

**LOCUS STANDI IN JUDICIAL REVIEW MATTERS:  
A REVIEW**

**BY**

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I recommend that the obligatory essay prepared under my supervision by Penjani Masiye Longwe entitled:

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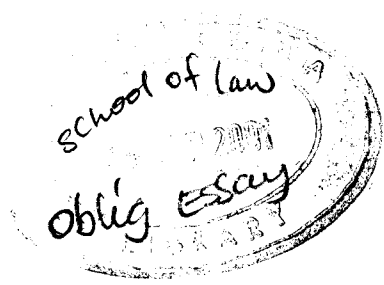
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**Frederick Mudenda  
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**Date**



### Dedication

My dearest mom, for the sacrifice, and all the love and care you have showered me with.

And to my late uncle, Norbet Magaisa. For the good and close friend you were to me.

*... neither death nor life ... will be able to separate us from the love of God....*

I love you.

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## Table of Contents

Submission:.....	(I)
Dedication:.....	(ii)
Acknowledgements:.....	(iii)
Table of Contents:.....	(iv)
Abstract:.....	(vi)
General Introduction:.....	(viii)

### CHAPTER ONE

1.1	<b>Introduction:</b> .....	1
1.2	Meaning of Locus Standi:.....	1
1.5	Essence of standing:.....	2
1.6	Instances of Locus Standi:.....	3
1.6.1	Standing under constitutions:.....	3
1.6.2	Standing in Habeas Corpus applications:.....	5
1.6.3	Standing in statutory applications:.....	5
1.6.4	Standing under private law proceedings:.....	
1.6.5	Standing under Order 53 of the Rules of the Supreme court of England.....	6
1.7.1	Development of the test for Locus Standi:.....	7
1.7.2	The 1978 Reforms:.....	9
1.8.1	Meaning of sufficient interest:.....	11
1.8.2	Inland Revenue Commissioner v National Federation of Self-Employed and Small Business Ltd:.....	12
1.9	<b>Conclusion:</b> .....	14

### CHAPTER TWO

2.1	<b>Introduction:</b> .....	18
2.3.1	Standing tied to rights that are in existence:.....	19
2.3.3	Locus Standi in relation to associations:.....	21
2.3.4	Restriction of standing of associations:.....	22
2.4.1	Standing in constitutional matters:.....	23
2.4.2	Standing in non-constitutional matters.....	24
2.5	<b>Conclusion:</b> .....	28

### CHAPTER THREE

3.1	<b>Introduction:</b> .....	30
3.3.1	Shortfalls of Locus Standi in Zambia:.....	30
3.3.1.1	Lack of clearly established guidelines determining standing:....	31
3.3.1.2	Confining standing to aggrieved persons:.....	32
3.3.1.3	Weakness of subsisting standing law:.....	32

3.3.1.4	Absence of institutionalised standing provisions:.....	33
3.4.1	Arguments for restricting the rules of standing:.....	35
3.4.2	Arguments against strict rules:.....	36
3.4.3	Locus Standi in the light of political, economic and Social background:.....	36
3.5	<b>Conclusion:</b> .....	40

## CHAPTER FOUR

6.1	General Conclusion:.....	43
	<b>Bibliography:</b> .....	46

## **Abstract**

It is trite to say that judicial review is the most effective means of redressing grievances occasioned by the maladministration of public officials as compared to the non-judicial mechanisms of redress, that is the Ombudsman, commissions of inquires, tribunals and constitutional arrangements.

This is seen in how, for instance, the Investigator General does not have the power to enforce findings – a major flaw that renders him quite ineffective. He simply recommends them to the president who is not under any duty to act on them.

Similarly, Commissions of Inquiries have not been a very effective means of controlling public powers in that one would come up with very good recommendations, but they are not binding on government. And more often than not they are largely ignored, as has been the trend in Zambia.

As with tribunals, their essence is to provide for speedy and cheap dispensation of justice, hence their foregoing of legal technicalities and formalities such as rules of evidence. However, the process drags on negating the purpose for having them.

Lastly, constitutional arrangements such as Question and Answer time in parliament and Select Committees are all means by which Parliament acts as a check on the excesses of the executive. Nonetheless the scenario in Zambia has been that Parliament has acted more like an extension of the executive mainly because of having all, or the majority of the members from one political party.

This essay is based on the view that, although judicial review is deemed to be the most effective mechanism of checking excesses in the administrative process, the position in Zambia regarding standing in matters of judicial review is too restrictive and therefore needs to be relaxed and extended.

## 2. **Research Objectives**

The objectives of this research are:

- (i) to examine the law of locus standi in matters of judicial review;
- (ii) to critically assess the way the Zambian courts have adjudicated upon the issue of standing; comparing with other jurisdictions where possible and;
- (iii) to make recommendations as to the development of the law pertaining to standing in judicial review matters.

### **Chapter Layout**

**Chapter 1** Defines locus standi generally and considers its development.

**Chapter 2.** Examines the position of the law as it subsists in Zambia by looking at relevant statutes and case law.

**Chapter 3** Critically looks at the need for the judiciary to articulate and settle the issue of standing. It also endeavours to compare standing in judicial review matters with other jurisdictions.

**Chapter 4** Concludes and makes recommendations towards the development of the law in matters of judicial review.



## GENERAL INTRODUCTION

Public authorities, that is, the government and its various agencies, yield wide powers necessary in the effective and diligent running of government or other public affairs. Their day-to-day work involves frequent interaction with individuals and the public in general. In other words the private lives of individuals are substantially controlled or regulated by them.

Inevitably, cases of maladministration and abuse of powers by these authorities arise in the process infringing the rights of some people. One would agree, for instance, that the Zambia Revenue Authority is a government agency which is susceptible to abuse by using it to silence political opponents through taxing them into bankruptcy. Notwithstanding, it is very necessary that public authorities have such wide powers to manage government affairs. So it is untenable to completely subject government to the same law as applies to ordinary individual litigants as Alfred Dicey advocated.<sup>1</sup> What is required is to maintain a balance between efficient government functioning and private and public rights.

There are a number of means of ensuring that this is done, that is, means by which government powers are controlled so that they are used in the manner they were intended for. These include parliamentary control, commissions of inquiry, office of the Investigator General (ombudsman), tribunals and the courts. Yet, this balance is not easily attainable. It is not feasible that each and every administrative or government wrong can be corrected, particularly by judicial means. Therefore, the issue of having access to courts is very cardinal. It is a common fact of life that those who have power and resources have greater access to courts than those that lack the necessary resources, are ignorant and powerless.<sup>2</sup> They suffer the most because they are not able to protect or enforce their rights.

Evidently, access to courts implies access to justice. Apart from other threshold limitations on access to courts in asserting public law rights (such as time limit, the case being of a public nature or having a cause of action),

standing is an important element. It is trite that “[h]ow issues of standing are decided determines who has access to justice....”. Therefore it is only logical, if not imperative, for any legal system to ensure that the courts are easily accessible as would be appropriate for availing justice for all, by relaxing the rules on standing.<sup>3</sup>

It should be borne in mind that the scope of the judicial role is limited so that access to courts is hurdled or restricted by this fact.

A major reason is that the judiciary is the weakest organ among the government organs. This is because it is not able to initiate its own functions and also because of its reliance on the other organs to enforce its orders<sup>4</sup>. This can be seen in how the other organs initiate their functions. The United States government structure is a good example of this in that separation of powers is most pronounced there. Admittedly in Zambia, like in most other commonwealth African countries, the executive branch plays a dominating role over the other branches. For instance Cabinet Ministers are members of parliament. Also, party loyalty by members of parliament belonging to the party in government (having the majority seats) support all laws initiated for submissions and consideration to the national assembly by the president almost without question.<sup>5</sup> However, the ability to initiate its own proceedings cannot be said of the courts. They have to wait to be moved. As Professor Nwabueze aptly puts it that even if there is a “hideous and flagrant violation of the constitution or other laws by the political organs of government, the court cannot intervene, except at the instance of a complainant”.<sup>6</sup>

Apart from the above, there is also the issue of the courts not being able to give advisory opinions. One cannot invoke the jurisdiction of the courts to adjudicate over matters *in vacuo*; matters that are non-existent abstract or hypothetical. They can only entertain real complaints with real litigants. As such the problem of uncertainty surrounding an administrative decision or action in terms of its legality continues until someone is adversely affected by it. The whole idea of advisory opinions is to have an authoritative pronouncement over an issue so that recourse to the tedious and expensive process of litigation can be avoided.

By and large courts have not countenanced advisory opinions and the political government branches have frowned upon them. For instance, it was once stated, "that courts of law exist for the settlement of concrete controversies...not to pronounce upon abstract questions or to advise upon differing contentions, however important."<sup>7</sup> And similarly the 1972 Chona Commission on the establishment of the One Party State in Zambia had as one of its recommendations that the Supreme Court be empowered to make advisory opinions of any issues without litigation.<sup>8</sup> Though government accepted this, it was never implemented.<sup>9</sup>

It is here submitted that great injustice is caused to many people by this failure of the courts to move on their own motion or to make advisory opinions.

Lastly, the High Court of Zambia is empowered by the constitution (under article 94 by which it enjoys unlimited jurisdiction) to review executive and legislative actions in its duty to uphold the rule of law and as a means of checks and balances in line with the doctrine of separation of powers. Notwithstanding such a role, the judiciary as a whole does not have a machinery for detecting or investigating administrative wrongs by public officers, and taking them before the courts for review as is the role of the Director for Public Prosecution in criminal cases. What comes anything close to this is the office of the Attorney General. He is the custodian of the public rights and so he always has standing in public matters, that is, his locus standi is prima facie. He can initiate proceedings by a relater action (that is, where a person barred from bringing the proceedings requests the Attorney General to take up the matter) or on his own motion. Which public rights the Attorney General will protect are entirely within his discretion.<sup>10</sup>

However, the Attorney General is an appointee of the president, subject to ratification by parliament,<sup>11</sup> who can also remove him from office.<sup>12</sup> This power of the president has an overbearing influence on this office so that the exercise of the duties therein is not completely objective.

It is evident that any access to justice that would have been available had these limitations mentioned above not been there is curtailed. Restrictive rules on who has access to courts tend to further limit the chance of having access to justice, especially for the poor and ignorant people. In view of what has been said, there is arguable ground for the rules on locus standi to be relaxed and standing to be expanded

In this paper the terms locus standi and standing will be used interchangeably and public actions shall include to mean inactions or omissions as well as decisions. In addition, gender terms will be used generically. The paper is concerned with the issue of standing in judicial review proceedings as it subsists in Zambia. Its objective is to examine the law of locus standi in general in chapter one and in the second chapter narrow down to the position in Zambia. Chapter three critically assesses the way the courts in Zambia have handled the issue of standing. In addition, it considers the need to further expand and relax the rules on standing and it gives the reasons that necessitate the expansion. Lastly, in chapter four, the paper proposes some recommendations towards the development of the law in the subject matter.

## END NOTES

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2. John E. Bonine, Standing to Sue: The First Step in Access to Justice, 1999 Internet site—<http://merlin.law.mercer.edu/elaw/standingtalk.html>
3. DeSmith, Woolf and Jowell, Judicial Review of Administrative Action 5<sup>th</sup> (ed) (London: Sweet & Maxwell, 1995) p.99.
4. B. O. Nwabueze, Judicialism in Commonwealth Africa :The Role of the Courts in Government.(London:C.Hurst & Co. (publishers)ltd.1977) p. 51.
5. See article 44(3) (b) of the Zambian constitution
6. Op.cit. p.49
7. Cullinan, C.J. in the case of Law Society of Lesotho V Minister of Defence (1988) L.R.C.p.226.
8. The National Commission on the Establishment of a One-Party Participatory Democracy in Zambia.15 th October 1972, Lusaka (The Special Collections of the University of Zambia, Lusaka). The commission headed by Mainza Chona stated that: “We accepted the idea that the Court of Appeal be vested with the power and discretion to give advisory opinions on legal matters without the parties involved resorting to litigation ”.
9. See Government Paper No. 1 of 1972,(The Special Collections of the University of Zambia, Lusaka).

10. See DeSmith, Woolf and Jowell, Judicial Review of Administrative action 5<sup>th</sup> (ed) (London: Sweet & Maxwell, 1995) pp146-7 and 150.
11. Article 54 (1) of the Constitution of Zambia Chapter 1 of the Laws of Zambia
12. Article 54 (5) of the constitution

## CHAPTER ONE

### 1.1 Introduction

This chapter looks at what locus standi is and its role in judicial review of executive actions. It generally seeks to show when a person can invoke the jurisdiction of the courts in matters of public law, specifically in civil ones. A brief background on the development of the test used in determining the locus standi of an applicant is considered so as to enable an understanding and appreciation of the current legal position. Finally, the chapter discusses the meaning of sufficient interest.

### 1.2 Meaning of Locus standi

Locus standi can simply be defined as title to sue. But one needs to go a step further than this because locus standi connotes one being able to enforce an obligation of a public official or authority. It may be defined as:

“the right to bring .....proceedings, the right to challenge an act or decision of a public body”.<sup>1</sup>

Or that it is ;

“ a party’s competence to claim relief in a court of law as a result of a particular “interest” in the case.”<sup>2</sup>

In other words, locus standi is the ability of a person to invoke the supervisory jurisdiction of the courts over an action or decision of a public official, which action or decision directly affects his individual rights or claim of some kind (traditional meaning), or may not have affected him directly, but he still has an interest in the subject matter recognized as sufficient by the courts. This jurisdiction is meant to ascertain the legality of the conduct complained of.

1.3 Standing is quite obvious where the private rights of an individual have been infringed. For instance, where a local authority does not follow the correct procedure in refusing to renew a trading license of a person, it is this same person who is entitled to challenge the decision. However, where the decision or action does not affect any particular person over and above the others but the public interest at large, ascertaining locus standi is not as easy. As a result, this leads to denial of justice to some people for the trivial reason that they did not suffer damage peculiar to themselves in the traditional sense.

1.4 The role of the courts in reviewing administrative or government actions in general is supervisory. As such it is not so much the effect of the decision which is in consideration than the determination of whether there has been an improper use of power by the public authority as alleged by the applicant. If it has exceeded its powers or misused them or has not fulfilled its duties as is required of it, only then can the court intervene.

### 1.5 **Essence of standing**

The whole essence of locus standi is to ensure that the cases brought to the courts for review are not 'frivolous', 'vexatious' or 'hopeless', and also to avoid 'busy bodies', 'cranks' or 'mischief-makers'<sup>3</sup>, as such cases are commonly referred to.

Put another way, locus standi is a threshold measure that helps the courts sift undeserving cases from those that are. Thus, for instance, an application must not be over trivial matters or be blatantly hopeless so that any reasonable person can tell that the case cannot take-off, as it were. Apart from this, the courts avoid those would be litigants who want to go to court for the fun of it, or for their own ill conceived reasons, or involve themselves in matters that do not concern them so that they assume upon themselves the role of private 'Attorney Generals'.



Hence it was observed by the Supreme Court in the case of Mwamba and another V The Attorney general <sup>4</sup> that there is need to balance the need for spirited individuals to participate in upholding the rule of law and the avoidance of busy bodies. It was stated in this case at J4 that:

“ However, on the question of locus standi, we have to balance two aspects of the public interest, namely desirability of encouraging individual citizens to participate actively in the enforcement of the law and the undesirability of encouraging meddlesome private “Attorney Generals” to move the courts in matters that do not concern them”.

This explains the tenacity of the courts in wanting the applicants themselves to be directly affected or, at least, have sufficient interest. It is believed that in this way the applicant will endeavor to present his case as best as possible as opposed to one who has not been directly affected. In turn the courts avoid wasting the much needed time and other resources.

## 1.6 Instances of locus standi

Provisions conferring locus standi for one to challenge a public decision or action are found under constitutions, in habeas corpus applications, under statutory provisions, in private law proceedings involving public authorities and under Order 53 of the Rules of the Supreme Court of England. They cover both private and public law rights.

### 1.6.1 Standing under Constitutions

Most constitutions contain clauses conferring the right to challenge an action if it threatens or infringes ones fundamental rights protected by the Bill of Rights. For instance, the Zambian constitution provides in its article 28(1) that anyone whose rights, that is, rights protected under the Bill of Rights or part 3 of the constitution, have been, are being, or are likely to be infringed can petition the High Court for redress.

Note should be taken that it is the particular individual who has the right or competence to take a matter before court even when it involves the government or any other public official. And note also that this is only confined to the Bill of Rights of the Constitution.

However, the South African Constitution is different in that a challenge to a threat or infringement of any provision in the bill of rights extends to other than the individual whose fundamental rights are at stake. Section 38 provides that:

“ Anyone listed in this section has the right to approach a competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; an association acting in the interest of its members”.

In this sense the section provides for an *actio popularis* (a Latin term meaning people's legal action) such that any member of the public may enforce the rights enshrined in the Bill of Rights without his rights necessarily being in issue if he is acting in the interest of the public, or a class of persons.

As already intimated, there is no explicit provision in the Zambian Constitution giving standing of an *actio popularis* nature. As has been seen in article 28 of the constitution, it is the person who alleges that his rights are at stake who can challenge an action. Nonetheless the case of Mwamba and Mbuzi V The Attorney General (1993), (which shall later be considered in greater detail), gives very liberal standing in that it allows for any citizen to sue on issues pertaining to

the constitution even if that citizen is not directly affected. The only exception is where one is barred from suing by the constitution itself.

In Botswana, section 18(1) of the constitution permits any person to seek redress of the court for an alleged violation of the constitution.

Notwithstanding their liberal provisions on standing, the problem is that they are only limited to constitutional matters, excluding administrative issues which actually constitute the bulk of cases requiring redress against public authorities.

### 1.6.2 **Standing in Habeas Corpus applications**

An application for the writ of habeas corpus is meant to test the validity of a detention by the detaining authority. This restriction on personal freedom can be disputed either by the person detained, if he is able to, or his relatives, friends or advocate. Order 54 of the Rules of the Supreme Court of England, which applies by virtue of section 10 of the High Court, in Zambia, provides that an application for the writ may be made by the person restrained. The accompanying affidavit must indicate that it is at his instance that the application is made. If he is not able to make the affidavit it can be made by another person at the detainee's instance. Where no communication has occurred, a friend or relative can make the application. Indeed anyone can apply for this writ provided the application is accompanied by an affidavit explaining the reason(s) for the detainee's inability to make the application. An example of this is seen in the case of Dean Namulya Mung'omba V The Attorney General <sup>5</sup> where, upon the failed coup of 28<sup>th</sup> October, 1997, Mr. Mung'omba was arrested and detained under emergency regulations. It was his lawyers who commenced habeas corpus proceedings.

### 1.6.3 Standing in Statutory applications.

Some statutes provide that a person aggrieved by a public official exercising powers conferred by that same statute might appeal to court to redress the wrong. This standing is specifically conferred on the person(s) referred to in the statute. Thus section 11 of the Investment Act of Zambia 1993 grants standing to an applicant for an investment certificate, if he is aggrieved by the decision of the Investment Board of the Centre of rejecting his application to appeal to the Minister, which appeal is subject to a further appeal to the high court.

### 1.6.4 Standing in Private Law proceedings

Standing in private law proceedings arises in situations where the conduct of a public officer or body affects a person and that person can raise an ordinary cause of action for instance in tort or contract in substantially the same way as if the public body were an ordinary person. To further elaborate this by way of an example, many services are supplied to states by private business associations and individuals. Failure to pay for the services can result in court actions to recover the money, as would be the case where it involved parties other than the state. In the case of Stick rose (PTY) Ltd. V The Permanent Secretary, Ministry of Finance,<sup>6</sup> the State owed the appellant a colossal amount of money for some transaction. Upon failure to satisfy the debt, the appellant commenced an action to recover the money and obtained judgement against the State. However, in a bid to enforce payment when the State did not settle the judgement debt, the appellant commenced a new action of judicial review for an order of mandamus to compel payment, and later started committal proceedings when the former action failed. The point to be emphasized, however, is that standing is available for one aggrieved by the State or its officials in private law matters.

### 1.6.5 Standing under Order 53 of the Rules of the Supreme Court of England.

Only an overview of this Order is considered here. Like Order 54, it applies in Zambia by virtue of section 10 of the High Court. However, it is subject to a more detailed discussion in chapter two.

As earlier stated an application for judicial review under Order 53 of the Supreme Court Rules of England requires that the applicant have locus standi. This requirement is couched in the language that the applicant must have 'sufficient interest'. Rule 3(7) of the order categorically states that no leave to commence judicial review proceedings should be granted unless the applicant has this threshold requirement of interest. In its actual words it states that:

The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

And rule 3(1) states that:

No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule.

Before the meaning of sufficient interest is considered, it is opportune to give a background of the developments in English law of the test to ascertain locus standi.

#### 1.7.1 Development of the test for locus standi

Initially the traditional rule of locus standi was such that a legal right of the applicant for judicial review had to be violated by public authorities (or be under a threat of violation), or simply that he should be an aggrieved person. In stating who an aggrieved person is, Chitoshi, J said:

' a " person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongfully affected his title to something.'<sup>7</sup>

If the right deprived of a person was derived from the law, one had standing. The injury suffered had to amount to a legal right and not any other loss. Thus, for instance, in the case of R v Guardians of Lewisham Union<sup>8</sup> the sanitary authority of the Lewisham district or the board of works, sought a writ of mandamus against the guardians of the poor of the district to compel them to carry out their duties (which included ensuring vaccination of, especially the poor people) charged on them by the Vaccination Acts. The holding was that the board of works was not entitled to the relief sought because it had no legal specific right to enforce performance by the respondents of their duties under those Acts. It was stated that mandamus was not available for any and every one who so wished to seek it. But that an applicant could only be entitled to it if he showed that he had suffered a legal specific right. The fact that the board had a statutory duty in matters relating to public health did not arise in this case for it to be considered as having sufficient interest on, at least, that basis. In another case, plaintiffs who occupied two houses that were adjacent to a large open space forming part of the grounds of a convent, could not show that they had suffered an infringement to any of their legal rights (such as nuisance) because of the local planning authority having granted planning permission to the trustees of the convent to build a school in those grounds.<sup>9</sup> As such they were found not to have any standing.

Furthermore, an individual could not bring proceedings for an injunction or a declaration where public rights were in issue unless through a relator action. Only the Attorney General had standing to bring proceedings in his own name to assert public rights. This is illustrated in the case of Gouriet v Union of Post Office Workers.<sup>10</sup> Post office workers were called upon by their union to stage a

protest action for a week by not dealing with or handling mail destined for South Africa. This was contrary to the Post Office Act of 1953 which made it an offense for anyone to willfully delay or detain mail and also to solicit anyone to commit this offense. Upon failure to obtain consent from the Attorney General to commence a relator action against the Union, the applicant started proceedings in his own name for an injunction to restrain the Union. The question that arose was whether the applicant had locus standi. It was held by the House of Lords that a private person could only bring proceedings in his own name if the threatened breach of the law would infringe his private rights or inflict special damage, otherwise it is the Attorney General as representative of the public, who is competent to bring such proceedings in court.

**1.7.2 The 1978 Reforms**

Apart from the foregoing, a person seeking redress against an administrative authority had an array of procedures from which to choose the most appropriate one to grant him the relief desired. The remedies available in enforcing public law rights were the prerogative <sup>11</sup> writs or orders <sup>12</sup> of certiorari, mandamus and prohibition. Along with the differences in procedure, the required locus standi also differed depending on which relief was being sought. Hence one seeking certiorari or prohibition had to show that he had a grievance peculiar to himself while one seeking mandamus had a more strict and onerous task of showing that he had a specific legal right<sup>13</sup>

In 1978 the procedures for obtaining the prerogative orders were consolidated into one procedure so that an applicant could obtain any of the orders including the private law remedies of declaration and injunction that were now made available in public law as well. The single procedure was through an application for judicial review proceedings under the new Order 53.<sup>14</sup>

With this development came a chance for the test for locus standi to alter. And indeed the words in rule 3(7) of the order requiring a person to have sufficient

interest raised an opportunity for judges to give it a wider interpretation than was the case with the previous words like 'specific legal right' or 'aggrieved person'. Even though the courts continued to interpret sufficient interest restrictively, the new procedure further enhanced the obvious and growing trend towards relaxing the rules on locus standi.

This trend is important because it shows a significant move from a rigid position to a more relaxed one. It sufficed that one had sufficient interest. Evidence of this is seen by the changed attitude of English judges in that even where a grievance did not confer a legal right, it would still "provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review".<sup>15</sup>

For example, concerning cases involving the private rights of individuals in Schmidt V Secretary of State for Home Affairs<sup>16</sup> the plaintiff applied for an extension of his stay to complete studies. But the application was refused. What is of interest to this paper is the dicta given by Lord Denning M. R. when he stated that an alien has no right to enter a country or stay a day longer than he is permitted by leave. However, if the permit is revoked before the expiry of the time limit, Lord Denning said that the alien has a legitimate expectation of being allowed to stay a day longer and so should be given an opportunity to be heard or make representation.<sup>17</sup> This legitimate expectation is the sufficient interest necessary to challenge such a decision.

Furthermore, in R v Paddington Valuation Officer ex. p. Peachey<sup>18</sup> the applicant who owned a block of flats contended that the valuation roll of the whole area had been incorrectly prepared. He was not able to show that his property was rated wrongly. It was argued that even if the roll was wrongly rated, the applicant did not have title because he would not suffer any financial losses. Notwithstanding that an invalid roll would not have occasioned financial damage to the applicant, Lord Denning said that an applicant is entitled if he finds his name



included in an invalid valuation list, to have it quashed by the courts. That the courts will listen to anyone whose interests are affected, and so one should not be put off by a plea that he has not suffered damage any more than the others.<sup>19</sup>

Finally, pertaining to public rights, Lord Denning M.R again, aptly points out that:

‘...It is a matter of high constitutional principle that if there is good ground for supposing that a governmental department or a public authority is transgressing the law or is about to transgress it in any way which offends or injures thousands of Her Majesty’s subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced....’<sup>20</sup>

In this case Mr. Blackburn proceeded to obtain an order of prohibition against them to stop them acting in breach of their statutory duty which was to prevent the exhibition of pornographic films. Though he suffered no injury peculiar to himself, he was found to have locus standi to make the application because he lived within the administrative area of the council and also that he had children who might be harmed by watching such films.

Now the paper proceeds to consider the issue of sufficient interest.

### 1.8.1 What is Sufficient Interest?

It must be mentioned, first and foremost that Order 53 does not address the issue of what sufficient interest exactly is. So it is up to the courts to determine what they consider as constituting sufficient interest and what does not. As already adverted to, the words sufficient interest were included when drafting Order 53. They were cautiously used by the draftsman to avoid the technical difficulties that words like ‘specific legal right’ or ‘aggrieved person’ and others used to indicate standing, wrought in that they entailed seeking a particular relief which would either be mandamus or certiorari, to mention two notable remedies. What was of importance was that one had sufficient interest regardless of which relief was being sought.<sup>21</sup>

However, the need to ensure that mere busy bodies did not benefit from this liberal stand remained. The difficulty lay in distinguishing between one with no legal right to point to but with a genuine and reasonable concern in the matter and the busy body who interferes with other people's affairs that do not concern him in anyway at all.

Thus standing is a matter of mixed law and fact. A matter of law in that standing may be determined on the basis of whether it is conferred by any particular law; constitutional, statutory or common law. And a matter of fact because the courts in their discretion and good judgement may determine standing according to the facts of the case.

1.8.2 The case of Inland Revenue Commissioner V National Federation of Self-Employed and Small Businesses Ltd. <sup>22</sup> considered the issue of sufficient interest.

The facts were that casual workers of national newspapers had been evading tax for a long time. They got their wages without being taxed. They were able to do this because they gave fictitious names to the newspaper (Some as ridiculous as 'Mickey Mouse') and so could omit to declare their wages to the Revenue. Their employers also did not disclose to the revenue. Hence the Revenue decided to prevent this tax evasion by entering an agreement with the employers and the trade unions to the effect that the latter would disclose the earnings of the previous two years and also give proper disclosure of future earnings, while the former (i.e. the Revenue) would not investigate the tax evaded prior to the two years mentioned.

A group of self-employed persons and small businessmen were angered by this unfair action, as they saw it, on the part of the Revenue. So they sought to challenge it by an application for judicial review.

The Revenue contended that the federation did not have locus standi to challenge their action because they did not have the requisite sufficient interest in the matter. As a result, they further contended that, they could not apply for leave to proceed with an application for judicial review.

It was held by the House of Lords, *inter alia*, that the question of sufficient interest was not to be determined as a preliminary issue without considering the substantive issues involved unless the case was very simple so that it was obvious that the applicant had no sufficient interest.

Whereas Order 53 stipulates the requirement of sufficient interest as arising in the application for leave (or ex parte) stage, this case is authority for a two-stages test of locus standi, that is,

- (i) in the leave stage and;
- (ii) in the substantive hearing stage.

According to this case, the granting of leave is a threshold question or a provisional finding to ascertain sufficient interest. Nevertheless, the finding is subject to revisal upon hearing all the evidence in the substantive application.<sup>23</sup>

It is possible that the question of standing in the first stage is answered affirmatively, but on application on its merits, it is refused. Since some cases are not so obvious, it would be impracticable to decide on an applicant's interest without having evidence from both parties. The test in the first stage is designed to avoid hopeless or meddlesome cases, while the second stage determines if the applicant can show a strong case on the merits considered in relation to his concern with it.<sup>24</sup>

On the implication of Order 53 on locus standi, their Lordships were of the view that the position of locus standi was that the different tests were swept away so that the test was uniform. Lord Diplock stated that:

the main purpose of the new Order 53 was to sweep away these procedural differences including, in particular, differences as to locus standi, to substitute for them a single stipulated procedure for obtaining all forms of relief...<sup>25</sup>

And commenting on standing in the first stage, Lord Diplock, stated that sufficient interest should be dealt with as a threshold matter in the first stage of the application for leave and not delving into the substantive matters that must be considered only after leave has been granted. At this stage the court is only supposed to direct its mind on the material available from which it is to form a prima facie view on whether the applicant has sufficient interest or not.<sup>26</sup>

However, Lord Wilberforce did not follow the majority view, instead he opined that Order 53 did not do away with the different tests by virtue of having the same words covering all cases.<sup>27</sup>

Whether one can say in absolute terms that the rules on standing are generally uniform is not certain. Gordon admits that though under Order 53 this might be so according to the statements in the Fleet Street Casuals case, restrictive rules probably still apply outside Order 53 in respect of declarations and injunctions.<sup>28</sup> Hence Professor Wade observed that "it is premature to consign to oblivion the rules which made distinctions between various remedies previously".<sup>29</sup>

## 1.9 **CONCLUSION**

This chapter looked at what locus standi is and has defined it as the title or competence of a party to challenge an action or decision of a public body, and this by invoking the supervisory jurisdiction of the court. It has briefly discussed the essence of locus standi which is to facilitate for genuine cases coming to court and avoiding frivolous or hopeless ones, apart from avoiding mere busy bodies who want to litigate over trivial matters or for the fun of it.

The chapter also attempts to show a very important distinction between standing pertaining to private rights and to public rights. That is, grievances which affect the private rights of an individual only as opposed to those which affect the public at large. Instances of locus standi are given, being standing under constitutions, under statutory law, in private law proceedings and habeas corpus applications, as well as in judicial review proceedings under Order 53.

A background on the development of locus standi has been discussed to give a clear picture of what is obtaining now.

Lastly, the chapter considers what sufficient interest is. It shows that sufficient interest is either derived from law which confers locus standi on a person(s) or determined on the facts of the case by the court. The Fleet Street Casuals or Mickey Mouse case as it is otherwise referred to, was meant to show how standing under Order 53 is considered to be in two stages; when seeking leave to apply for judicial review and when making the application for judicial review itself. The first is subject to revisal upon the court receiving more evidence in the second stage. The case also shows a strong proposition supporting the view that the test for standing is uniform.

## ENDNOTES

1. F.T.J Chiluba and Another v National Media Corporation Limited and Others. (1991) HN/152 (Unreported) R10.
2. Elemene Bray, "Locus Standi. Its development in South African environmental law". Internet site <http://www.acts.or.ke/Gf-Chapter 6 pdf>. P. 124.
3. Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited (1981) 2 All ER p113
4. SCZ Judgment No.10 of 1993
5. 1997/HP/2617 (Unreported).
6. SCZ Judgment. No.30 of 1999.
7. Chitoshi, J. quoting from another case when sitting in the case of FTJ Chiluba and another V National Media Corporation Ltd. At R. 12.
8. (1897) 1Q.B.498
9. Gregory V London Borough of Camden (1966) IWLR p. 889.
10. (1977) 3All ER p70
11. Prerogative because, initially, they were only available to the Crown and not ordinary subjects. The Crown could obtain orders from court to ensure that public authorities carried out their duties.
12. In 1938 the public law remedies changed from prerogative writs to orders, except for habeas corpus. From H.W.R Wade, Administrative Law 5<sup>th</sup> (ed.) (Oxford: Clarendon Press, 1982) pp. 30 and 540 respectively.
13. Inland Revenue Commissioners, Op.cit., p. 97.
14. De Smith, Woolf and Jowell, Judicial Review of Administrative Action. 5<sup>th</sup> (ed.) (London: Sweet and Maxwell, 1995) p126
15. Ibid, p126.
16. (1969) 1 All ER p. 904.
17. Ibid, at p. 909

18. (1966) 1Q.B. 360
19. Ibid, p 400
20. R. v Greater London Council, ex. p. Black burn (1976) 3 All ER
21. p. 184 at p. 192
22. Inland Revenue Commissioners, op.cit., p. 109.
23. Ibid, p 93
24. See Ibid, p 105
25. Wade, Administrative law 5th (ed) p 588
26. Op.cit., p. 102.
27. Ibid, p 105
28. Ibid; p 97
29. R.J.F.Gordon, Judicial Review: Law and Procedure (London: Sweet and Maxwell, 1985) p 50
30. Wade, Administrative Law, p.578.

## CHAPTER TWO

### 2.1 Introduction

We saw in Chapter one how locus standi was initially determined on the basis of the particular relief sought. We also saw how this position has tremendously changed to allow a person without any specific or legal right as having title to sue, that is, having sufficient interest in the matter is adequate. We now proceed to consider locus standi in Zambia. This chapter discusses the legal framework of standing in Zambia, that is, legislative provisions and case law on the subject matter.

Generally speaking, there has not been much litigation concerning locus standi in Zambia. Nonetheless, there is still something that one is able to glean to give us an adequate picture.

2.2 The history of the authority of the courts in Zambia, particularly the High Court can be traced to the time when the British South African Company relinquished power to the British Crown. The administration of Northern Rhodesia was premised on that obtaining in England. It ran parallel to the system of law of the indigenous people. Hence, at the inception of the High Court, the practice and jurisdiction of this court was along the same lines of practice and jurisdiction as in England. In fact, it was considered to be equivalent to the corresponding court in England. And since the courts there had power to control administrative authorities, so could the High Court in Northern Rhodesia.<sup>1</sup>

Independence ushered in new developments in the judicial set up. Among the notable changes which are of relevance to this discourse are the regarding of the High Court as now being constituted under the independence constitution, having unlimited jurisdiction to hear any civil or criminal matters under any law. It also had supervisory jurisdiction over any proceedings before a Subordinate Court. Of



particular importance is the fact that the jurisdiction of this court was further extended in that it had the duty of enforcing the newly introduced Bill of Rights, under section 28(as the articles were then called) of the Independence Constitution. <sup>2</sup>Therefore, a person was availed standing in the event of anyone encroaching on his fundamental rights.

### 2.3.1 **Standing tied to existing fundamental rights**

A prominent case in this area is that of Nkumbula v The Attorney General<sup>3</sup> which shows that standing is tied to the provisions of the Bill of Rights upon them being violated. Nkumbula, as leader of the African National Congress party, sought a declaration to the effect that the Government's decision of introducing a One-Party system was likely to violate his rights guaranteed by the Constitution, as it existed then. The petitioner contended that his rights, such as the right to assembly, and to form political associations, freedom of expression and freedom from discrimination on political grounds, would not be fully enjoyed, let alone exist, under such a political dispensation, as it was incompatible with them. The court held that the Government's decision was no more than a declaration of intention and that the petitioner should have shown that the introduction of the One Party system in the future, after being lawfully and constitutionally introduced, would violate his rights under the Constitution. As a result, the Court held that it had no power, even by declaration, to prevent the carrying into effect of an intention to amend the Constitution, if the amendment is done in a manner prescribed by the Constitution. In this way, it is shown that an individual can only have standing on existing rights. And so, since there was no guarantee that the rights the applicant sought to protect would be in existence after amendments to the constitution, Nkumbula could not have standing.

2.3.2 It can be deduced from the Nkumbula case that an individual can challenge an act perceived to infringe his rights as enshrined in the Bill of Rights. One is tempted to construe from this particular case that any member of the public may enforce these rights without his own being in issue. It cannot be disputed that the

issues in this case affected not only the applicant but also the public at large. However, it was decided on the basis of the applicant's rights only and not including the effect on the general public, which would simply be incidental to the matter. This is shown from the fact that the applicant had to show that his current rights would be violated in the future. The language in article 28 of the Zambian Constitution states that the contravention of any right has to be in relation to the one who alleges the infringement. Musumali, J, in the Maxwell Mwamba case cites this section as a particular instance where the Constitution confines standing to the injured person(s) only, and not the public, that is, in cases of human rights of the person who alleges an infringement, only he has standing otherwise in any other constitutional matter any citizen has standing.

This implies that a person wishing to enforce rights under articles 11 to 26 of the Constitution, of an individual or group of persons, would not have title to sue. Hence, the Mwanakatwe Draft Constitution of 1996 sought to remove this limitation by providing wider standing. Under article 64 of the draft Constitution, redress for the rights and freedoms as enumerated by the same could be sought by:

- I. a person in his or her own interest;
- II. an association acting in the interest of its members;
- III. a person acting on behalf of another person not in a position to seek such redress in his or her own name; or
- IV. a person acting as a member of or in the interest of a group or class of persons.<sup>4</sup>

The exact recommendation concerning the foregoing stated that there was need to revise article 28 of the constitution in order to afford an aggrieved person adequate means of obtaining redress. Government accepted this.<sup>5</sup> However, the recommendation is not reflected in the constitution as amended. Adoption of this recommendation would have given a much wider, and more desirable, standing

on matters pertaining to the Bill of Rights, akin to the position of standing under the South African Bill of Rights.

### **2.3.3 Locus standi of associations confined to cases involving the association itself or its members**

In the light of what has been said above, on an infringement having to be in relation to the one who alleges it, in a situation where the rights of a class of persons have been contravened, their representatives who are members of that class can have title to sue on behalf of the group. In the case of The Attorney General and the Speaker of the National Assembly v The People <sup>6</sup>, the respondents who had commenced proceedings for judicial review were seeking an Order of stay of the proceedings relating to the University Bill in Parliament. Their contention was that they feared that the University Bill was going to be enacted into law without them as stakeholders being consulted by government. It was further deposed in their affidavit that the proposed Bill would encroach on their rights and freedoms as then enjoyed under the University Act of 1992. Their application for leave was dismissed and they made a renewal of the application before another High Court judge.

It was the contention of the appellants, *inter alia*, that the application by the respondents was improper in that they did not follow the right procedure under article 28 of the Constitution, since they claimed that their rights under the Act would be infringed upon enactment of the Bill. The Supreme court affirmed this when it was said the respondents complained that they had a genuine and real fear that once the Bill gets Presidential assent, they shall lose their rights and freedoms under the Act as it subsisted. Relying on this, the court held that the law in Zambia is clear on the procedure to be adopted in relation to the enforcement of fundamental rights and freedoms; that article 28 of our Constitution provides that procedure for people to enforce their rights.

Thus it is shown, though not in so many words, that the appellants in their representative capacity had locus standi to bring proceedings under article 28 of the Constitution.

Another case showing this aspect is that of Resident Doctors Association of Zambia and 51 Others v The Attorney General,<sup>7</sup> where the petitioners petitioned the High Court contending that the Police had violated their freedoms of expression, assembly and association as guaranteed by the Bill of Rights, by their action of not following the prescribed procedure for regulation of, inter alia, processions as was the case here. Apart from this is the Police action of intercepting the petitioners' demonstration, which they said was peaceful. The Resident Doctors Association was the first Petitioner. One is able to conclude from this fact that the Association had standing on its own behalf and on behalf of its members.

#### **2.3.4. The Legal Practitioners Act as a restriction to standing of associations**

It is vital to note that the associations mentioned above only have standing on their own behalf or on behalf of their members and this is confined to matters affecting the members as a whole. This is so because it enables us to differentiate between associations representing their members as seen above and associations not being able to commence or carry on proceedings on behalf of persons over whom they are responsible. For associations such as non-governmental organisations, lobby groups and indeed associations involved in the welfare of less privileged people or those less able to stand for their rights would require to be qualified as advocates. They would need practicing certificates from the Law Association of Zambia if they are to represent the people whose concerns they advocate for. Neither one who is qualified to practice as an advocate can represent people under the auspices of such associations. The case of The People v Teddy Phiri and 80 Others<sup>8</sup> gives a good illustration of this position. The Attorney General made an application to remove from the record the Legal Resource Foundation (hereinafter as the Foundation) as not being

competent or having the jurisdiction to appear on behalf of the accused through a Mr. G. Mulenga. The same was one of the defense counsels appearing under the Foundation. It was stated that the Foundation being an incorporated company, was a distinct legal person and was unqualified to appear before Court to represent an accused person or to receive instructions from one. The High Court ruled that the Foundation could not act as an advocate unless qualified in respect of section 41(1) of the Legal Practitioners Act( chapter 30 of the laws of Zambia) nor could anyone, though qualified as an advocate act as an agent for the Foundation as this is prohibited by section 48(1) of the same Act. As a result, even if Mr. Mulenga was qualified as a practitioner, he could not act on behalf of the Foundation. Concerning the same, and an issue, which bars associations from representing people in their own name, Banda, J. stated that the Foundation could not:

“ ...employ advocates to defend or sue in cases where it is itself not a party....It can only hire the services of an advocate to defend it or to sue on its behalf or to otherwise act on its behalf only. ”<sup>9</sup>

#### **2.4.1 Standing in constitutional matters**

However, quite a liberal position of standing is given in the following cases that directly deal with the issue of locus standi.

In the aforementioned case of Maxwell Mwamba and Stora Mbuzi v The Attorney General<sup>10</sup> the applicants challenged the President's appointment of two members of his political party. The appointees had previously been implicated in drug trafficking. The applicants based their challenge on article 44 of the Constitution, which requires the President, as head of state, to perform with dignity and leadership all acts that are, inter alia, necessary for the discharge of the executive functions of the government. They argued that appointing, as ministers, persons implicated in dealing with mandrax was contrary to this requirement.

The respondents made a submission questioning the applicants' locus standi. Four of the judges declined to give an unequivocal pronouncement on the issue of standing, apart from stating that the two public interest aspect of individual participation in the enforcement of the law and the prevention of meddlesome litigants should be balanced.

Musumali, J., though not disagreeing with the discussion of his learned brothers, expressed dissension on the wording of the sentence dealing with balancing of the two aspects of public interest. He opined that stating locus standi in such terms was ambiguous because a citizen would not firmly know whether he has standing or not in the kind of case as the one before them. He stated that in Constitutional matters, a citizen has locus standi unless expressly or by necessary implication, barred by the Constitution itself. He adds that apart from provisions in the Constitution, which confine standing to persons firmly interested such as article 28, a citizen has liberty to go to court and seek redress.

#### **2.4.2 Standing in non-constitutional matters**

The case of FTJ Chiluba and another v National Media Corporation Ltd and Others <sup>11</sup> concerned the argument by the plaintiff that there was unauthorized transfer of assets and property held by government on behalf of the people of Zambia, to the United National Independence Party (UNIP) and its companies, as well as to individual members; that the companies proposed to be transferred to UNIP were bought using public funds and as a result cannot be transferred to a political party where other political parties are operating. The defendants submitted that the plaintiffs had no locus standi to prevent what they considered a lawful transfer of shares; that the plaintiffs were neither shareholders nor creditors of the defendant companies, nor was there any private interest involved. It was further submitted that all that the plaintiffs were doing was to try and protect public interest and to prevent an abuse of trust reposed in the leadership by the public, and so they did not have a legal interest, which could be protected.

The court found that the plaintiffs had standing because the issues raised were serious and of public interest and must be litigated.<sup>12</sup> This case, though a private law matter, borders on a challenge to public officials because of the public interest matters raised. It is significant in that it extends liberal standing to cater for administrative matters as well.

2.4.3 In Edith Zewelani Nawakwi v The Attorney General<sup>13</sup> Miss Nawakwi wished to renew her passport on which her two children were included. She was requested to obtain a letter of consent from the father of the children by the passport officer before their personal particulars could be endorsed. This was notwithstanding that the petitioner had previously sworn an affidavit that she was the mother of the children born out of wedlock in order to have the particulars of the children endorsed on her passport. The respondent raised the issue of locus standi of the petitioner in the proceedings, arguing that she had no cause of action since she had not been issued with the passport she had applied for and that the aggrieved parties were the children. The Court held that the children had not yet attained maturity to be able to sue on their own and so their mother had legal standing.

2.4.4 Coming to standing under Order 53 of the Rules of the supreme Court of England, mention must be made, first, that the rules and practice of the courts of England apply in Zambia by virtue of S10 of the High Court Act and S 8 of the Supreme Court Act, chapters 27 and 26 respectively. These provisions provide, respectively, that:

10. The jurisdiction vested in the Court shall as regards practice and procedure be exercised in the manner provided in this Act and the Criminal Procedure Code, or by any other written law or by such rules, order or direction of the court as may be made under this Act, or in default,

thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.

And,

8. The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and rules of court: provided that if this Act or rules of court do not make provision for any particular point of practice and procedure, then the practice and procedure of the court shall...

- (ii) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal in England.

Hence in Zambia, Order 53 is applied to the extent that there is no provision on a matter in the domestic law. So, where leave to apply for judicial review is refused, an applicant in Zambia cannot renew his application before another High Court judge but must appeal to the Supreme Court. This appeal is treated as a renewal of the application for leave.<sup>14</sup> The reason for this is that the High Court judges are of the same powers and jurisdiction and so one High Court judge cannot review the decision of the other<sup>15</sup>.

In the case of Derrick Chitala v The Attorney General,<sup>16</sup> the applicants sought the orders of certiorari and mandamus to quash the President and his Cabinet's decision to enact the Constitution by the National Assembly and to direct and compel them to facilitate for a wider determination of the Constitution and subject it to a national referendum. Their major argument was that there was a misdirection on the part of the Court below when it determined the substantive application without having an interparte hearing before granting leave; that what was necessary at this stage was only to show that the applicants had sufficient



interest, whether there was an arguable case capable of investigation in the substantive hearing, and whether the application had been made promptly.

The court conceded that the applicant had sufficient interest in the matter, considering that it concerned major amendments to the Constitution- an issue of serious interest to all citizens, including the appellant as a member and representative of a political party. Nonetheless the applicant was not granted leave to apply for judicial review on the ground that the case was hopeless in that there was no sufficiently arguable case fit for further investigation at a substantive hearing. The case was untenable because the three grounds upon which an administrative action can be judicially reviewed did not arise. The grounds, enunciated by Lord Diplock,<sup>17</sup> are illegality, irrationality and procedural impropriety.

This case illustrates the much-confused issue of standing and justiciability. These are distinct aspects. The latter entails redressability, and so one with standing may still not be able to obtain relief for his grievance. An area where this is also seen is that under Part IX of the Zambian Constitution. Standing is tied to existing rights as earlier mentioned, however there are other rights as those under Part IX, which an individual has but cannot enforce. These are the economic and social rights (as opposed to the political and civil rights under Part III of the Zambian Constitution). They are said not to be justiciable but that they are simply directive principles of State policy meant to give the State the necessary guidelines in its function of governance. The government under article 110(2) is given leeway to observe these rights only when State resources are sufficient to sustain their implementation or if the public's general welfare is such as makes it imperative to apply them. Hence, one cannot sue government or any public authority to compel it to fulfill obligations of such a nature as fall under the same Part IX. As such one does not have standing in this area.

## 2.5 CONCLUSION

In concluding this chapter, it should be observed that standing under habeas corpus and statutory applications have not been considered because it is quite clear and straight forward, and the position of standing in Zambia pertaining to the same has been adverted to in chapter one. The same will suffice.

This chapter endeavoured to show the position of standing in Zambia. It attempts show that under the Constitution, a citizen is at liberty to seek redress on matters pertaining to the Constitution even if he has not suffered a peculiar harm, as long as he is not barred by the Constitution itself. Furthermore, it discusses the issue of the Constitution conferring standing to particular persons, that is, those with sufficient interest. An example of this is found in article 28, which confers standing on a person whose fundamental rights have been infringed.

Apart from this, members of a group or an association have standing to represent their group members. It is of utmost importance that a distinction be noted here. This group action does not mean the representatives or those bringing the case before the court may not be members of the group. They are all members of the particular group whose members, together, have suffered a grievance. In this way, groups such as non- governmental organisations or lobby groups do not have standing to bring an action on behalf of a class or a group of people who are not members of their organizations.

Furthermore, the FTJ Chiluba v National Media Corporation Case attempted to show that standing is extended to cover administrative matters as well. This case gives credence to the holding that a rate payer can challenge a public authority even if he has suffered no greater harm by the public authority's action. And lastly, the chapter discusses an illustration that differentiates the aspect of standing from that of redressability. It sought to show that an individual who has standing will not necessarily be able to claim relief for his grievance.

## ENDNOTES

1. S.K.C. Mumba, Judicial control of Administrative powers in Zambia: with comparative reference to English law. PhD Thesis, 1983 (Lusaka: Special collections, UNZA) p.38.
2. Ibid, p.38.
3. [1972] ZR 111 (HC).
4. The Citizen's Convention on the Draft Constitution.
5. Government Paper No.1 of 1995, p.39.
6. SCZ Judgment No. 34/99. SCZ Appeal No. 158/99.
7. 1997/HP/0817.
8. HP/55/98.
9. Ibid, R3.
10. SCZ Judgment No. 10 of 1993 (unreported).
11. (1991) HN/152 (Unreported)
12. Ibid, p.19.
13. (1990/92) ZR 112 (HC).
14. See The Attorney General and The Speaker of National Assembly v The People (1999) and Derrick Chitala v The Attorney General 1995/SCZ/14.
15. See case of The Attorney General and Speaker of National Assembly v The People(1999) and Mohamed Muaza v The Attorney General (1988/89) ZR p.8.
16. Derrick Chitala v The Attorney General (1995).
17. Council of Civil Service Union and Others v Minister Civil Service (1985) A.C. 374.

## CHAPTER THREE

### 3.1 Introduction

Having considered standing generally and standing in Zambia particularly, this chapter critically analyses the position of standing in Zambia. It identifies the shortfalls or limitations in our standing law. The chapter discusses the arguments for retaining restrictive rules. It endeavours to counter them by attempting to show that the safeguards put in place to ensure that access to courts is not abused are actually sufficient. It proceeds to substantiate the foregoing by considering the economic, political and social conditions obtaining in Zambia and how they actually necessitate very wide standing provisions.

3.2 For our benefit, a recapitulation of standing in Zambia should be given. Deducing from the discussion in the preceding chapter, an individual has locus standi if a public action adversely affects him.<sup>1</sup> Where the public at large has been affected, an individual has standing if the matter relates to the constitution<sup>2</sup> or is generally in the public interest.<sup>3</sup> So that even where he is not directly affected over and above the others, or in any obvious way so long he has a genuine interest or concern in the matter, he can challenge an action. Associations such as non-governmental organisations or pressure groups, whether corporate<sup>4</sup> or not do not have standing to represent a person or a class of people before court on matters that do not directly affect them. They can only act on behalf of the members of their associations or on their own behalf.

#### 3.3.1 Shortfalls of Standing Law in Zambia

Standing in Zambia has shortfalls which make it fall way back behind the modern trend. To start with locus standi is more of a creation of the judges than it is of the legislature, and so a responsive judiciary is pertinent to having liberal standing rules. Bonine<sup>5</sup>, in reference to the United States of America stated that "restrictive standing jurisprudence .... is actually the product of an ideological agenda of certain judges and scholars...It is based on choice by

judges". Thus, it is dependant on judges to what extent (if at all) they will allow the rules of standing to be relaxed and/or expanded. Forinstance, and particularly in public interest matters, it was once the practice not to consider an applicant as having standing even if the matter brought before court was a serious one. R v Commissioner of Police of the Metropolis ex p. Blackburn<sup>6</sup> shows this aspect in that, whereas the court admitted that the issues to which its attention was called were serious, it could not see how the applicant himself was affected by the police decision and so he was considered not to have standing in that sense.

Now the jurisprudence is such that the courts, in some jurisdictions, like Canada for instance, have discretion to recognize that an applicant has public interest standing, even if he does not exhibit traditional standing.

The criterion relied on is that the issues must be justiciable, serious, the applicant must have a genuine concern or interest in the issue and that there is no other way in which the issue may be brought before court.<sup>7</sup>

#### 3.3.1.1 Lack of clearly established guidelines determining standing.

In Zambia, government has admitted that there are restrictive provisions regarding standing.<sup>8</sup>

And it agrees that they should be removed. Notwithstanding, the judges, with due respect, have not properly utilized any opportunity to state the position of standing so that it is clear and unambiguous. A case in point is that of Maxwell Mwamba and Stora Mbuzi v The Attorney General (1993) where the Supreme Court judges denied to give a conclusive answer except for Musumali, J. He held that a citizen has standing in public interest matters as they pertain to the constitution only. However, the problem with this is that it is too narrow because most grievances arise in administrative cases. More people are affected by administrative actions than by constitutional ones for the reason that administrative affairs affect people nearly on a daily basis. And since ascertaining sufficient interest or standing in the area of public law

is not as obvious as in private law, this makes it all the more necessary for the judges to have clear guidelines on ascertaining it. The worst that the judges did in the above cited case was to abdicate their duty to decide over the matter after entertaining it in the first place.

Canada is one of the countries whose courts have made the position of standing in public interest matters very clear. A person who may not have personal or direct interest in a public matter may still have standing if in the court's discretion the issue is justiciable, serious as well as the applicant being genuinely concerned about the matter. There should, in addition, be no other way of bringing the matter before court.<sup>9</sup> This criterion is cardinal in that it gives guidance to judges to follow whenever they are dealing with public interest matters. The Maxwell Mwamba case was opportune for the judges to lay down a similar criterion.

### 3.3.1.2 **Confining standing to aggrieved persons**

Apart from lack of a clear guideline another shortfall relates to standing in human rights issues. In Zambia it is only limited to the person whose rights under Part III of the constitution are at stake. Article 28 specifically confers particular standing. Any other person or interest group cannot do so on his behalf. Extending locus standi to other than the injured or aggrieved person ensures that relief is sought and the issue is addressed even where the aggrieved person is not able to do so himself. And so there is an urgent need to allow individuals that are public spirited as well as interest groups and other members of the civil society to commence and carry on proceedings on behalf of those that cannot.

### 3.3.1.3 **Weakness of subsisting standing law**

We saw in the FTJ Chiluba case that the plaintiffs were said to have standing as the case was of public interest. This is the position of the law as it stands. However, the problem lies in the fact that High court decisions lack the certainty and predictability that Supreme Court decisions have. The Supreme

Court has no power to review its own decision and so there must be sufficiently strong reasons for departing from its decision in an earlier case in relation to a case before it with similar facts.<sup>10</sup> Whereas the High Court has power to review its decision in a case before it.<sup>11</sup> As a result it can quite easily upset its earlier decision. In view of the principle of *stare decisis*, a higher court's pronouncement is binding on a lower court in similar fact cases. This avoids the lower court departing from precedent, and so it is submitted that had the decision in this case been made by the Supreme Court, it would have been more certain and settled. As it is, the Supreme court is not bound by the decision and the case stands as long as it is not reversed.

#### 3.3.1.4 **Absence of institutionalized standing provision**

The ideal situation would be to have the liberal standing position given by judicial decisions institutionalised in our Constitution. If public interest standing (as obtains in Canada for instance) and standing extended to persons other than the one whose fundamental rights are at stake were provided for in the constitution, the position of locus standi would have achieved decent levels requisite for any country that purports to be democratic. This in turn would ensure access to justice for the many Zambian people that are otherwise denied justice.

3.3.2 It is submitted that the requirement of justiciability in determining whether to grant leave to apply for judicial review, is actually a fetter on standing because it precludes an applicant from being fully heard in the substantive stage of an application for review. Granted that having locus standi does not automatically imply success in an application, nonetheless it is because of having the benefit of hearing arguments from both sides that even the success or failure of the applicant is determined.

Emery and Smythe<sup>12</sup> bring out a very interesting issue that underscores the view in the Fleet Street Casuals case<sup>13</sup> concerning treating locus standi in the factual context of a case. They gave their considered opinion that in actual fact when the Law Commission recommended that there be a new Order 53,<sup>14</sup>

it simply indicated that the question of standing should be a consideration in the court's discretion whether to grant or refuse the remedy sought.<sup>15</sup> The Law commission recommendation was merely that:

The court [should] not grant any relief sought on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.<sup>16</sup>

However, according to these authors, the draftsman misunderstood the nature of the issue so that when it was included in the new Order 53 it was made part of rule 3 which deals with leave to apply and not with the grant of remedies. As such, establishment of sufficient interest was made to be determined in the first stage. The authors proffer three questions that they consider pertinent in ascertaining if there should be judicial review or not, and these are:

- (i) whether the defendant is amenable to judicial review;
- (ii) and if so, whether the defendant has acted unlawfully;
- (iii) if so, whether the court in its discretion can grant the relief sought.<sup>17</sup>

They further subdivide question (iii) into more questions which are:

- (a) whether the defendant should be subjected to the order sought
- (b) if so, whether to grant that order at the suit of the applicant
- (c) and if so, whether the applicant has done anything that disqualifies him from so applying.<sup>18</sup>

The authors point out that (iii) (b) is the only locus standi question, and they see no reason to elevate it over the other questions in determining the issue of leave.

In view of this, and as was also held in the Fleet Street Casuals case, a court may refuse to grant leave only if the case is so blatantly bound to fail for any of the reasons given in the foregoing questions, including the question of locus standi.



However, according to the line of thought taken by the authors, the issue of sufficient interest relates to the grant of relief. Following from this premise in the case of Derrick Chitala v The Attorney-General,<sup>19</sup> leave to apply for judicial review was refused on the basis that the case did not show any ground warranting review. The court did not call to its mind the need to consider the applicant's interest (which it admitted was present) in relation to whether it should grant the relief sought or not.

Thus, it is submitted, the Supreme Court should have only done that upon hearing arguments from both sides for it to be in a better position to exercise its discretion of granting or denying the remedy sought. But one ought to look beyond the case itself and see the context in which it was decided. It is not far fetched to state that the private interest of judges influence their decisions<sup>20</sup>. They are conscious of the reprisals that may follow from their decisions such as in their security whether financial, physical, or otherwise. This is especially so in politically controversial cases such as the Chitala one. Dr. Chanda aptly observes concerning such behaviour or attitude of judges that it is "a deliberate policy by the courts to avoid adjudicating cases, more especially sensitive cases" a policy which he rightly considers to be "deplorable as it reduces the efficacy of a Bill of Rights"<sup>21</sup>, and one might hasten to include any other rights whether private or public. Therefore, it was safer and convenient for their Lordships to decide the case in the manner they did to avoid putting themselves in any situation that would incur predictable government displeasure.

#### **3.4.1 Arguments for restricting the rules of standing**

Judges, in general and other proponents have tendered arguments with respect to what they consider as a need to limit those who can bring a matter before them or can challenge an impugned public action. The contentions are that the judiciary has meagre resources which should not be expended on proceedings that are frivolous or cases that are not justiciable. Neither should the courts time be wasted on giving audience to persons with such cases.

Therefore, a person directly affected by an action is preferred because, the courts' believe that, such a one is able to adequately present his case.

Furthermore, judges argue that it is most undesirable to have the functioning of public authorities interrupted especially by unmeritorious claims. They further argue that safeguards against increased unmeritorious cases such as power of court to award damages and the effect of precedent do not suffice to deter frivolous cases<sup>22</sup>. And so they conclude that the rules of standing have to be strict so that courts intervene only when it is certain that there has been an abuse of public power that has adversely affected someone.

#### **3.4.2 Arguments against strict rules**

Granted that having an open ended standing so that anybody who, for instance to give an extreme example, happened to overhear a matter being talked about and rushes to court to seek redress of that matter would definitely be a busy body and should not be allowed if only for the reason that he is not in a position to give the best arguments there are, but also that he would be wasting the court's time on matters that do not concern him. Nonetheless extending this so that even those who may not necessarily be personally or directly affected but have a genuine interest or concern, are included defeats the whole purpose of achieving justice and participation in the nation's affairs.

Instead, proponents of liberal standing argue that the policy should be to encourage public spirited individuals as well as interest groups to challenge impugned public authority actions. And so the above mentioned arguments are said to be sufficient.<sup>23</sup>

#### **3.4.3 Locus standi in the light of political, economic and social background**

Standing and the rules attendant to it should not therefore, be considered in isolation of the economic, social and political realities prevailing. These

aspects are vital in determining the most appropriate or suitable position of standing.

A large segment of the Zambian population lives in dire poverty. It is estimated that about six million people – equivalent to two-thirds of the population – is below the poverty datum line. The extent of poverty in Zambia has been described as a social crisis.<sup>24</sup> With the economic restructuring came mass lay-offs leading to fewer people than there were in gainful employment. The majority have been reduced to a life of struggling to survive. As a result people cannot afford to engage themselves in litigation.

3.4.4 And mainly flowing from the above, most of the people are not able to get any decent level of education. There is illiteracy on a very wide scale in Zambia. Such people are not even aware of their rights. Their ignorance makes them fearful of going to court because the whole idea of legal proceedings is way beyond their comprehension. As a result they do not assert their rights. This is compounded by the fact that the distribution of legal practitioners (who are concentrated mainly in the urban areas) as well as locations of the High Court which is only in Lusaka, Ndola and Kitwe, does not help reach the most vulnerable who dwell in rural areas.<sup>25</sup>

Apart from these constraints, there is also the political aspect. The presidency in Zambia (and the executive organ generally) enjoys a lot of power mainly a relic from the colonial era. The same has very wide discretion and is made immune to the ordinary operation of the law on a number of issues. To cite just two examples which are but the tip of an iceberg. For instance the president is given very wide latitude by the constitution (article 31) in respect of a declaration of a state of emergency. The court cannot review such a decision. In Dean Namulya Mun'gomba v The Attorney-General<sup>26</sup> the High Court's holding was such as exempts the court from reviewing the reasons for which the president may declare a state of emergency. Under what situation such a state will arise, the constitution is silent, so that it is only under a war situation where it is certain. Any other instance lies in the president's discretion.

In terms of immunity, the Penal Code in section 69<sup>27</sup> protects the president from being defamed. But the provision is such that almost anything can be brought into the ambit of defamatory or insulting matter; causing a serious curtailment to the freedom of speech and of the press.

With such enormous powers, the tendency to abuse then is very high. In the process wrongs are committed and people may be adversely affected as a result. And yet others remain without redress if no person, or interest group, starts an action on their behalf.

In fact, there are cases where an interest group is better placed to start an action. It would be more effective to have a pressure group, for instance, challenge the use of finances by government where colossal sums of public funds are directed to areas that do not urgently need financing. In such circumstances, even if rights under part IX of the constitution are not justiciable, they can be realised in a way and to an extent by ensuring that public funds are expended on urgent and rightful priorities. In R v Secretary of State for Foreign Affairs ex p. World Development Movement Limited<sup>28</sup> a pressure group challenged a decision by the foreign secretary to conclude an agreement with the Malaysian Government for aid and trade support for the Pergan Scheme which was very exorbitant, and as such, economically unsound. The foreign secretary had authority under section 1 of the Overseas Development and Co-operation Act of 1980, to disburse funds for promotion of development or maintenance of economies of overseas countries. Actually, the Foreign Secretary maintained that though the Scheme was exorbitant, it was necessary for enhancing diplomatic ties with the other nation. The pressure group succeeded in its application even though the issue of it not having locus standi was raised. Rose, L. J., in determining the group's standing stated *inter alia* that the case had merits, important issues were raised and the prominent role of the applicants was another important consideration enabling it to act on behalf of others.

Having interest groups or collective litigation ensures that individuals, or indeed sectors of the population, who cannot commence litigation proceedings for reasons of poverty, ignorance and the like, are catered for. In almost every aspect of life there is an interest group that is involved in that particular aspect. This includes women and children's rights and protection of the environment, to mention a few salient ones.

Standing in environmental rights has so far proved to be quite successful in terms of public law rights in some countries. For instance in the South African Constitution section 24 (which is part of the Bill of Rights) embodies environmental rights so that where such rights have been infringed or threatened, a wide range of persons may seek redress in court and enforce them. In the United States, clauses granting locus standi to all citizens to enforce provisions in environmental statutes have been included. These can be enforced either by individuals or organizations.<sup>29</sup>

In India Judges have provided a very conducive environment in which liberal standing particularly in public interest matters, has flourished. The Judges have not sought to simply apply the rules of standing in a strict and insensitive way. But rather they have risen to the occasion by making locus standi more relevant and suitable to their own circumstances as a nation. The Judges have taken a very active role in ensuring that socio-economic change is effected: Clauses on protection and improvement of the of the environment in the Indian constitution fall under directives of state policy and so are unenforceable, nonetheless the Supreme Court creatively and ingeniously goes around this problem by using the environmental clauses in such a way as to justify certain of their decisions that involve social and economic rights.<sup>30</sup> Interest groups have played a major role in enhancing liberal standing.

Thus, genuine cases will not be dismissed on the basis of lack of standing of an applicant. For instance Krishna Iyer, J. dismissed an objection to the standing of the plaintiff which was an unregistered association. He stated a core issue concerning public standing when he said that:

It is broad based and people oriented and envisions access to justice through “class actions” “public litigation” and “representative proceedings”. Indeed little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy.<sup>31</sup>

Furthermore in another case<sup>32</sup> the Indian Supreme Court enumerated some reasons that make it imperative to have liberal standing. These are corruption which the court said leads to use of power in ways that are unrelated to its nominal purpose, social justice, a healthy system of administrative law which entails correction of administrative wrongs and participative justice where public minded citizens are able to enforce rights of individuals and the public at large. This is the kind of approach required of our judges. The fear that wide standing will open the flood gates of litigation is, for the reasons aforesaid, unfounded. A certain professor, K.F. Scott, refuting this fear precisely stated that “[t]he idle and whimsical plaintiff, a litigant who litigates for a lark, is a spectre which haunts the legal literature, not the court room”.<sup>33</sup> With the economic, social and political conditions in Zambia, the direction should be towards a more liberal position of standing.

### **3.5 Conclusion**

It was intended in this chapter to highlight the shortfalls or limitations of standing law in Zambia. Arguments for the retention of restrictive rules were considered and countered by arguments for relaxed rules. The same was further substantiated by consideration of the environment within which the rules operate with respect to the political, economic and social conditions. A comparative approach was taken basically to show how liberal or settled rules of locus standi are in some jurisdictions, and on this premise, contend for the need to remove restrictive rules and clarify or settle standing in Zambia. In this way, individuals and interest groups can have standing on behalf of aggrieved individuals or groups of people.

## ENDNOTES

1. Forinstance standing conferred by article 28 of the Zambian Constitution.
2. Maxwell Mwamba and Stora Mbuzi v The Attorney-General (1993)
3. FTJ Chiluba v National Media Corporation Ltd. (1991).
4. Teddy Phiri and 80 Others v The People (1998).
5. J.E. Bonine, 'Standing to sue: The First Step to Justice' (1998).
6. (1968) 2 QB 118
7. DeSmith, Woolf and Jowell, Judicial Review of Administrative Action (1995) p.103.
8. Governance: National Capacity Building Programme for Good Governance in Zambia. 31<sup>st</sup> March, 2000 p.78.
9. Finlay v Canada (Minister of Finance) (1956) 2 SCR 607.
10. See Match Corporation Ltd and Development Bank of Zambia v The Attorney-General (SCZ Judgement No. of 1999).
11. Order XXXIX of the Rules of the High Court Act Cap 27.
12. C.T. Emery and B. Smythe Judicial Review (Londong Sweet and Maxwell, 1986).
13. (1981) 2 ALL ER 93.
14. Its development is discussed in chapter One.
15. C.T. Emery, Judicial Review, p.275.
16. Ibid, p.275.
17. Ibid, pp.275 and 276.
18. Ibid, p.276.
19. 1995/SCZ/14.
20. A.W. Chanda, Zambia: A Case Study in Human Right in Commonwealth Africa JSD Thesis (Connecticut: Yale University 1992) p.384.
21. Ibid, p.379.
22. DeSmith, Woolf and Jowell, Judicial Review 5<sup>th</sup> (ed) p.100.
23. Ibid, p.101.
24. Prospects For Sustainable Human Development in Zambia 1996. Published jointly the Government of the Republic Zambia and the

United Nations system in Zambia(Lusaka: Special Collections UNZA), p.33.

25. A. W. Chanda, Zambia: A Case Study, p.377.
26. (1997)
27. Cap 87.
28. (1995) 1 ALL ER 611.
29. E. Bray, Locus Standi: Its Development in South African Environmental Law, p.129.
30. Ibid,p.130.
31. The Case of Akhil Bharatiya Shoshit Karma Chari Sangh (RLY) v India Air (1981) SC 298 as cited from FTJ Chiluba v National Media Corporation Ltd. (1991) at R.17.
32. The Case of Fertilizer Corporation Kamgar Union v India Air (1981) SC 344 as cited from FTJ Chiluba v National Media Corporation Ltd (1991) at R.16.
33. DeSmith, Woolf and Jowell, Judicial Review footnote 2 of p.100.



## Chapter Four

### 6.1 General Conclusion

This dissertation attempted to examine the law of locus standi. It considered the development of standing in England. From the same a trend of liberalization can be observed whereby the law on standing was in terms of one being aggrieved or having a specific legal right to one simply having sufficient interest in a matter even if not personally or directly affected. This was especially so in matters that affected the public at large. Instances of this can be seen in Constitutions like the South African one where a person, other than the person whose rights under the Bill of Rights have been infringed, can challenge an action by a public authority.

Furthermore, the trend of liberalized standing has moved to extents where class actions or representative litigation is accommodated. Interest groups, organizations and other associations have title to sue public authorities on behalf of persons aggrieved. This has been more pronounced in matters involving environmental issues where a number of associations involved in, or concerned with, the protection of the environment have locus standi to challenge public actions deemed to be detrimental to their cause.

In either case of individual or class action all that has to be shown is that the matter is serious and that the applicant has a genuine interest in it.

In addition the case must be justiciable and must be such that there is no other likelihood of being brought before court.

6.2 However, there has not been a corresponding development in the law of standing in Zambia. Under article 28 of the constitution standing is confined to the person(s) whose rights are under threat or have been infringed. Apart from this some associations are not able to represent aggrieved persons because they are barred by legislation such as the Legal Practitioners Act. Mr. G. Mulenga of the Legal Resource Foundation could not represent the accused in the Teddy Phiri case under the auspices of the same notwithstanding that the Foundation is meant to give legal aid to those that

are not able to afford hiring legal services. The Legal Resource Foundation has had to establish the Legal Resource Chambers to enable to litigate on behalf of seeking legal aid. This is an undertaking which is very costly and is not in the interest of expanding locus standi for the vulnerable sectors of society. It is unreasonable to expect the various organizations or interest groups to establish legal chambers for the same reason that it is costly. It is also tedious and not many such organisations would have the capacity to run a legal chamber alongside their usual work.

A further drawback to locus standi in Zambia is that the judicial decisions that have broadened standing to a significant extent are not institutionalized, that is, not contained in legislation especially the constitution. Preferable still would be to have them entrenched in the Bill of Rights which would guarantee standing. This would preclude the element of locus standi being dependant on the court's discretion specifically in public interest standing when ascertaining if the interest of the applicant is sufficient or not. Be that as it may, emphasizing standing as being confined to constitutional issues only appears to preclude administrative issues. But an individual can bring an action against a public authority on an administrative grievance by relying on constitutional rights. It is such ambiguity that leaves it open to evasion of addressing clearly the issue of standing by judges in especially politically controversial cases. Where standing is clearly stated, the foregoing would not be much of a problem.

6.3 The whole essence of having liberal standing is so that as many people as are aggrieved by public actions should be given a hearing by the court. This right to redress by the court should not be limited to those that have the financial ability or other resources to litigate. A person or a class of people should not be denied a chance of justice because they are constrained by their indigence or ignorance.

The quality of life of the majority of the Zambian population does not allow having restrictive standing. Instead the circumstances of developing countries and particularly Zambia should challenge the judges to ensure that individuals

or groups or classes of people are still able to enforce their rights through other individuals or organizations. The recommendation in the document, Governance: National Capacity Building (31<sup>st</sup> March 2001 at p.78) proposes that restrictive provisions regarding locus standi should be removed. Further and as already adverted to the Mwanakatwe Constitution Review Commission recommended that standing should be broadened in the constitution to include other individuals or classes of people.

The challenge is incumbent on the judges because they are the ones who are best suited and able to be pacemakers in setting the parameters of locus standi. Parliament should simply be left to enact judicial decisions on the same into statute law. Judicial activism is indispensable.

In brief therefore and by way of emphasis, the following recommendations are proposed

- Locus standi should be extended under our Bill of Rights to include individuals other than the aggrieved person(s);
- Associations or interest groups should be allowed to commence and carry on proceedings on behalf of individuals or classes of people, and in line with this;
- Revision of legislation, such as the Legal Practitioners Act to allow associations, whether corporate or not, to represent aggrieved persons over whom they have a genuine concern;
- Institutionalize wide standing in the constitution, which entails individuals as well interest groups having locus standi and;
- Moreover entrench the same under the Bill of Rights so that locus standi becomes a guaranteed right.

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