace or security then such interests would override the need to observe the rules of natural justice. Such considerations as public morality, security and public interest override the need to observe the rules of natural justice. It is for that reason that deportees forfeit their entitlement to the rules of natural justice because they are normally deported in the public interest or the good of the public.

5.2 RECOMMENDATIONS

Having noted the position of the rules of natural justice in the Zambian justice system, it is the considered view of this writer that certain changes still have to be made in order to ensure that there is a proper entrenchment of the rules of natural justice. It is well that at least there is recognition of the importance of the rules of natural justice. The

Constitution must be clear enough and ensure that the rules of natural justice are considered to be of equal significance in all spheres of adjudication. Though admittedly it would be far -fetched in matters of national security to always take into account the rules of natural justice, it is the view of this writer that national security should not be construed ambiguously so as to permit abuse. The law must be clear on the ambit of national security and instances that exclude the application of the rules of natural justice.

In addition, it is clear that the words "in the opinion of the Minister" in the Immigration And Deportation Act have been abused. It is true that such words imply that the decision is in the subjective determination of the minister. But the Act should be construed properly to avoid abuse. Emphasis ought to be given to the fact that though the words imply that it is in the discretion of the Minister to make the decision; such discretion is still subject to the control of the judiciary. As Lord Halsbury said in **Sharp V. Wakefield**[73], " when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to the private opinion, according to law not humour. It is not to be arbitrary, vague or fanciful but legal and regular."

Furthermore, it is suggested that the Zambian laws should incorporate what international instruments particularly the International Covenant on Civil and Political Rights and African Charter on Human and Peoples Rights say about giving a hearing before deportation is effected on an alien. The above international instruments recognize the need for a hearing to be accorded to a deportee unless there are compelling reasons of

[73] (1891) AC 173

national security. For instance, in a case of **Amnesty International V Zambia**[74], the African Commission on Human and People's Rights considered the question of the right to be heard. In that case, Amnesty International brought an action against Zambia on behalf of John Lyson Chinula and William Steven Banda who had been deported to Malawi from Zambia without being accorded a chance to be heard. The Commission held that the two deportees having not been accorded an opportunity to be heard were in violation of Article 7 of the Charter.

Besides, it is the opinion of this writer that the scope of cases to which the rules of natural justice would apply should be expanded as well as the circumstances under which such rules would apply. The test for the application of the rules of natural justice should not be limited to public bodies only but should extend even to bodies of a private nature. This is because nowadays many bodies termed private bodies are actually carrying out functions of a public nature. In that way, it will be ensured that all people and their rights, whether from the public or private spheres of life are safeguarded.

Apart from that, it is also suggested that the rules of natural justice and their application in as far as employment relationships are concerned should be expanded. It is suggested that the application of the rules of natural justice should not only be restricted to cases of dismissal on disciplinary grounds but should be extended to other instances of dismissal not necessarily on disciplinary grounds.

[74] N.212/98

Thus the importance of the rules of natural justice cannot be overemphasized. It is acknowledged that no man is a better judge of himself and that there are always two sides to a case and thus the significance of the rules of natural justice. A man cannot be judge in a cause in which he has an interest. The Buganda people of East Africa, to illustrate the same principle that no man shall be judge in his own cause say "a monkey does not decide matters of the bush." [75] Indeed, no man should be permitted to be judge in his own affairs.

[75] Glenn C. Africa. Customary Law(1947) p.34

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