

IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

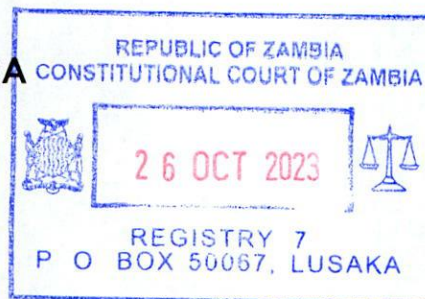
2023/CCZ/0012

IN THE MATTER OF: ORDER IV RULE 1 OF THE
CONSTITUTIONAL COURT
RULES, 2016

IN THE MATTER OF: ALLEGED CONTRAVENTION OF
ARTICLE 189(2) OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

BETWEEN:

TRESFORD MUBANGA



PETITIONER

AND

ZESCO LIMITED

RESPONDENT

CORAM: SITALI, MUSALUKE AND CHISUNKA, JJC ON 12TH
SEPTEMBER, 2023 AND 26TH OCTOBER, 2023.

For the Petitioner: Mr. P. Zulu – Messrs. Nganga Yalenga and
Associates.

For the Respondent: Mrs. J. Kunda – Principal Legal Officer, In-
House Counsel, ZECO Limited.

R U L I N G

Cases referred to:

1. Antonio Ventriglia v Finsbury Investment Limited, S.C.Z. Appeal No. 2 of 2019
2. Wang Ying v Youjun Zhuang and Others, 2020/CCZ/0015
3. Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick, 2021/CCZ/0002
4. Levy Mwale v Zambia National Broadcasting Corporation, 2020/CCZ/001
5. Mcqueen Zenzo Zaza v ZESCO Limited, 2018/CCZ/006
6. Gervas Chansa v Attorney General, 2019/CCZ/004
7. Lubunda Ngala and Jason Chulu v Anti-Corruption Commission, CCZ Selected Judgment No. 4 of 2018
8. Anderson Mwale and Others v Zambia Open University, 2021/CCZ/001

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Industrial Relations Act, Chapter 269 of the Laws of Zambia
3. The Employment Code Act No. 3 of 2019
4. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016
5. The Rules of the Supreme Court of England, 1965 (1999 Edition)

Introduction

1. When we heard this motion, we sat with our brother Justice M. K. Chisunka who is currently indisposed. The Ruling is therefore, by the Majority
2. This Ruling decides an application by the Respondent for an Order to determine the matter on points of law. The application is made pursuant to order 14A of the Rules of the Supreme Court of England, 1965 (1999 Edition) (the White Book).

Background

3. The background to this application is that the Petitioner commenced an action by way of Petition on 26th April, 2023, against the Respondent. The relevant underlying facts, as per the Petition and the affidavit verifying facts sworn by the Petitioner, are summarised below and were to the effect that:

3.1. The Petitioner was employed by the Respondent as a Mechanical Fitter in 2005 and rose through the ranks to the position of Electrical Technician. His employment ended on 27th November, 2019, when the Respondent accepted his application to terminate his employment by way of redundancy in accordance with clause 18 of the Collective Agreement applicable to the Petitioner.

3.2. Upon the cessation of the Petitioner's employment, the Respondent paid him salaries at the rate of K18,679.38 per month for the months of December, 2019, January, 2020, and February, 2020. The Respondent, however, recovered the February, 2020, salary on 14th September, 2020, citing that it had been erroneously paid to the Petitioner.

3.3. The Petitioner was paid his terminal benefits in the sum of K623,245.85 and K135,907.20 on 13th January and 5th

October, 2020, respectively. Finally, on 17thDecember, 2020, the Respondent paid the Petitioner the sum of K 23,595.00 being monies for three months pay in lieu of notice.

3.4. The Respondent withheld the Petitioner's emoluments and removed him from the payroll in February, 2020, before he was paid his full pension benefits. Further, the Petitioner was not paid compensation by the Respondent for the termination of his employment by way of redundancy.

4. Based on these facts, the Petitioner sought the following relief:

- (i) A declaration that the conduct of the Respondent to remove the Petitioner from the payroll before the payment of his pension benefits owed to him is contrary to Article 189(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016;
- (ii) A declaration that the conduct of the Respondent of withholding the emoluments of the Petitioner is unconstitutional;
- (iii) An order that the Petitioner be paid all his allowances excluded from the three (03) months basic salary pay in lieu of notice by the Respondent including the withheld salary arrears until such a time that the Petitioner will be paid his pension benefits in full;
- (iv) An order for damages for summary termination of employment by redundancy;
- (v) Interest; and
- (vi) Legal costs or such order as this Honourable Court shall deem just.

5. On 1st June, 2023, the Respondent filed this application for an Order to determine the matter on points of law. The Respondent presented two questions for the determination couched in the following terms:

- (i) **Whether this Court does not have jurisdiction to hear matters on alleged summary termination of employment; and**
- (ii) **Whether the Petition is an abuse of process, and if so, that the entire action be dismissed.**

THAT if the said questions be answered in the positive, then the action be dismissed, and that the Petitioner do pay the Respondent the costs thereof but if the questions be answered in the negative then the Court proceeds to set the matter down for trial.

6. This is the context under which the Respondent's application to determine this matter on points of law came before us.

Respondent's affidavit evidence in support of the application

7. The Respondent's application was supported by an affidavit in support sworn by Derrick Ngubai, the Respondent's Principal Officer-Employee Relations. The affidavit evidence was to the effect that:

7.1. The Petitioner was removed from the payroll upon being paid his pension benefits in full on 13th January, 2020 and there was therefore no need to continue paying the Petitioner monthly salaries. The Respondent had, however, inadvertently paid the Petitioner a salary for the month of February, 2020. This salary was recalled because paying the

Petitioner for a period not worked for, after he had been paid his pension benefits, would have amounted to unjust enrichment.

7.2. The Respondent discovered an omission when computing the Petitioner's pension benefits on 13th January, 2020 which resulted in an underpayment. This omission was later corrected by the Respondent and it did not vitiate the payment for pension benefits made on that date neither did it entail that the Petitioner was not paid nor warrant the retention of the Petitioner on the payroll. The decision to remove the Petitioner from payroll after he was paid his full pension benefits was, therefore, constitutional

7.3. On 17th December, 2020, the Respondent paid the Petitioner three months basic pay in lieu of notice, which payment was not part of the computation for the Petitioner's pension benefits. The Respondent does not owe the Petitioner any allowances nor withheld salary arrears as he was correctly separated from employment.

Respondent's arguments in support of the application

8. The Respondent's written skeleton arguments in support of the application were to the effect that this matter must be dismissed for

want of jurisdiction and for being an abuse of court process. In particular, the Respondent:

- 8.1. Argued that pursuant to Order 14A of the White Book, this Court is suitably clothed with authority to determine preliminary issues on points of law by virtue of Article 128 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution). Further that any matter that does not fall within the scope of this Article cannot be entertained by this Court. He cited the Supreme Court case of **Antonio Ventriglia v Finsbury Investment Limited**⁽¹⁾ as authority for the proposition that a court that has no jurisdiction cannot take any step in a matter and any decision rendered by that court would be a nullity. A court, therefore, has an obligation to check whether it has jurisdiction to hear and determine a matter.
- 8.2. Submits that, in this case, the Petitioner seeks an order for summary termination of employment by way of redundancy. This remedy entails that the Petitioner is asking this Court to hear and determine whether his termination from employment was unlawful. Article 128 of the Constitution, however, shows that this Court does not have jurisdiction to entertain

allegations of unlawful termination of employment. In view of this, this Court has no jurisdiction to entertain the Petitioner's claim for damages for summary termination of employment and it must be dismissed for want of jurisdiction.

8.3. Further submits that the Petitioner also seeks this Court to hear and determine issues concerning salary underpayments or non-payments of one's salary. This Court, however, is not the right forum to make those determinations and it, therefore, has no jurisdiction to hear the Petition.

8.4. Also submits that the Petition is an abuse of process because the Respondent paid the Petitioner his pension benefits in full. The Petition is a misuse of the machinery of justice for an ulterior motive, namely, to punish the Respondent. In support of this submission, the Respondent relied on the case of **Wang Ying v Youjun Zhuang and Others**⁽²⁾.

9. At the hearing, Counsel for the Respondent relied on the case of **Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick**⁽³⁾ and submitted that this Court has already made an interpretation of Article 189(2) of the Constitution in relation to retention on the Payroll. That the Petitioner's claims concern the retention of the Petitioner on the payroll and not the interpretation of the

Constitution. Since this matter does not concern the interpretation of the Constitution it is, therefore, a case suitable to be dealt with by the Industrial Relations Division of the High Court (the IRD) and not this Court.

Petitioner's affidavit evidence in opposition to the application

10. In opposing the application, the Petitioner filed an affidavit in opposition and skeleton arguments. The affidavit was sworn by the Petitioner. It was averred that:

10.1. The Respondent paid him the first portion of his redundancy package on 13th January, 2020. The second portion was paid on 5th October, 2020. The Respondent, however, removed him from the payroll in February, 2020, eight (08) months before his full redundancy package was settled. He was, therefore, entitled to remain on the payroll for the duration that his redundancy package remained unpaid.

10.2. The Petitioner's removal from the payroll was unconstitutional and that his claims are rightly before this Court. This Court, therefore, has jurisdiction to entertain matters that pertain to redundancy and payment of salaries where one has not received his or her pension benefits in full after separation from employment.

- 10.3. The Petition raises constitutional issues and if it is dismissed the Petitioner will not be heard on matters pertaining to the abrogation of the Constitution by the Respondent and this will result in an injustice. The issues raised in this application must be dismissed because they are frivolous, vexatious and serve only to delay the hearing of the Petition.

Petitioner's arguments in opposition to the application

11. In his written skeleton arguments, the Petitioner submits that:

11.1. This Court has jurisdiction to hear and determine questions concerning summary termination of employment. This case hinges on the retention of an employee on the payroll until that employees' pension benefits are paid in full. The issue of retention on the payroll is a factual situation and cites the case of **Levy Mwale v Zambia National Broadcasting Corporation**⁽⁴⁾ in which this Court opined that an employee who has not been paid his or her pension benefit in full must continue to receive a salary until the pension benefit is liquidated in full.

11.2. In this case, the Petitioner alleges that the Respondent abrogated the Constitution by removing him from the payroll before his redundancy package was paid in full. As per the

case of **McQueen Zenzo Zaza v ZESCO Limited**⁽⁵⁾ a redundancy package qualifies to be compensation under the provisions of Articles 189 and 266 of the Constitution. Further, this Court has jurisdiction to grant all the remedies sought in the Petition pursuant to order 15(1)(g) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

- 11.3. It is not enough to allege that there is abuse of process without evidence in support of that allegation. The Respondent has failed to show how the Petition is an abuse of court process and the Petition is, therefore, not an abuse of court process.

12. In augmenting the written arguments, Counsel for the Petitioner stated that the Respondent raised a jurisdictional question in this application, therefore, it needs to be dealt with first. Counsel argued that this Court entertained matters similar to this one in cases such as **Levy Mwale**⁽⁴⁾ and **McQueen Zaza**⁽⁵⁾. The **McQueen Zaza**⁽⁵⁾ case is akin to the present Petition the only difference being that, that case was commenced in the IRD and not in this Court. Thus, when it came up for determination before this Court, it was dismissed on grounds that it had already been litigated before the IRD. The present Petition, however, was neither commenced in the

IRD nor has it gone through any prior litigation. As a result, this Court, therefore, has jurisdiction to entertain the Petition and the authority to do so is vested in this Court by the Constitution.

The Respondent's Reply

13. In reply to the Petitioners arguments in opposition, Counsel for the Respondent argued that the cases of **Levy Mwale**⁽⁴⁾ and **McQueen Zaza**⁽⁵⁾ relied on by the Petitioner could be distinguished from this case. The **Levy Mwale**⁽⁴⁾ case had a different set of facts as it concerned an agreement pertaining to retention on the payroll between the employer and the employee and the employer acted outside that agreement. The **McQueen Zaza**⁽⁵⁾ case was, at first instance, brought before the IRD and not this Court. As such, this matter should also have been commenced in the IRD and not in this Court.

Issues for Determination

14. The Respondent's application poses two questions for determination. These questions appear at paragraph four of this Ruling. We are of the view that the main issue arising from the two questions is whether or not the Petition should be dismissed for want of jurisdiction and abuse of court process.

Evaluation and determining the Issue

15. We have considered the Respondent's application to determine the matter on points of law together with the affidavit evidence, the written skeleton arguments filed by the parties and the oral arguments made by Counsel. Our approach in determining the main issue, is to answer the two questions presented for determination as they have been posed in the Respondent's application.

Question One

16. Question one of the application raises issues that go to the jurisdiction of this Court. The Respondent contends that this Court has no jurisdiction to hear and determine the Petition because it concerns the termination of employment by way of redundancy. The Respondent argues that this matter must have been commenced before the IRD and not this Court. The Petitioner, on the other hand, heavily relied on the **McQueen Zaza**⁽⁵⁾ case and asserted that this Court has jurisdiction to hear the Petition because it alleges a violation of Article 189(2) of the Constitution.
17. The starting point when determining any question regarding the jurisdiction of this Court is Article 128(1) of the Constitution which provides that:

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 councillors; and

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

18. Taking into account the affidavit evidence and submissions herein, our considered view is that the issue that arises is whether the whole Petition herein exclusively raises constitutional issues or questions that can only be heard and determined by this Court in terms of Articles 1(5) and 128 of the Constitution. To put it simply, whether or not this Court has the jurisdiction to entertain the Petition. We hasten to mention that we have the jurisdiction to determine this issue under Article 128(1)(e) of the Constitution which bestows on us the jurisdiction to determine whether or not a matter falls within the jurisdiction of this Court.
19. In the case of **Bric Back Limited**⁽³⁾ we were faced with the issue as to whether the IRD, as opposed to this Court, could entertain a claim that sought an employee to continue receiving a monthly salary pending full payment of his or her pension benefits under Article 189

of the Constitution. We stated, at pages J24 and J25 of that case, that:

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.

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.

20. In *casu*, amongst the four substantive relief sought under the Petition, it is plain that relief numbers (i) and (ii) under the Petition impugn the conduct of the Respondent under Article 189(2) of the Constitution. Relief numbers (iii) and (iv) seek the payment of allowances, notice pay, salary arrears and damages for termination of employment by way of redundancy, respectively. In our considered view, relief numbers (iii) and (iv) are employment disputes and they are not constitutional matters or issues that can invoke the jurisdiction of this Court. We say so on the basis that the Constitution does not give this Court the power to grant employer-employee based remedies such as the payment of allowances, notice pay, salary arrears and damages for termination of employment by way of redundancy.

21. This view is strengthened by the Petitioner's mode of separation from employment, namely, redundancy, which is regulated by, and is a cause of action under, the Employment Code Act No. 3 of 2019 (the 'Employment Code'), in particular section 55. It is trite that disputes between an employer and an employee arising from a redundancy situation are resolved by interpreting and interrogating the provisions of the Employment Code and not the Constitution. We stated in the case of **Gervas Chansa v Attorney General**⁽⁶⁾ that this Court determines constitutional questions or issues that are resolved by the interpretation of the Constitution only rather than interpretation of legislation. In consideration of the foregoing, we have no jurisdiction to entertain relief numbers (iii) and (iv) under the Petition.
22. We are minded to add that the jurisdiction to entertain the claims and grant the remedies contained in relief numbers (iii) and (iv) under the Petition falls squarely on the IRD.
23. It is clear from the remaining substantive relief numbers (i) and (ii) sought in the Petition that the Petitioner is not seeking for an interpretation of Article 189(2) or any other provision of the Constitution. In any event, we have already provided guidance on the interpretation of Article 189(2) of the Constitution on numerous

occasions including in the cases of **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**⁽⁷⁾ and **Anderson Mwale and Others v Zambia Open University**⁽⁸⁾.

24. As there is no requirement for interpretation of Article 189(2) of the Constitution in this case and as per the case of **Bric Back Limited**⁽³⁾ the IRD is a court of competent jurisdiction to determine a matter, such as this case, that requires the determination of an employment dispute together with a dispute as to whether a person should continue drawing a monthly salary pending final settlement of pension benefits. This is so as the IRD enjoys complete jurisdiction to hear and determine all the claims and relief raised in this matter as opposed to this Court which lacks the jurisdiction to entertain relief numbers (iii) and (iv) under the Petition.
25. The result is that this Court does not have jurisdiction to hear and determine the whole Petition herein. In view of the foregoing, we find merit in question one of the Respondent's application and we dismiss the Petition accordingly.

Question Two

26. It follows that question two of the application has been rendered nugatory.

Conclusion

27. For these reasons, we find merit in question one of the Respondents application to the effect that we do not have jurisdiction to hear and determine the whole Petition.

Orders

28. Accordingly, we make the following orders:

- 28.1. The Respondent's application to dismiss the Petition for want of jurisdiction is upheld.
- 28.2. The Petition herein is hereby dismissed.
- 28.3. Each party to bear their own costs.



A.M. SITALI
CONSTITUTIONAL COURT JUDGE



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE