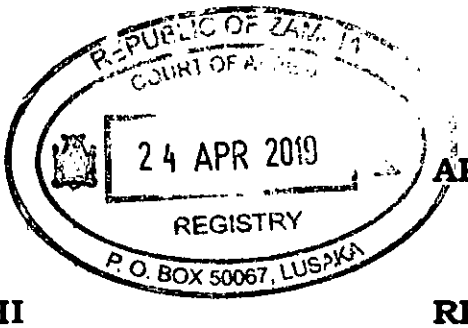
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 143 OF 2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

THE ATTORNEY GENERAL **APPELLANT**

AND:

EMMANUEL MANDA MUSASHI **RESPONDENT**

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 27th March and 24th April 2019

FOR THE APPELLANT: MR. C. MULONDA SENIOR STATE ADVOCATE

FOR THE RESPONDENT: IN PERSON

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Case referred to:

1. Attorney General v Marcus Kampumba Achiume (1983) ZR 1

This is an appeal against the Judgment of the High Court which held that the Respondent had been retired from the Zambia Army and ordered that he be paid his terminal benefits in accordance with Regulation 17 (c) of the Defence (Regular Force) (Pensions) Regulation.

The synopsis of the matter in the Court below shows that the Respondent was employed in the regular Zambia Army holding the rank of staff sergeant and stationed at the School of Ordinance in Livingstone. On 30th April 2013 he was discharged from service on account of misconduct. The basis of the misconduct is that on or about 11th January 2013, whilst making arrangements to vacate the house he was occupying pending his transfer to the Copperbelt, a dispute arose between him and Warrant Officer Class 1, H. Ngwira as to who was to occupy the house he was to vacate. In the process the altercation turned physical with the Respondent alleged to have struck Warrant Officer 1 Ngwira.

The Respondent moved to Ndola on 14th January 2013, but before he could settle down in his new place, he was informed that he had been attached to the School of Ordinance in Livingstone for the purpose of disposing of his case. He travelled back to Livingstone where he was formally charged and taken through the disciplinary process that led to his ultimate discharge from the Army.

Dissatisfied with the disciplinary process and its outcome, the Respondent commenced an action against the Zambia Army and the Attorney General claiming as follows;

(a) Damages for wrongful and unlawful dismissal from the Zambia Army on 30th April 2013 and an order for re-instatement to his former position as a non-commissioned officer in the rank of staff Sergeant without any loss of seniority or emoluments.

(b) Interest on damages to be found

(c) Costs

(d) Any other relief the Court may deem fit and equitable.

The Respondent's claims were premised on the basis that he did not appear before his Commanding officer contrary to section 106 of the Defence Act. He also contested the invocation of section 22 of the Defence Act in his discharge letter.

The Appellant entered appearance and settled a defence stating that the discharge was in accordance with the provisions of the Defence Act for having committed military offences. It was also conceded that the citing of section 22 in the latter of discharge was an error as the appropriate section is 21 of the Defence Act.

At trial the Respondent told the Court below his version of the events that led to his altercation with Warrant Officer Class 1, Ngwira that gave rise to the disciplinary process. The Respondent presented himself as the victim of both verbal and physical abuse at the instance of Warrant Officer Class 1 Ngwira. He was however, presented with three charges namely; striking Warrant Officer Class 1 Ngwira, use of insubordinate language to superior authority and conduct prejudicial good order and military discipline.

The evidence shows that the Respondent objected to the jurisdiction of the Commanding officer for the School of Ordinance on account that it was contrary to the law as he did not belong to the Army School of Ordinance. The objection was not granted as a result of

which the Respondent refused to give evidence before the disciplinary committee.

After the proceedings before the Commanding Officer, the record of proceedings were sent to the Appropriate Superior Officer, being the Regional Commander who in turn recommended the discharge of the Respondent. On 8th May 2013 he was informed of his discharge via a letter dated 30th April 2013.

He raised issue with the letter in that it purported to discharge him under section 22 which did not apply to him. He also said that the letter of discharge was self-contradicting in that in the first paragraph it said that he had been retired as well as in the third paragraph. He further questioned the invocation of section 38 of the Public Service Pensions Act which applied to discharges and not retirements.

It was further his contention that the Commanding officer was not reposed with power to recommend a discharge in terms of sections 81 and 82 of the Defence Force Act which prescribe the procedure and the punishments that a Commanding Officer can impose.

The Appellant gave evidence through Lieutenant Colonel Kashumba, who was serving as Staff Officer in charge of manpower administration at Army Headquarters and Colonel Chanda, who was the Commanding officer for Army School of Ordinance and presided over the Respondent's disciplinary hearing. They both gave the procedure for the disciplinary process in the Army with DW2

outlining the procedure he used leading to the discharge of the Respondent from the Army. He stated that when the Respondent appeared before him, he refused to cross-examine the witnesses and to give evidence on his own behalf. He however, found the evidence overwhelming against the Respondent after analyzing the summaries thereof. He submitted the same to the higher authority for guidance. He later received guidance recommending the Respondent for discharge from the Zambia Army.

After considering all the evidence before her, the import of the learned Judge's judgment is that the Respondent was retired and not dismissed and therefore entitled to receive his retirement benefits in accordance with the law. The reason for that finding is that the Commanding officer did not follow the procedure in dealing with the Respondent's case even though he had jurisdiction to preside over it. She also found that the text of the letter of discharge and the law cited for the discharge did not connect to the disciplinary proceedings the Respondent was subjected to.

Dissatisfied with that outcome, the Appellant filed a Notice and Memorandum of Appeal containing three grounds of appeal.

In the first ground, it is contended that the lower court, while holding that the Plaintiff had been lawfully discharged from the Army, erred in law and fact when her ladyship held that the Plaintiff's discharge from the Zambia Army ought to be treated as a retirement. The Appellant has argued that there was sufficient evidence before the learned trial Judge showing that the

Respondent was charged and subjected to a disciplinary process which yielded the discharge. The Appellant referred to an extract of the Judgment at J54 where the learned Judge stated as follows;

> **"I find that the Plaintiff was never dismissed from the Regular Force, but that he was retired not for the reason of misconduct or the charges he faced which were tried by DW2"**

That finding of fact is being impugned for being erroneous and perverse and we are called upon to reverse it in line with the holding in the case of Attorney General v Marcus Kampumba Achiume[1].

We have carefully considered the Judgment of the Court below and the reasoning deployed by the learned Judge and the finding of fact being impugned. First and foremost, we note that this ground and the decision by the Judge are intricately connected to the question of the procedure adopted by the Commanding Officer, DW2, in dealing with the Respondent's charges. In coming to that conclusion, the learned Judge considered section 81 (8) of the Defence Act which provides as follows;

> **"Notwithstanding anything in subsection (3), where a Commanding Officer has determined that the accused is guilty and if the charge is dealt with summarily, he will award a punishment other than severe reprimand, reprimand or admonition, confinement to barracks, extra guards or pickets, or where a finding of guilty (whatever the punishment awarded) will involve a forfeiture of pay, the Commanding Officer shall not record a finding until after affording the accused an opportunity of electing to be tried by court martial; and if the accused so elects and does not subsequently, in accordance with regulations, withdraw his election, the Commanding Officer shall not record a finding but shall take the prescribed steps with a view to the charge being tried by court martial."**

This subsection, as read together with subsection (3), mandates the Commanding Officer to impose one or more of the punishments listed under sub-section (3). If he forms the view that the accused is guilty and that dealing with the matter summarily would warrant a punishment other than the ones listed, or regardless of the punishment if it will involve forfeiture of pay, the Commanding Officer is under obligation to accord the accused an opportunity to indicate if he would like to be tried by court martial. This requirement is mandatory and the learned Judge found that the Commanding Officer did not give the Respondent an opportunity to exercise that option. The Commanding Officer instead, opted to refer the matter to a higher authority for guidance.

Although the learned trial Judge did not state the effect of that omission on the part of the Commanding Officer, it is clear to us that the failure by the Commanding Officer to invite the Respondent to exercise the option and his failure to pronounce a punishment pursuant to subsection (3) rendered the subsequent proceedings a nullity. This is so because based on the outlined provisions of the law, firstly, the Commanding Officer had no authority to refer the matter to the higher authority after summary procedure and recording a finding and secondly, the higher authority lacked jurisdiction to deal with the matter.

Under subsection (9), the Commanding Officer can only refer a matter to a higher authority where he has taken steps with a view to having the matter tried by court martial and if such higher

authority refers the matter back to the Commanding Officer for summary procedure, then it shall be dealt with in accordance with subsections (3) to (8).

We also note that section 81 of the Act specifically deals with non-commissioned officers, corporals and private soldiers. This section does not provide for reference of a matter to higher authority other than when steps with a view to having it tried by court martial are being considered. There was no evidence before the trial Judge that such steps were being considered at the time of reference to higher authority. Section 82, which provides for such reference under subsection (1), applies to officers and warrant officers. Ultimately, the Commanding Officer had only two options namely; imposing one or more of the punishments authorized under section 81 (3) or invite the Respondent to exercise the option to be tried by court martial under subsection (8).

We therefore, find that the learned trial Judge misdirected herself in law when she placed reliance on section 83 (1) (b) of the Act to come to the following conclusion as recorded at page 57 lines 18 to page 58 lines 1 and 2 of the Record of Appeal;

> **"In the circumstances, I do not find anything wrong with the Commanding Officer referring the matter to the Higher Authority for guidance and, thereafter, receiving the recommendation for the discharge of the Plaintiff"**

The error was occasioned by the learned Judge's failure to note that section 83 (1) (a) refers to the procedure under section 81 while subsection (b) which she relied upon applies to the procedure under

section 82. As we have earlier shown, section 82 did not apply to the Respondent as he was a non-commissioned officer holding the rank of Staff Sergeant.

The learned trial Judge however, accepted the submission that the Commanding Officer had no power to impose a discharge as that can only be a product of court martial or an order of a competent military authority under section 18 (3) of the Defence Act. The competent military authority is also defined under section 2 and Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations xviii, column 3 as the Commander.

The learned Judge found that the circumstances under which the Competent Military Authority may order a discharge are not well defined. However, Regulation 9 (3) xviii is specific as it provides for a discharge of a soldier when his services are no longer required. In that regard, the learned Judge considered the letter of discharge in relation to the Respondent dated 30th April 2013 at the instance of the Army Commander and found that the Respondent was properly discharged pursuant to section 18 (3) Regulation 9 (3) xviii.

The letter of discharge which is exhibited at page 94 of the Record of Appeal states as follows in paragraph 1;

> **"The above named Senior Non-Commissioned Officer will retire from the Zambia Army under Regulation 9 (3) item (xviii) of third schedule of the Defence Force (Regular Force) (Enlistment and Service) Regulation as read together with section 22 of the Defence Act Cap 106 of the Laws of Zambia"**

The learned Judge accepted the submission at trial by the Respondent that section 22 was an error as the correct section is 21. That being the case, we reproduce section 21 of the Act hereunder for ease of reference.

> **"A soldier of the Regular Force may be discharged by the competent military authority at any time during the currency of any term of engagement upon grounds and subject to such special instructions as may be prescribed"**

Under this section, the competent authority enjoys the discretion to discharge upon grounds and subject to special instructions as may be prescribed. Competent military authority is defined under section 2 of the Act as "the President or any officer as may be prescribed"

Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations provides as follows;

> **"A soldier may be discharged from the Regular Force at any time during his service in such force upon any of the grounds set out in column 1 of the Third Schedule, subject to the Special Instruction appearing opposite thereto in column 2 of the said Schedule, and, for the purposes of section twenty-one of the Act, the person specified opposite thereto in column 3 of the said Schedule shall be the competent military authority for the purpose specified in column 1 thereto"**

Under item (xviii) of the Third Schedule, the cause of discharge is specified as "His services no longer required." In column 3 the designated competent military authority is the Commander under whose hand the order of discharge was written.

Of special note is that under the Third Schedule, there is no provision for a discharge resulting from misconduct such as the one

prescribed under section 81 except where such matter had been referred to a court-martial and the accused sentenced accordingly. We therefore, find no fault in the learned Judge's finding that the Respondent was not discharged as a result of the disciplinary process conducted before the Commanding Officer but under the special powers vested in the Commander to discharge as prescribed under the cited provisions of the law. She was on firm ground to make a finding of fact that the Respondent was discharged for the simple reason that his services were no longer required in the Regular Force.

We further accept the learned Judge's finding that the Respondent was not dismissed and it was therefore, erroneous for the discharge letter to order that he be paid pursuant to section 38 of the Public Service Pensions Act Chapter 260 of the Laws of Zambia. This is for the reasons earlier stated in this Judgment but also because, in the Defence Act Chapter 06 of the Laws of Zambia, there is no specific reference to a dismissal. The Act seems to use the term "discharge" to refer to exiting the service of the Regular Defence Force regardless whether the exit is as a result of misconduct or otherwise.

It is therefore, our considered view that to all intents and purposes; a discharge on account that one's services are no longer required is equivalent to a retirement as the discharge letter states in paragraphs 1 and 3. We consider paragraph 2 which directs payment of terminal benefits under section 38 of the Public

Pensions Act to have been made in error just as section 22 was cited in error instead of section 21 of the Defence Act in paragraph 1.

We therefore, dismiss ground two accordingly for want of merit.

As for ground three, we accept that it was erroneous for the learned Judge to have ordered that the Respondent be paid under Regulation 17 (c) of the Defence (Regular Force) (Pensions) Regulation for the reason that the same was repealed by section 9 of the Public Service Pensions Act under sub-section (2) which provides as follows;

> **"Without further assurance, the existing fund shall be transferred to the Public Service Pensions Fund"**

Under section 2 of the Act, "Existing Fund" is defined as;

> **"the Civil Service (Local Conditions) Pensions Fund which was established by the Zambia Civil Service (Local Conditions) Contributory Pensions Act and continued in being by the Civil Service (Local Conditions) Pensions Act, and the Pensions Funds established under the Defence Act and the African Educational Act"**

The appropriate provision of the law that the learned Judge should have cited in light of the above provision is section 41 of the Public Service Pensions Act No 35 of 1996 which provides for the computation formula for retirement benefits in circumstances not covered under sections 39 and 40 of the Act. Ground three has merit and we allow it although the result does not help the Appellant in its quest to have the Respondent considered as having been dismissed.

The net effect of our Judgment is that the appeal fails and we dismiss it with costs.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE