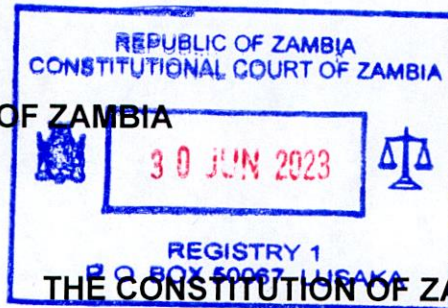


IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)



2022/CCZ/0016

IN THE MATTER OF:

THE CONSTITUTION OF ZAMBIA, CHAPTER
1 OF THE LAWS OF ZAMBIA (AMENDMENT)
ACT NO. 2 OF 2016

IN THE MATTER OF:

ARTICLE 128 (3) (b) AND (c) OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 OF
THE LAWS OF ZAMBIA (AMENDMENT) ACT
NO. 2 OF 2016

IN THE MATTER OF:

ARTICLE 189 (1) AND (2) OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 OF
THE LAWS OF ZAMBIA (AMENDMENT) ACT
NO. 2 OF 2016

AND IN THE MATTER OF:

CONTRAVENTION OF ARTICLE 189 (1) AND
(2) OF THE CONSTITUTION OF ZAMBIA,
CHAPTER 1 OF THE LAWS OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

AND IN THE MATTER OF:

PART 9 SECTION 33 (4) OF THE ZAMBIA
NATIONAL SERVICE ACT CHAPTER 121 OF
THE LAWS OF ZAMBIA

BETWEEN

EMMANUEL MULENGA

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

Coram: Munalula PC, Musaluke and Mulife JJC. On 19th April, 2023
and 30th June, 2023

For the Petitioner: In Person

**For the Respondent: Mr. P. Shambulo and Col. F. Chidakwa,
Principal State Advocates – Attorney
General’s Chambers**

JUDGMENT

Musaluke, JC delivered the Judgment of the Court.

Cases referred to:

1. Lucas Haamatowe and Others v Zambia Postal Services Corporation
2022/CCZ/0015
2. Benjamin Mwelwa v The Attorney General 2020/CCZ/006

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as
amended by the Constitution of Zambia (Amendment) Act No. 2 of
2016
2. Zambia National Service Act Chapter 121 of the Laws of Zambia

Introduction

- [1] This is a Judgment relating to the Petition filed by Mr. Emmanuel Mulenga (the Petitioner). The Petitioner alleges that the Respondent has contravened Article 189(1) and (2) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) as read with section 33 (4) of the Zambia National Service Act Chapter 121 of the Laws of Zambia (the ZNS Act), by its failure to retain the Petitioner on the payroll pending Appeal against his discharge from the Zambia National Service (the ZNS).
- [2] The Petitioner seeks relief as follows:
- i. **A declaration that the Petitioner was entitled to be retained on the payroll during the time of appeal to the Zambia National Service Commandant and to the President and that the claim by the ZNS to have discharged the Petitioner without concluding the appeal is illegal as long as his appeal is not heard;**
 - ii. **A declaration that the Petitioner is entitled to payment of salaries, allowances, mealie meal subsidy among others that were not paid to him during the time of the appeal to the President as prescribed by ZNS Act;**
 - iii. **An Order to re-instate the Petitioner in the Zambia National Service, pay roll and pay all that the Petitioner is entitled to and consequently retire him accordingly;**
 - iv. **Damages for mental torture as a consequence of unlawful punishment;**
 - v. **Costs of this action as well as interest;**

vi. Any other orders that the court deems fit.

Petitioner's case

- [3] The facts as contained in the Amended Petition and the Affidavit verifying facts are that, the Petitioner was employed by the ZNS in 1987 and worked as a driver at the ZNS headquarters and rose to the rank of Staff Sergeant.
- [4] That on 26th November, 2004 the Petitioner's services were terminated by the Commanding Officer of the ZNS after an allegation that the Petitioner whilst on duty attempted to steal fuel from the bus he was driving on 5th November, 2004. That the Petitioner was thereafter, removed from the payroll.
- [5] The Petitioner appealed against his discharge to the ZNS Commandant on 10th December, 2004 in accordance with section 33(1) of the ZNS Act. In a response dated 27th June, 2006 the Commandant upheld the discharge against the Petitioner.
- [6] Being dissatisfied with the Commandant's verdict, the Petitioner, on 6th July, 2006 appealed to the President of the Republic of Zambia (the President), the Commander in Chief of the Armed Forces in accordance with section 33(3) of the ZNS Act.

- [7] The Petitioner alleges that on 14th November, 2006 he wrote to the ZNS administration and claimed salary arrears, leave benefits, allowances and mealie meal subsidies which he claims he was entitled to, pending the two-year appeal to the ZNS Commandant. The Petitioner's claims were rejected, which resulted in the Petitioner instituting a legal action against the ZNS, which matter was settled by way of a consent judgment on 13th September, 2010.
- [8] On 25th September, 2009 the Petitioner received a response from the President in which he was assured that his appeal was receiving active attention. Consequently, the Petitioner received another letter from the office of the President, dated 30th October, 2009 in which the Petitioner was advised to re-lodge his appeal with the ZNS, which he did on 12th November, 2009.
- [9] The Petitioner avers that since re-lodging his appeal to the President, he has written several reminder letters to State House dated 10th April 2007, 17th December 2013, 10th August 2015 and 31st July 2020 and was told that the ZNS did not submit the case proceedings to State House to enable the President make a decision on the appeal.

[10] That on 15th November, 2017 the Petitioner wrote to the ZNS administration to have him officially retired from the service having attained the age of 55 years and stating that he was still an employee of the ZNS by virtue of section 33(4) of the ZNS Act, as his appeal was pending before the President. The ZNS rejected the Petitioner's request claiming that the Petitioner had been discharged from service in June, 2006.

[11] Based on the above, the Petitioner alleges that the Respondent contravened Article 189(2) of the Constitution which provides as follows:

Where a pension benefit is not paid on a person's last working day, that person shall stop work but the person's name shall be retained on the payroll, until payment of the pension benefit based on the last salary received by that person while on the payroll.

[12] The Petitioner anchors his arguments on section 33 of the ZNS Act which provides as follows:

33. (1) Any Serviceman aggrieved by any finding of an appropriate tribunal or any award of an appropriate tribunal may, within seven days of the notification to him thereof, appeal to the Commandant in writing and the Commandant may quash, confirm or vary any finding of the appropriate tribunal or substitute therefore any finding at which the appropriate tribunal could have arrived upon the evidence, including any additional evidence which the Commandant, in his discretion, admits at the hearing of the appeal and may quash, confirm or remit any punishment imposed by the appropriate tribunal or may

substitute therefore any punishment which the appropriate tribunal could have imposed.

(2) Where the Commandant hears any new evidence on appeal, he shall give the appellant an opportunity of being present and putting questions to any witnesses so heard.

(3) Any Serviceman aggrieved by the finding or award of the Commandant under the provisions of subsection (1) of this section, or subsection (3) of section thirty-one, may, within fourteen days of the notification to him thereof, appeal to the President in writing and the President may confirm or vary any finding of the Commandant and may vary, remit or confirm any punishment imposed or confirmed by the Commandant and in all such cases the decision of the President shall be final.

(4) In every case in which an appeal is lodged, the punishment shall be suspended during the hearing of the appeal.

[13] The Petitioner contends that he was entitled to be retained on the payroll during the time of his appeal to the ZNS Commandant and to the President and that the action by the ZNS to have him discharged without concluding the appeal process, is illegal and in breach of section 33 (3) of the ZNS Act.

[14] That by removing him from the payroll and not reinstating him into employment while his appeal against discharge was being attended to by the President, Article 189 (2) of the Constitution has been contravened by the Respondent. He bases his argument on section 33 (4) of the ZNS Act which provides that once an appeal is lodged, the disciplinary process is suspended during the hearing of the appeal. He

also claims that, the ZNS's decision to discharge him without writing an official discharge letter, was a contravention of Article 189(2) as read with Article 128(3)(b) and(c) of the Constitution.

Respondent's case

[15] In response, the Respondent filed an Answer, Skeleton Augments and List of Authorities.

[16] The gist of the Respondent's arguments is that the Petition is misconceived, as all the facts that gave rise to the claim by the Petitioner arose in 2004 and that the Petitioner was officially discharged from the ZNS in June, 2006. That Article 189 of the Constitution only came about after the 2016 constitutional amendments.

[17] The Respondent argues that the events that led to the Petitioner to being discharged from the ZNS happened in 2004. That Article 189 of the Constitution which the Petitioner has relied upon to bring an action in this Court was not in place at that time. On that point, the Respondent, therefore, argues that the provisions of Article 189 of the Constitution cannot apply to the Petitioner as the Constitution has no

retrospective effect and that this Court, accordingly, lacks jurisdiction to entertain this Petition.

[18] In addition, it is the Respondent's submission that this Court deals with matters that involve violations and interpretation of the Constitution and not interpretation of provisions of statutes such as the ZNS Act which the Petitioner has relied upon to invoke this Court's jurisdiction.

[19] The Respondent prays that the petition be dismissed with costs.

Determination

[20] We have considered the Petition, the claims therein, the Respondent's Answer with the accompanying Affidavit verifying Answer and the Reply by the Petitioner. We have also considered the Skeleton Arguments filed by the Respondent as well as the *viva voce* submissions made during the hearing of the Petition. In addition, we have carefully perused the evidence as contained in the Record of Proceedings filed on 8th February, 2023.

[21] The Respondent has questioned our jurisdiction to entertain the Petition alleging that the facts on which the Petition is anchored happened before the 2016 constitutional amendments that introduced

Article 189 of the Constitution. We therefore, find it imperative that we deal with this issue principally. In that regard, we pose the following question for determination:

- i. Does the Petition herein fall within the jurisdiction of this Court?

[22] Article 128 (1) (e) of the Constitution gives this Court the jurisdiction to determine whether or not a matter falls within the jurisdiction of this Court and provides as follows:

**128 (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—
(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.**

[23] It is therefore, vital that we examine whether or not the allegations of breach of the Constitution made by the Petitioner in this matter fall within the purview of this Court's jurisdiction.

[24] The substance of the Petition is that the Respondent breached the provisions of Article 189 (2) of the Constitution by removing the Petitioner from the payroll and not reinstating him into employment while his Appeal was pending before the ZNS Commandant and the President.

[25] The Petitioner's reasoning grounded on Article 189 (2) of the Constitution is to the extent that he has not been paid his pension benefits as the appeal process is in progress he ought to be retained on the payroll. That his fate as to whether or not he is in employment with the ZNS can only be determined at the conclusion of the appeal process. That until that time, he should be treated as an employee of the ZNS and be placed on the payroll.

[26] It is clear from the evidence on Record that the facts giving rise to the Petition herein, arose in 2004, when the Petitioner's services were terminated after an allegation emerged that whilst on duty, he attempted to steal fuel from the bus he was driving. The facts on record reveal that a disciplinary tribunal was constituted to deal with these allegations after which he was discharged. The Petitioner then appealed his discharge sometime in December 2004 and received a response from the ZNS Commandant, confirming his discharge on 27th June, 2006. The Petitioner later appealed to the President against his discharge in accordance with section 33 (3) of the ZNS Act.

[27] What we gather from the record is that, as at June 2006 the Petitioner, stood discharged from the ZNS.

[28] It is not in dispute that the Constitution of Zambia (Amendment) Act No. 2 of 2016 which introduced Article 189 only came into force on 5th January, 2016 way after the Petitioner was discharged.

[29] The Petitioner is in essence pleading that we look at the actions and processes that were done to him between the periods 2004 to 2006 through the lenses of Article 189 (2) of the Constitution. He is inviting us to examine whether or not Article 189 (2) of the Constitution has a retrospective effect.

[30] In the case of **Lucas Haamatowe and Others v Zambia Postal Services Corporation**¹ we affirmed our earlier decision in the case of **Benjamin Mwelwa v The Attorney General**² that for a statutory or constitutional provision to have retrospective effect, the wording imputing retrospective effect must be clear. We went on to state as follows:

A perusal of the Constitution and indeed a plain reading of the said Article 189 (2) reveals that the clause does not provide for retrospective application.

[31] The Petitioner cannot therefore, seek to enforce his rights under the provisions of Article 189 (2) of the Constitution which was not in existence at the time of his discharge from the ZNS in 2006. Article 189

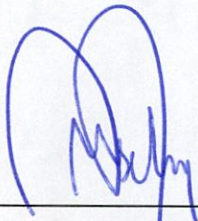
(2) of the Constitution does not have a retrospective effect, it cannot therefore, apply to the Petitioner's facts which arose in 2006, prior to its enactment as doing so would amount to applying the law retrospectively.

[32] We therefore, determine that the Petition herein does not fall within the jurisdiction of this Court as per dictates of Article 128 (1) (e) of the Constitution.

[33] We accordingly, dismiss the petition and order that each party bear own costs.



M. M. MUNALULA, JSD
PRESIDENT
CONSTITUTIONAL COURT



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



K. MULIFE
CONSTITUTIONAL COURT JUDGE