

**IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA**
(Constitutional Jurisdiction)

2023/CCZ/0015

**IN THE MATTER OF: SECTION 8 (1) (a) OF THE
CONSTITUTIONAL COURT ACT NO. 8
OF 2016**

**IN THE MATTER OF: INTERPRETATION OF ARTICLE 145
OF THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016**

BETWEEN:

SANDRAS SAMAKAYI

AND

ATTORNEY GENERAL



APPLICANT

RESPONDENT

**CORAM: Chisunka, Kawimbe and Mulife JJC on 17th April, 2024
and 6th June, 2024**

APPEARANCES:

For the Applicant: Mr. J. Mataliro – Messrs. James and Doris
Legal Practitioners.

For the Respondent: Ms. C. Mulenga – Acting Chief State Advocate
and Mr. N. Mwiya – Principal State Advocate,
Attorney General's Chambers.

J U D G M E N T

Chisunka, JC, delivered the Judgment of the Court

Cases referred to:

1. Aaron Chungu v Peter Chanda and Others, SCZ/8/02/2023
2. Henry M. Kapoko v The People, CCZ Selected Judgment No. 43, 2016/CC/0023
3. Attorney General v Nigel Kalonde Mutuna and Two Others, SCZ Appeal No. 088/2012, SCZ/8/185/2012
4. Chishimba Kambwili v Attorney General, 2019/CCZ/009
5. Matilda Mutale v Emmanuel Munaile, SCZ Judgment No. 14 of 2007
6. Godfrey Malembeka v Attorney General and Electoral Commission of Zambia, CCZ Selected Judgment No. 34 of 2017
7. Zambia National Commercial Bank PLC v Martin Musonda and Others, CCZ Selected Judgment No. 24 of 2018
8. Milford Maambo and Others v The People, CCZ Selected Judgment No. 31 of 2017
9. Stephen Katuka and Law Association of Zambia v Attorney General, Ngosa Simbyakula and Others, CCZ Selected Judgment No. 31 of 2017
10. Benjamin Mwelwa v 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. The Constitutional Court Act No. 8 of 2016

Other works referred to:

1. Oxford Dictionary of Current English, Edited by Soanes C, Hawker, S and Elliot, J, Oxford University Press, Fourth Edition, 2006

INTRODUCTION

1. The Applicant, Mr. Sandras Samakayi, commenced this matter by Originating Summons on 21st July, 2023 which was amended on 16th

November, 2023. The Applicant seeks, by way of interpretation, the determination of the following question:

- 1.1. Whether the correct interpretation of Article 145(4) is that a judicial officer who does not opt to retire at the age of fifty-five (55) years can only retire at the age of sixty-five and not at any other age after attaining the age of fifty-five (55).

THE FACTUAL BASIS FOR THE APPLICANT'S CASE

2. The Applicant's factual basis for commencing this suit is contained in his affidavit in support of Originating Summons. The Applicant, among other things, deposed that:

- 2.1. He was employed by the Respondent on 7th May, 2004, and his last working day was 23rd May, 2023. Thus, he served the Respondent for a period of nineteen years. By way of a letter of retirement dated 9th August, 2022, the Respondent, informed him that the Judicial Service Commission (the 'JSC') directed that he be retired upon attaining the age of sixty years with effect from 23rd May, 2023.

- 2.2. On 14th June, 2023, however, the Respondent sent another letter which revoked its decision to retire him for the reason that once a judicial officer exercised the option to continue working beyond the

age of fifty-five years, the next and only age for retirement of that judicial officer was sixty-five years.

2.3. He was aware of other judicial officers, in particular, magistrates that retired at the age of sixty but whose retirement was not revoked by the Respondent through the JSC. He believes that the Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the 'Constitution') does not give the JSC the power to revoke his appointment or reinstate him after retirement. The correct position, therefore, is that he was retired as a judicial officer on 23rd May, 2023, upon attaining the age of sixty years.

THE APPLICANT'S ARGUMENTS

3. The Applicant filed written skeleton arguments in which he cited Article 145 of the Constitution and section 8(1)(a) and (b) of the Constitutional Court Act No. 8 of 2016 and submitted that:

3.1. He seeks an interpretation of Article 145 of the Constitution and this Court has jurisdiction to hear matters that relate to the interpretation of the Constitution. The Applicant also submitted

that he had been discriminated against by the Respondent, which discrimination was in violation of the Constitution.

- 3.2. In terms of the interpretation of Article 145 of the Constitution, the mandatory retirement age applicable to a judicial officer is sixty-five years. For the ages between fifty-five and sixty-four years, however, a judicial officer is at liberty to retire with full benefits, at any time during that period starting from the age of fifty-five years up to the age of sixty-four years.
- 3.3. The use of the word 'may' in Article 145(4) of the Constitution gives an option to a judicial officer to either retire at the age of fifty-five years or not. If a judicial officer opts to not retire at the age of fifty-five years, his or her right to retire before the age of sixty-five years is not taken away. The Applicant relied on the case of *Aaron Chungu v Peter Chanda and Others*⁽¹⁾ for this submission.
- 3.4. The position of the Respondent and the JSC that they can retire a judicial officer at the age of sixty-years and subsequently revoke that retirement on account that the judicial officer had

earlier exercised the option to continue working beyond the age of fifty-five years, is therefore, a clear misinterpretation of the law.

4. At the hearing, Counsel for the Applicant augmented the written skeleton arguments and submitted that:

4.1. The question for determination before the Court is whether the correct interpretation of Article 145(4) is that a judicial officer who does not opt to retire at the age of fifty-five years can only retire at the age of sixty-five years and not at any other age after attaining the age of fifty-five years.

4.2. The age of fifty-five years is the qualifying point for the retirement of a judicial officer under Article 145 of the Constitution and any period thereafter also remains a period of qualification for retirement. A judicial officer is, therefore, entitled to retire at any time between one's fifty-fifth anniversary of age and before attaining the age of sixty-five years. The literal or ordinary meaning of the words used in Article 145(4) of the Constitution convey that a judicial officer cannot be precluded from exercising

the right to retire after attaining the age of fifty-five years but before attaining the age of sixty-five years.

4.3. The catch-phrase and important words in Article 145(4) of the Constitution are 'on attaining the age of fifty-five years' and the ordinary meaning of the word 'attaining' is 'to reach'. Thus, the benefit or right accruing to a judicial officer under Article 145(4) of the Constitution vests immediately one reaches the age of fifty-five years and this right cannot be forfeited by virtue of the fact that a judicial officer exercises this right a few days, weeks, months or years after attaining the age of fifty-five years.

4.4. To interpret Article 145(4) of the Constitution in a manner that stops a judicial officer from retiring at any time between the ages of fifty-five and sixty-four years, would be imposing a disqualification which the law does not envisage. This Court is, therefore, urged to give the words used in Article 145(4) of the Constitution their ordinary meaning and provide an interpretation to the effect that once a judicial officer attains the age of fifty-five

years, that judicial officer is at liberty to retire at any time between the ages of fifty-five and sixty-four years.

THE RESPONDENT'S CASE

5. The Respondent's position regarding the factual basis is contained in the amended affidavit in opposition to affidavit in support of Originating Summons filed on 29th November, 2023, sworn by Exnobert Zulu, the Secretary to the JSC.
6. He deposed that the Applicant is a judicial officer and is legally due to retire at the age of sixty-five years. By a letter dated 26th May, 2020, the Attorney General furnished his office with a legal opinion regarding the retirement age of judiciary staff to the effect that the law on the retirement age for magistrates is prescribed in Article 145 of the Constitution, wherein a magistrate has an option to retire at the age of fifty-five years. It was on the strength of the Attorney General's legal opinion that, in his capacity as the Secretary of the JSC, he revoked the Applicant's letter of retirement dated 9th August, 2022.

THE RESPONDENT'S ARGUMENTS

7. In the written skeleton arguments, the Respondent submitted that:

- 7.1. In view of the case of *Henry M. Kapoko v The People*⁽²⁾ the interpretation of Article 145 is within the ambit of this Court. Article 145 of the Constitution is clear and unambiguous and in accordance with the case of *Attorney General v Nigel Kalonde Mutuna and Two Others*⁽³⁾, the literal rule of interpretation ought to be applied in its interpretation.
- 7.2. It is clear that Article 145(4) affords a judicial officer the option to retire at the age of fifty-five years with full benefits. Prior to the enactment of the 2016 amendments to the Constitution, judicial officers retired at the age of fifty-five years. This position, however, was changed by Article 145(3) of the Constitution which was enacted to give judicial officers that were in service at the time of the enactment, an option to retire at the initial retirement age of fifty-five years and also to allow those who were employed after the 2016 amendments to choose to retire either at fifty-five or sixty years of age. The Constitution as amended, however, does not give a judicial officer the option to retire at the age of sixty years.
- 7.3. The Applicant misconstrued the use of the word 'may' in Article 145(4) of the Constitution. The Applicant's interpretation of

Article 145(4) to mean that a judicial officer can retire at any time between fifty-five and sixty-five years of age amounts to stretching the law beyond its intended boundaries. The proper interpretation of Article 145(4) of the Constitution is that a judicial officer has an option to retire when he or she attains the age of fifty-five years. In the event that the Judicial officer opts to remain in employment after the age of fifty-five years, that judicial officer is bound to retire at the age of sixty-five years.

8. During the hearing, Counsel for the Respondent augmented the written skeleton arguments and argued that:

8.1. Article 145(4) of the Constitution gives a judicial officer the discretion to retire with full benefits on attaining the minimum age of retirement for a judicial officer, which is fifty-five years. Article 145(4) should not be read in isolation rather it ought to be read together with Article 145(3) of the Constitution which provides that a judicial officer shall retire on attaining the age of sixty-five years. Thus, there are only two retirement ages under Article 145 of the Constitution. The age of sixty-five years is the mandatory retirement age and the age of fifty-five years, which confers discretion on a judicial officer to opt to retire. The use of

the word “shall” in Article 145(3) of the Constitution signifies that the age of sixty-five years is the mandatory age of retirement for a judicial officer. This ought to be contrasted with the use of the word “may” in Article 145(4) of the Constitution.

8.2. The interpretation of Article 145(4) presented by the Applicant invites this Court to read words into the Constitution. This Court ought to decline the invitation to read words, which are not provided for, into the Constitution. As per the case of *Chishimba Kambwili v Attorney General*⁽⁴⁾ the roles of the Judiciary and the Legislature are clearly spelt out in the Constitution and this Court must not assume the role of legislating and amending a constitutional provision that is clear, unambiguous and captures the intention of the framers of the Constitution. In view of the case of *Matilda Mutale v Emmanuel Munaile*⁽⁵⁾ and the clear and unambiguous words in Article 145 of the Constitution, this Court cannot and should not read any words into Article 145(4) of the Constitution.

THE APPLICANT’S REPLY

9. In reply to the Respondent’s arguments, Counsel for the Applicant, contended that the Applicant does not wish for the Court to read words into Article 145(4) of the Constitution. The Applicant’s contention is that

the words 'on attaining the age of fifty-five years' in Article 145(4) of the Constitution merely indicate that a judicial officer qualifies to enjoy the full benefits upon retirement under that clause. The Applicant disagrees with the position that a judicial officer who does not exercise discretion to retire at the age of fifty-five years is stopped from retiring until that judicial officer attains the age of sixty-five years. The Applicant's position is that a judicial officer is at liberty to exercise the discretionary option to retire with full benefits at any point in time between the ages of fifty-five years and a day before attaining the age of sixty-five years. Further, Article 145(3) of the Constitution does not provide a mandatory retirement age. In any case, reading Article 145(3) and (4) of the Constitution together, does not change the meaning of the words in Article 145(4) of the Constitution.

INTERPRETATION

10. We have considered the sole question raised in the amended Originating Summons, the affidavit in support, the amended affidavit in opposition and the skeleton arguments and authorities filed by both parties together with the oral submissions made by counsel.
11. We wish to state at the outset that the Applicant's written skeleton arguments contained in the record of proceedings filed on 31st August,

2023, and relied on by Counsel for the Applicant at the hearing, included submissions to the effect that the Applicant was discriminated against. We note, however, that the sole question for determination as per the Applicant's amended Originating Summons does not relate to discrimination as provided for under Article 23 of the Constitution. In any event, we have no jurisdiction to entertain issues pertaining to discrimination under the Constitution in line with our decision in the case of *Godfrey Malembeka v Attorney General and Electoral Commission of Zambia*⁽⁶⁾. For the avoidance of doubt, we will, therefore, properly mind ourselves to answering the sole question posed in the Applicant's amended Originating Summons pursuant to our jurisdiction under Article 128(1)(a) of the Constitution.

12. We understand the question to be whether the meaning of Article 145(4) of the Constitution, is that a judicial officer who does not opt to retire at the age of fifty-five years can only retire at the age of sixty-five years and not at any other age after attaining the age of fifty-five years.
13. In determining this question, it is important that we firstly consider the relevant principles that relate to the interpretation of the Constitution. The first principle is found in Article 1 of the Constitution which stipulates that the Constitution is the supreme law in this

Country. The supremacy of the Constitution means that any law that is inconsistent with the Constitution shall, to the extent of the inconsistency, be invalid. We confirmed this position in the case of *Zambia National Commercial Bank PLC v Martin Musonda and Others*⁽⁷⁾.

14. In the case of *Milford Maambo and Others v The People*⁽⁸⁾, we endorsed the position that the correct approach in interpreting the Constitution is to apply the literal rule of interpretation, thereby, giving the words used in the Constitution their plain and ordinary meaning. The literal rule of interpretation should only be vacated where the plain and ordinary meaning used leads to an absurdity.
15. In the case of *Stephen Katuka and Law Association of Zambia v Attorney General, Ngosa Simbyakula and Others*⁽⁹⁾, we stated that when interpreting the Constitution, the relevant words or provisions must not be read in isolation. Rather, they must be read together and the entire Constitution must be considered as a whole to achieve the objective of the Constitution.
16. In addition to the abovementioned principles, Article 267 of the Constitution instructs us to interpret the Constitution in accordance with the Bill of Rights, in a manner that promotes its

purposes, values and principles, permits the development of the law and contributes to good governance. We are mindful of these principles that guide the interpretation of the Constitution as we consider the issue before us.

17. The Applicant implored us to interpret Article 145(4) of the Constitution to mean that a judicial officer is entitled to retire at any time on or after that judicial officer attains the age of fifty-five years but before attaining the age of sixty-five years. The Respondent, on the other hand, urged us to interpret Article 145(4) of the Constitution to mean that a judicial officer has an option to retire when he or she attains the age of fifty-five years and where they remain in employment after the age of fifty-five years, a judicial officer is bound to retire at the age of sixty-five years.

18. In interpreting Article 145(4) of the Constitution, the starting point is to consider Article 145 of the Constitution as a whole. Article 145 reads that:

- 145 (1) **The Judicial Service Commission shall appoint judicial officers, as prescribed.**
- (2) **The qualification for appointment as judicial officer shall be prescribed.**
- (3) **A judicial officer shall retire on attaining the age of sixty-five years.**

(4) A judicial officer may retire, with full benefits, on attaining the age of fifty-five years.

19. Our considered view is that the words used in Article 145(3) and (4) of the Constitution are clear, unambiguous and precise. We shall, in accordance with the case of *Milford Maambo*⁽⁷⁾, interpret Article 145(3) and (4) of the Constitution by giving the words therein their plain, ordinary and natural meaning as doing so will aid us in construing the true intention of the framers of the Constitution regarding Article 145(3) and (4) of the Constitution.
20. A reading of Article 145(3) of the Constitution shows that the retirement age of a judicial officer, specified therein, is sixty-five years. Article 145(4), however, gives a judicial officer the option to retire at the age of fifty-five years. The question is whether a judicial officer that does not take up the option to retire at the age of fifty-five years, can only retire at the age of sixty-five years and not at any other age after attaining the age of fifty-five years. To put it another way, at what age can a judicial officer retire if he or she does not select to retire at fifty-five years and has not yet attained the age of sixty-five years as specified in Article 145(3) of the Constitution.

21. The operative words in Article 145(3) and (4) of the Constitution are 'on' and 'attaining'. It is, therefore, imperative to discern their plain, ordinary and natural meaning. The **Oxford Dictionary of Current English** defines the words 'on' and 'attaining' in the following terms:

on: indicating the day or time of an event.

attain or attaining: succeed in doing or achieving something; or to reach.

22. In view of the plain, ordinary and natural meaning of the words 'on' and 'attaining', a literal interpretation of Article 145(3) of the Constitution reveals that a judicial officer must retire at the point or time at which that judicial officer reaches the age of sixty-five years. Further, the use of the word 'shall' in Article 145(3) carries a mandatory connotation and it, therefore, imposes an obligation on a judicial officer who has reached the age of sixty-five years to retire.

23. In respect of Article 145(4) of the Constitution, the literal interpretation is that a judicial officer has the option to retire at the point or time that the judicial officer reaches or achieves the age of fifty-five years. The word 'may' in Article 145(4) of the Constitution, therefore, gives a judicial officer the freedom, right or permission to decide whether or not to retire at the age of fifty-five as specified therein. The

words 'on attaining', used in Article 145(3) and (4), therefore, in their literal sense, refer to the specific time or moment that the stipulated retirement age is reached and not at any time before or after the stipulated retirement age.

24. Thus, Article 145(3) and (4) of the Constitution provides for the retirement of a judicial officer on only two occasions that are tied to a judicial officer's age. The first is at the specific time or moment that the judicial officer reaches fifty-five years of age. This is the first retirement age for a judicial officer in terms of Article 145(4) of the Constitution. The second is at the specific time or the moment a judicial officer reaches the age of sixty-five years as stated in Article 145(3) of the Constitution. The Constitution does not prescribe any other retirement age for a judicial officer save for the two retirement ages of fifty-five and sixty-five years. This position is consistent with our decision in the case of *Benjamin Mwelwa v Attorney General*⁽¹⁰⁾ where, at pages J24 and J25, we considered Article 145(3) and (4) by stating that:

These provisions are couched in similar fashion as the provision in Article 145 (3) and (4) where the retirement age for judicial officers is prescribed as 65 years but with an option to retire at 55 years.

Article 145 (3) and (4) of the Constitution provides for the retirement age of a judicial officer as 65 years with an option to retire at 55 years.

25. The language used in Article 145(3) and (4) of the Constitution shows that the framers of the Constitution intended for a judicial officer to retire at either fifty-five or sixty-five years of age. The framers did not provide for any other age of retirement for a judicial officer under the Constitution. If the framers of the Constitution intended for a judicial officer to be able to retire at any other age after the age of fifty-five years but before the age of sixty-five years, they would have aptly included the words 'or after' in Article 145(4) of the Constitution to effect such an intention.

26. We, therefore, agree with the Respondent that adopting the interpretation advanced by the Applicant would result in us reading the words 'or after' in between the words 'on' and 'attaining the age of fifty-five years'. We say so because if the words 'or after' were inserted in Article 145(4) of the Constitution, those words would clearly denote an intention by the framers of the Constitution to permit a judicial officer to opt to retire at any point in time after attaining the age of fifty-five years. In such an instance, a judicial officer would have a choice to retire at any age between the ages of fifty-five years and the

retirement age of sixty-five years prescribed under Article 145(3) of the Constitution.

27. In light of the foregoing, we are of the considered view that the omission of the words 'or after' in Article 145(4) of the Constitution connotes that the framers of the Constitution did not intend for a judicial officer to effectively have the freedom to pick the age at which to retire over a ten-year period starting from the age of fifty-five up to the age of sixty-four years. Such a situation would, in our view, entail that a judicial officer would qualify for retirement on ten different occasions or ages, namely, at the ages of fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one, sixty-two, sixty-three and sixty-four years. This, in our considered view, would be an absurd situation.

28. The position we take, is fortified by the constitutional principle we expressed in the case of *Stephen Katuka and Law Association of Zambia v Attorney General, Ngosa Simbyakula*⁽⁹⁾, that the provisions of the Constitution must not be segregated and that those provisions relating to a specific subject matter must be read together in order to achieve the objective of the Constitution.

29. In the absence of words that expressly provide for a judicial officer to retire at any age or point in time between the ages of fifty-five and sixty-four years old, we cannot render such an interpretation of Article 145(3) and (4) as presented by the Applicant, as it would amount to reading words into the Constitution and thereby posing the risk of the Courts encroaching into the work of Parliament. As already stated, the words used by the framers of the Constitution in Article 145(3) and (4) of the Constitution are clear and unambiguous and therefore, the literal interpretation we have undertaken herein sufficiently shows the framers' intention in regard to that Article.
30. Taking the above into account, in terms of Article 145(3) and (4) of the Constitution, our considered view is that a judicial officer can only take up the option to retire at the age of fifty-five years at the specific point or time that the judicial officer reaches the age of fifty-five years. This, therefore, means that once a judicial officer reaches the age of fifty-five years but does not select to retire at that age, that judicial officer cannot retire after attaining the age of fifty-five years until he or she reaches the next prescribed retirement age stipulated under Article 145(3), which is the age sixty-five years.

CONCLUSION

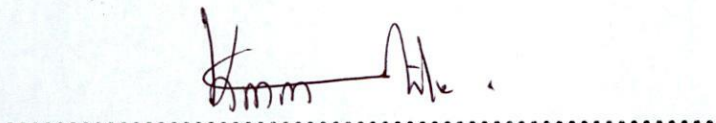
31. In conclusion, our answer to the sole question in the Applicant's Originating Summons is in the affirmative. For the avoidance of doubt, our answer is that a judicial officer who does not opt to retire at the age of fifty-five years can only retire at the age of sixty-five years and not at any other age after attaining the age of fifty-five years.

ORDER

32. Each party to bear their own costs.



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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE


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M.M. KAWIMBE
CONSTITUTIONAL COURT JUDGE
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K. MULIFE
CONSTITUTIONAL COURT JUDGE