

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2021/CCZ/0002

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF: THE INTERPRETATION OF THE CONSTITUTION
OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016
IN RELATION TO THE RULING OF 8TH JULY 2020
UNDER CAUSE NUMBER
COMP/IRCLK/452/2017 AS PERTAINS
JURISDICTION TO ENTERTAIN CLAIMS
SEEKING PAYMENT OF CLAIMED BENEFITS

BETWEEN:

BRIC BACK LIMITED T/A GAMAMWE RANCHES

APPLICANT

AND

NEIL KIRKPATRICK

RESPONDENT



CORAM: CHIBOMBA, PC, MULENGA, MULONDA, MUSALUKE

AND CHITABO, JJC

ON 19th MAY, 2021 AND ON 20th JULY, 2021

For the Applicant: Mr. M. Mwanza of Messrs J and M Advocates

For the Respondent: Ms. Z Maipambe of Messrs Mwenye and Mwitwa Advocates

JUDGMENT

Cases referred to:

1. *Bernard Shajilwa & 4 Others v Attorney General & 3 others*
2018/CCZ/004
2. *Brick Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick*
2020/CCZ/A002
3. *Polythene Products (Zambia) Limited v Cyclone Hardware Construction Limited and Another* (2012) 3 ZR 396
4. *Lubunda Ngala and Jason Chulu v Anti - Corruption Commission, Selected Judgment No. 4 of 2018*
5. *Owen Mayapi and Others v The Attorney General*
2019/CCZ/003
6. *N.B. Mbazima and Others Joint Liquidation of Zimco Limited (In Liquidation) and Rueben Vera SCZ Judgment No. 6 of 2001*
7. *DBZ and Mary Nc'ube v Christopher Mwanza and 63 Others*
SCZ/8/103/08
8. *Access Bank Zambia Limited v Attorney General*
2019/CCZ/009

Legislation referred to:

1. *Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia*

[1] By originating summons the Applicant, Bric Back Limited T/A Gamamwe Ranches, instituted proceedings before this Court claiming that the Respondent's reliefs under cause COMP/IRCLK/2017, and in particular relief (v) fell within the jurisdiction of this Court. The Applicant sought the following reliefs:

- (i) *An interpretation of the pronouncement by the Honourable Judge of the Industrial Relations Division of the High Court, Mr. E. Mwansa as per Ruling of 8th July, 2020 where he stated that he has jurisdiction to entertain the Respondent's claim number (v) in the Notice of Claim filed under cause number COMPL/IRCLK/452/2017 and a determination as to whether the said ruling is sound when viewed in light of the sole jurisdiction of the Constitutional Court over Constitutional Matters, save for the Bill of Rights as provided under the Constitution of Zambia Act No. 2 of 2016*
- (ii) *An Interpretation of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and the Industrial Relations Act Chapter 269 of the Laws of Zambia to determine whether outside the provisions of section 55(3)(b) of the Employment Code Act*

2019, the Industrial Relations Division of the High Court can entertain claims seeking for an employee to continue receiving a monthly salary or be retained on the payroll pending payment of full benefits/pension as provided under Article 189 of the Constitution as amended.

- (iii) A determination of whether the Respondent's claim to continue receiving his monthly salary pending payment of his benefits is properly before the Industrial Relations Division of the High Court as opposed to the Constitutional Court.*
- (iv) Any other reliefs the Court might deem fit; and*
- (v) Costs of and incidental to the proceedings.*

[2]The brief facts leading to this action as deposed to by Hillary Duckworth, the Chief Executive Officer in the Applicant Company, are that on 16th November, 2017 the Respondent instituted proceedings in the Industrial Relations Division of the High Court against the Applicant claiming, among other reliefs the following relief:

“(v) An (sic) declaration that the Complainant is entitled to continue receiving his monthly salary from the Respondent until his full severance benefits are paid and an order for the payment of his salary until severance benefits are paid.”

[3] In light of this relief, the Applicant’s advocates applied before the High Court Judge for a notice to raise a preliminary issue on 3rd July, 2020 for the Court to decide whether the High Court has jurisdiction to deal with claim (v) of the Complaint in view of the fact that the same would involve the interpretation of constitutional provisions which are the preserve of the Constitutional Court.

[4] The Judge of the High Court, Mr. Justice E. Mwansa, rendered an *ex tempore* ruling declining the application on the ground that the matter raised only incidents of an employee, employer relationship. The Applicant was of the view that it is pertinent that this Court renders its interpretation of the holding in the said Ruling as to whether it was in line with the Constitution of Zambia as amended. The Applicant also sought for this Court to

render an interpretation with regard to whether the claim was properly before the Industrial Relations Division of the High Court.

[5] In the Applicant's skeleton arguments, it is argued that Article 128 of the Constitution of Zambia as Amended stipulates the jurisdiction of the Constitutional Court. That because the Applicant sought to remain on the payroll until his separation/termination severance package was paid, such a claim can only be made to the Constitutional Court.

[6] The applicant contends that according to the Employment Code, the only exception giving the Industrial Relations Division of the High Court jurisdiction to hear a matter relating to the retention of an employee on the payroll is found under section 55(3)(b) of the Employment Code Act No. 3 of 2019. This applies only to employees declared redundant. It was submitted that in *casu*, there was no redundancy but the Respondent was asking to remain on the payroll pending his severance benefits.

[7] In opposing the application, the Respondent relied on the affidavit in opposition deposed to by himself and skeleton arguments. The gist of his affidavit was that the Constitutional

Court has jurisdiction to interpret only the Constitution and not Rulings or Judgments delivered by another Court of competent jurisdiction. He contended that the impugned claim before the Industrial Relations Division of the High Court was properly before that Court because the claim related to a right that emanated from an employee-employer relationship which existed between the Applicant and the Respondent. It was therefore not necessary for this Court to render an interpretation as to whether the claim was properly before the Industrial Relations Division of the High Court.

[8] In the Respondent's skeleton arguments he argued that prior to this action, the Applicant launched an appeal to this Court which was subsequently dismissed on account of it having been irregularly commenced. He contended that this Court in dismissing the appeal guided that:

"The Court's jurisdiction begins with Article 1(5) of the Constitution which states that a matter relating to the Constitution shall be heard by this Court."

[9] The Court went further to state the Court's jurisdiction as outlined in Article 128 of the Constitution. It was further guided that:

"It is the holding of this Court that it has no jurisdiction to entertain an appeal against a refusal by another court or tribunal to refer a matter to it. The Court's guidance is that a party that is dissatisfied with the presiding person's decision refusing to refer an alleged constitutional question to this Court ought to apply to stay the proceedings in that Court and initiate a separate action for the interpretation of the issue by this Court in accordance with Order IV of the CCR."

[10] It was the Respondent's argument that had the Applicant heeded the Court's guidance, they would not have convoluted the issue by seeking a review or explanation of the decision of the High Court Judge but a determination of whether or not the Respondent's claim to be retained on the payroll and receive monthly salaries falls within the jurisdiction of this Court as directed under Article 128(1)(e) of the Constitution as amended. That the originating summons therefore has improperly moved the Court by invoking the Court's jurisdiction as provided under

Article 128(1)(a) and (c) in light of the Applicant's 1st and 2nd relief seeking the Court's interpretation of the Ruling of the Court below, the Industrial Labour Relations Act and the Employment Code. It was argued that the originating summons do not seek the interpretation of any provision of the Constitution and that this was an appeal dressed and presented to have been commenced within this Court's jurisdiction as contemplated under Article 128(1) of the Constitution.

[11] It was further submitted that in this Court's Ruling in the earlier matter, it was further held that:

“Article 128(2) provides for referrals where the presiding Court finds that there is a constitutional question in issue. It does not provide for what is to happen if the presiding court finds that there is no constitutional question and the affected party wants to appeal to this Court because Article 128(2) must be read with Article 128(1) (d).”

[12] It was argued that there being no constitutional provision supporting non-election appeals, there can be no leeway for appeals against a refusal to refer a matter to this Court.

[13] As to whether the Industrial Relations Division of the High Court has jurisdiction to hear and make a determination on whether the Respondent should stay on the payroll until his severance benefits are paid, the Respondent referred to this Court's decision in **Bernard Shajilwa & 4 Others v Attorney General & 3 others**¹ that the jurisdiction of this Court is exclusive over constitutional matters and this Court is precluded from adjudicating upon general questions of law which are not constitutional in nature whether criminal or civil.

[14] It was submitted that the Applicant sought for the determination of whether the Respondent's claim to continue receiving his monthly salary pending payment of his benefits falls within the jurisdiction of the Constitutional Court as provided under Article 128(1) of the Constitution. It was contended that this matter was supposed to be commenced by Petition and referred to this Court's guidance in the earlier case of **Bric Back Limited T/A Gamamwe Ranches v Neil KirkPatrick**² at page R13 of the ruling where the Court stated that:

“Further, Order IV of the CCR on commencement of proceedings, provides in rule 1(1) that except as otherwise provided in the Constitution, the Act and these Rules, all matters under the Act shall be commenced by Petition.”

[15] It was submitted that because the issue raised by the Applicant on the jurisdiction of the Constitutional Court in this matter was not expressly provided for, it should therefore be commenced by way of petition. As such, that the matter was therefore improperly before this Court and reference was made to a number of authorities including **Polythene Products (Zambia) Limited v Cyclone Hardware Construction Limited and Another**³ on mode of commencement.

[16] With respect to whether the Respondent’s claim for the declaration that he should be receiving his monthly salary until his full benefits are paid is within the jurisdiction of the Industrial Relations Division, the Respondent referred the Court to sections 85 and 85A of the Industrial and Labour Relations Act which sets out the Division’s jurisdiction. It was submitted that the Respondent did not seek for the interpretation of an

Article in the Constitution but merely sought a declaration that he is entitled to receive his monthly salary until full settlement of his terminal benefits and as such Justice Mwansa had jurisdiction to hear and determine the Respondent's claim.

[17] It was contended that the mere fact that a relief is provided for by the Constitution does not automatically mean that an issue becomes a constitutional matter to be commenced and determined by the Constitutional Court. It was submitted that Article 189(2) of the Constitution as amended has been interpreted by this Court in a plethora of cases such as **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission** and **Owen Mayapi and Other v The Attorney General**⁵.

[18] The Applicant filed in its skeleton arguments in reply whose essence was that Order IV of the Constitutional Court Rules provides that all matters relating to the interpretation of the Constitution shall be commenced by way of Originating Summons.

[19] It was contended that reliefs 1, 2 and 3 were dependent on the Court's interpretation of Articles 187 and 189 and therefore the matter was properly commenced before this Court.

[20] It was also submitted that the Applicant's contention was that in order for the Industrial Division of the High Court to have jurisdiction in a matter, it must relate to labour disputes that emanate from the Industrial and Labour Relations Act and the Act provides for the remedies which relate to labour matters. In the case in *casu*, the Industrial Relations Division of the High Court lacked competence to determine a matter that was beyond its scope. Counsel referred to a Supreme Court decision of **N.B. Mbazima and Others Joint Liquidation of Zimco Limited (In Liquidation) and Rueben Vera**⁶ where the Court found that the Industrial Relations Division had no jurisdiction to entertain matters relating to the impugning of certificates of land.

[21] It was contended that it was incorrect to argue that any Court can entertain matters if the reliefs are contained in the Constitution. Further, that the Respondent's relief in paragraph (v) had the effect of contending that if he is not retained on the payroll then the Applicant is in contravention of the Article 189 of the Constitution and therefore their claim falls under Article 128 of the Constitution. Counsel went on to attack the learned

High Court Judge's ruling and referred to authorities where guidance was given on what should be contained in a judgment.

[22] We have considered the facts before us and the arguments by the parties. The matter was commenced before this Court on account that there were constitutional issues that arose in a matter before the Industrial Relations Division of the High Court which required this Court's interpretation. However, the High Court Judge in his ruling was of the view that the matters that arose were of an employer / employee relationship and declined the application to refer the matter to this Court.

[23] From the onset, we hasten to state that as argued by the learned Counsel for the Respondent, the Applicant initially brought this matter before this Court as an appeal against the High Court Judge's decision to decline to refer the matter to this Court when the action allegedly raised constitutional issues. We dismissed the appeal highlighting that there was no constitutional provision supporting non-election appeals and that there can be no leeway for appeals against a refusal to refer a matter to this Court under Article 128 (2) of the Constitution.

[24] We also wish to take judicial notice that the Applicant also commenced an appeal to the Court of Appeal where it challenged the manner in which the High Court Judge rendered his ruling and his lack of jurisdiction to hear and determine matters relating to reliefs (i), (iii) and (iv). The Court of Appeal held that the High Court Judge was well founded when it gave an *extempore* ruling and it was found that he had given his reason for his refusal to refer the matter to the Constitutional Court upon his consideration of the reliefs sought and the contract of employment which gave rise to the reliefs that were being sought.

[25] It therefore follows that the issue of whether the ruling conformed to what a ruling or judgment should constitute as was argued in the Applicant's arguments in reply was fully dealt with by the Court of Appeal and cannot be a matter of consideration before this Court. This is further premised on our earlier guidance that an appeal from the Court of Appeal cannot lie to this Court but to the Supreme Court. The jurisdiction of this Court does not extend to review of judgments and rulings in such instances as we already guided.

[26] Coming back to the reliefs sought before this Court, the first relief sought seeks for this Court to interpret the pronouncement by the learned Judge of the Industrial Relations Division and whether the ruling is sound in light of the Constitutional Court's jurisdiction. The Respondent has contended that this relief seeks for the Court to delve into and review the ruling of the learned High Court Judge which is not the mandate of the Constitutional Court. We will restate our position on this matter as we did in the earlier action of **Bric Back Limited T/A Gamamwe Ranches v Neil KirkPatrick**² as follows::

"The Constitutional Court of Zambia is a specialised Court, set up to resolve only constitutional questions. In that sense, it is separated from the general court hierarchy under which matters move from the lower courts up to the final court of appeal..."

In the Zambian court system, all questions of a general nature, including procedural questions, must proceed through the courts of general jurisdiction."

[27] We went on to state that:

“Article 128 (2) provides for referrals where the presiding court finds that there is a constitutional question in issue. It does not provide for what is to happen if the presiding court finds that there is no constitutional question and the affected party wants to appeal against that decision.”

[28] Article 128 of the Constitution is clear on this Court’s jurisdiction. It provides that:

“(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear –

(a) a matter relating to the interpretation of this Constitution;

(b) a matter relating to a violation or contravention of this Constitution;

(c) a matter relating to the President, Vice-President or an election of a President;

(d) appeals relating to election of Members of Parliament and councilors; and

(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

(3) Subject to Article 28, a person who alleges that –

(a) an Act of Parliament or statutory instrument;

(b) an action, measure or decision taken under law; or

c) an act, omission, measure or decision by a person or an authority;

[29] In light of Article 128 and as we guided in our earlier decision in ***Brick Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick***², it is not the mandate of this Court to delve into or review a ruling of a Court or tribunal of competent jurisdiction except as provided within the Constitutional Court's jurisdiction.

It is also noted that the refusal to refer a matter to the Constitutional Court currently cannot be appealed against to this Court.

[30] We find that this relief, as was the case under cause 2020/CCZ/A002, seeks for this Court to intervene in the ruling

of the learned trial Judge who refused to refer the matter to the Constitutional Court on account that the matter raised issues which arose from an employee / employer relationship which is not the mandate of the Constitutional Court.

[31] We hold the view that this issue has been extensively dealt with and we call in aid the case of ***DBZ and Mary Nc'ube v Christopher Mwanza and 63 Others***⁷ where the Supreme Court in a decision delivered by Mambilima, DCJ, as she then was, held among other things that there must be finality to litigation especially where a party is represented by counsel.

[32] We accordingly find that there is no merit in the arguments seeking this relief sought.

[33] We now turn to the second and third reliefs which will be dealt with as one because both reliefs seek the interpretation as to whether the Industrial Relations Division of the High Court can hear a matter where a party seeks a relief which is provided for under Article 189 of the Constitution.

[34] Under the second relief, the Applicant seeks this Court to interpret the Constitution of Zambia (Amendment) Act No. 2 of 2016 and the Industrial Relations Act Chapter 269 of the Laws

of Zambia in order to determine whether, outside the provisions of section 55(3)(b) of the Employment Code Act 2019, the Industrial Relations Divisions of the High Court can entertain claims seeking for an employee to continue receiving a monthly salary or be retained on the payroll pending payment of full benefits/pension as provided under Article 189 of the Constitution as amended.

[35] Under the third relief, the Applicant requires this Court to make a determination as to whether the Respondent's claim to continue receiving his monthly salary pending payment of his benefits is properly before the Industrial Relations Division of the High Court as opposed to the Constitutional Court.

[36] Counsel for the Respondent has submitted that it does not mean that just because a relief sought is provided for under the Constitution, the matter should be determined by the Constitutional Court. She highlighted the jurisdiction of the Industrial Relations Division under section 85 of the Industrial and Labour Relations Act. Sections 85(1) to (4) and 85A provide that:

“(1) The Court shall have original and exclusive jurisdiction to hear and determine any industrial relation matters and any proceedings under this Act. (underlined for our emphasis)

(2) The Court shall have jurisdiction to commit and punish for contempt any person who disobeys or unlawfully refuses to carry out or to be bound by an order made against that person by the Court under this Act.

(3) The Court shall not consider a complaint or application unless it is presented to it within thirty days of the occurrence of the event which gave rise to complaint or application:

Provided that, upon application by the complainant or applicant, the Court may extend the thirty day period for three months after the date on which the complainant or applicant has exhausted the administrative channels available to that person.

(4) The Court shall have the jurisdiction to hear and determine any dispute between any employer and an

employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter. (underlined for our emphasis)

(5).....

(6).....

(7)....

(8)....

(9) For the purpose of this section "industrial relations matters" shall include issues relating to-

(a) inquiries, award and decisions in collective disputes;

(b) interpretation of the terms of awards, collective agreements and recognition agreements;

(c) general inquiries into, and adjudication on, any matter affecting the rights, obligations and privileges of employees, employers and their representative bodies.

85A. Where the Court finds that the complaint or application presented to it is justified and reasonable, the Court shall

grant such remedy as it considers just and equitable and may-

(a) award the complainant or applicant damages or compensation for loss of employment;

(b) make an order for reinstatement, re-employment or re-engagement;

(c) deem the complainant or applicant as retired, retrenched or redundant; or

(d) make any other order or award as the court may consider fit in the circumstances of the case.”

[37] Our understanding of the above provisions is that they define the jurisdiction of the Industrial Relations Division of the High Court by stating matters that the Division can hear and the awards that can be awarded within its jurisdiction. To be specific, the reading of these provisions reveals that the Industrial Relations Division has exclusive jurisdiction to determine matters relating to industrial relations. Industrial relations under section 85(9) also means general inquiries into,

and adjudication on, any matter affecting the rights, obligations and privileges of employees, employers and their representative bodies, among other things.

[38] It therefore follows that the Industrial Relations Division of the High Court has jurisdiction to determine any dispute arising from an employee / employer relationship and relating to the rights, obligations and privileges of an employee and an employer.

[39] We hold the view that the Industrial Relations Division of the High Court has been granted clearly stipulated jurisdiction and this relates to all disputes involving industrial relations. The dispute between the Applicant and the Respondent is purely a matter falling within industrial relations and it gives the Industrial Relations Division of the High Court complete jurisdiction to determine the matter. We hold the view that even though a relief sought is provided for under the Constitution, it does not in any way oust the jurisdiction of the Industrial Relations Division of the High Court unless what is sought is the interpretation of the constitutional provision referred to. The Applicant has however not brought an action for the

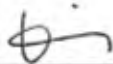
interpretation of Article 189 of the Constitution in this matter commenced by originating summons.

[40] We therefore find that the Industrial Relations Division of the High Court is a court of competent jurisdiction to determine the dispute between the Applicant and the Respondent including making a determination whether the Respondent, based on the facts before it, should continue drawing a monthly salary pending final settlement of his pension benefits. This Court has in several cases guided on who qualifies to fall under article 189 of the Constitution and Courts have been ably guided. We therefore agree with Counsel for the Respondent's submissions that where this Court has given guidance on a matter, as we guided on the interpretation and use of Article 118 (1)(e) of the Constitution in the case of **Access Bank Zambia Limited v Attorney General**⁸ and on Article 189 of the Constitution in the case of **Lubinda Ngala and Another v Anti-Corruption Commission**⁴, it is not necessary to raise the same issue before the Constitutional Court where there is no ambiguity in the understanding of a constitutional provision.

[41] We accordingly find no merit in the Applicant's originating summons and we dismiss it with costs to the Respondent.



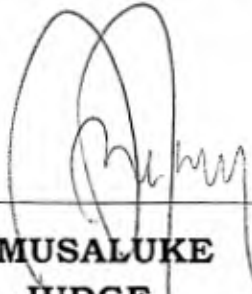
**H. CHIBOMBA
PRESIDENT
CONSTITUTIONAL COURT**



**M.S. MULENGA
JUDGE
CONSTITUTIONAL COURT**



**P. MULONDA
JUDGE
CONSTITUTIONAL COURT**



**M. MUSALUKE
JUDGE
CONSTITUTIONAL COURT**



**M. CHITABO, S.C.
JUDGE
CONSTITUTIONAL COURT**