IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 16/2015**
HOLDEN AT KABWE **SCZ/8/298/2014**
(Civil Jurisdiction)

BETWEEN:

DAVID MOTO SIKANANU **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

Coram: Mwanamwambwa DCJ, Hamaundu and Kabuka, JJS
on 1st August, 2017 and 28th August, 2017

For the Appellant : Mr M.Z. Mwandanga, Messrs M.Z. Mwandenga & Company

For the Respondent: Lt. Col. Nhamboteh, State advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:
Zambia Consolidated Copper Mines Limited v Chileshe [2002] ZR 86.

Legislation referred to:
The Defence Act, Chapter 106 of the Laws of Zambia

This appeal is against the dismissal of the appellant's action by the High Court on an application by the respondent to determine

questions of law under **Order 14A** of the **Rules** of the **Supreme Court** (*White Book*).

The background to this appeal is this: The appellant was a commissioned officer in the Zambia Air Force, holding the rank of Lieutenant. On 18th November, 1997, the appellant applied for early retirement from the Zambia Air force. The application was not processed. Instead, on 31st August, 1999 the appellant was dismissed for disciplinary reasons under **Regulation 10A(1)** of the **Defence (Regular Force) (officers) Regulations, 1960**, contained in the **Defence Act, Chapter 106** of **the Laws of Zambia**. This Regulation empowers the President, as Commander in Chief of the Armed Forces, to cancel the commission granted to an officer. When that step is taken, the officer is to be dismissed forthwith. The regulation, also, provides that the President's decision to cancel a commission under this regulation is final and shall not be questioned in any proceedings whatsoever.

The appellant appealed against the dismissal, pointing out that he had applied for voluntary early retirement before the dismissal. He repeated his appeal on 13th June, 2001. On 23rd August, 2002, the appellant commenced this action, challenging the

dismissal as being unlawful and claiming re-instatement. On 23rd September, 2002 the Ministry of defence wrote to him, informing him that, in view of his earlier application to go on early retirement, his dismissal had been an administrative error. The letter went on to state that, after noticing the error, the Air Force, through the Ministry, had endevoured to apply to the Commander-in-chief (The President) to change the decision from dismissal to early retirement. The letter finally stated that the application to change the mode of separation was now being processed and that the outcome would be communicated to him. The communication that the mode of separation had now been changed to early retirement as from 31st August, 1999 was only made in, or about, 2004. At about that time the record containing the proceedings in this matter went missing from the High Court Registry. The state of affairs prevailed for ten years, until in 2014 when the Judge in charge decided to reconstitute the record using the documents in the possession of the appellant's advocates. When the record was reconstituted, the appellant immediately applied for, and was granted, an order to amend his writ of summons and statement of claim. In the amendment, the appellant now claimed that since he was not given

6 months notice of his retirement or paid 6 months salary in lieu thereof, in accordance with the requisite regulation, his retirement was unlawful, wrongful or null and void. Therefore, he still maintained his claim for re-instatement.

The respondent, then, applied under **Order 14A** of the **Rules** of the **Supreme Court** to determine two questions, namely;

(i) whether the court could entertain the action in view of Regulation 10A (3) which stipulates that the cancellation of a commission by the President is final and shall not be questioned in any proceedings;

(ii) whether the court could entertain the claim on retirement when such a claim was statute-barred.

The learned judge in the High Court held that *Regulation 10A* ousted the court's jurisdiction to question the President's decision. With regard to the issue relating to retirement, the learned judge held that the issue of retirement arose in April, 2004 and the appellant only set up a claim on it in 2014. According to the judge, therefore, the claim was caught up by the Limitation act, 1939. The judge then dismissed the entire action. Hence this appeal.

The appellant has filed six grounds of appeal as follows:

"1. The learned trial judge misdirected himself when he

failed or neglected to deal with the issue questioning the validity of Regulation 10A (3) of the Defence (Regular Forces) (officers) Regulations, 1960.

2. The learned trial judge misdirected himself when he rejected the appellant's argument that in order to invoke 10A (3) of the Defence (Regular Forces) (officers) Regulations, 1960 there ought to be evidence about the conduct of the officer including the Commander's recommendation and that the court ought to be satisfied that there was indeed such evidence before it can in turn uphold the President's decision.

3. The learned trial judge in any event misdirected himself when he failed or neglected to deal with the issue that in the circumstances of the case at hand question No.1 on the notice of motion for the determination of questions of law had merely raised an academic or hypothetical issue.

4. The learned trial judge misdirected himself by failing or neglecting to pronounce himself on both issues in the notice of motion for the determination of questions of law.

5. The learned trial judge misdirected himself when he failed to appreciate the implications of the misplacement of the case record by the court itself and its reconstruction in July, 2014 and the subsequent amendment of the writ of summons and statement of claim with leave of the court granted on the 13th August, 2014.

6. The learned trial judge misdirected himself when he failed to appreciate the purport, meaning and legal effect of the amendment of the writ of summons and

statement of claim with leave of the court granted on the 13th August, 2014."

In the respective heads of argument filed by the parties, we were addressed on quite a wide range of legal issues. However, at the hearing we pointed out to learned counsel for the respondent that, when the first question in the motion was raised, the dismissal under *Regulation 10A* appears to have already been superseded by a separation by retirement. Counsel agreed that, indeed, that was the position but submitted that the respondent had raised that question simply because the pleadings of the appellant still maintained a claim against the dismissal. We shall take this appeal from that response.

It must be borne in mind that the respondent's motion was made under **Order 14A** of the **Rules** of the **Supreme Court** (*White Book*). This order is employed to determine questions which may bring a matter to an end, without any need for a trial. It is not employed to summarily determine claims which may appear to be weak or misconceived. In this case, there was ample indication on the record that retirement had been substituted for dismissal and backdated to 31st August, 1999. Therefore, even though the

appellant appears to have maintained the claim for dismissal, there was need for the court below to be alive to the fact that the documents on record suggested that the dismissal had been superseded by retirement. Hence, when the matter went to trial there was a very big likelihood that *Regulation 10A* would not be in issue. Consequently, the question that was raised on it was hypothetical or moot, as contended by the appellant in one of his grounds of appeal. Even if the persistence by the appellant with the claim for dismissal appeared to be misconceived, in view of the change of mode of termination, the court ought not to have curtailed the claim by granting a question that appeared to be moot.

Coming to the second question, the **Limitation Act** applies to causes of action and not to mere issues. In our view, the cause of action in this matter is this: The whole issue in the dispute between the parties is about the termination of the appellant's employment from the Zambia Air Force. From a broad point of view, the appellant is pursuing a cause of action for unlawful termination of employment and is, consequently, seeking re-instatement. Termination of employment takes different forms, namely;

dismissal, retirement, and so on. In this case the termination of employment was at first by way of dismissal under *Regulation 10A*. The appellant challenged that mode of termination, charging that it was unlawful. He sought re-instatement. The termination by way of dismissal appears to have been replaced by termination by way of retirement. By the amendment to the pleadings, we see the appellant stating that, even if retirement has been substituted for dismissal, the termination still remains unlawful; and, hence, he still maintains that he ought to be re-instated. We, therefore, see that the cause of action still remains the same; namely that the appellant is challenging his termination of employment. On that ground, the argument that the termination is a separate cause of action that is statute-barred cannot stand.

In any event the issue of termination in the pleadings was introduced by way of amendment.

Order 20/5/(2) provides:

> **(2) where an application to the court for leave to make the amendment mentioned in paragraphs (3) (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such**

> **leave in the circumstances mentioned in that paragraph if it thinks it just to do so."**

The amendment which is applicable to this case is that which is provided for in *paragraph (5)*. That sub-rule provides:

> **"An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."**

Read together, the import of *paragraphs (2)* and *(5)* is that a new cause of action that is introduced by way of amendment will not be said to be statute-barred, even if the limitation period has lapsed, if it arises out of the same, or substantially the same, facts as the cause of action which is already the subject of the proceedings. That is what we said also in **Zambia Consolidated Copper Mines Limited v Chileshe**[1].

In this case, even if we were to assume that the pleading on termination introduced a new cause of action, it was clear from documents on record that the termination arose out of the same facts that gave rise to the dismissal. Infact, the termination arose

because it was substituted for the dismissal. Hence, in the first place, the amendment was properly granted by the Deputy Registrar; and that having been the case, the amendment could not subsequently be said to have introduced a new cause of action that was statute-barred.

For the above reasons, we allow the appeal. We set aside the ruling by the High Court and order that the matter proceeds to trial.

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M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE