

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)



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

IN THE MATTER OF: ARTICLE 187 AND 189 (1) AND (2) OF THE CONSTITUTION, CHAPTER 1 OF THE LAWS OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 187 OF THE CONSTITUTION CHAPTER 1 OF THE LAWS OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF LOCAL AUTHORITIES SUPERANNUATION FUND ACT CHAPTER 284 OF THE LAWS OF ZAMBIA AS AMENDED BY ACT NO. 8 OF 2015

IN THE MATTER OF THE UNIVERSITY OF ZAMBIA FIRST IN FIRST OUT POLICY

BETWEEN:

DR. GODFREY HAMPWAYE	1 th PETITIONER
MR. STEPEHN CHIPETA	2 nd PETITIONER
MR. VICTOR HAMAUNDU MUDAALA	3 rd PETITIONER
MR. HENRY MWELWA CHIMANA	4 th PETITIONER
DR. ALEX MWAMBA NGOMA	5 th PETITIONER
DR. SYLVESTER HATWAAMBO	6 th PETITIONER
DR. GERALD MBULAWABO CHISHIBA	7 th PETITIONER
DR. FELICITAS NOSIKU MOYO	8 th PETITIONER
MR. ALBERT KALUBA CHISHIBA	9 th PETITIONER

DR. WEBBY SILUPYA KALIKITI	10 th PETITIONER
DR. CHOZI VINCENT LUNGU	11 th PETITIONER
MR. KENNY MAKUNGU	12 th PETITIONER
DR. AMOS BANDA	13 th PETITIONER
DR. EUSTON KASONGO CHIPUTA	14 th PETITIONER
DR. MELVIN SIMUCHIMBA	15 th PETITIONER

AND

THE COUNCIL OF THE UNIVERSITY OF ZAMBIA	RESPONDENT
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Coram: Sitali, Chisunka, Kawimbe JJC on 16th April and 7th June, 2024.

For the Petitioners: Mr. P. Songolo of Messrs Philsong and Partners

For the Respondent: Ms. T. Nkhoma – In House Counsel

RULING

Kawimbe, JC delivered the Ruling of the Court.

Cases referred to:

1. Intelligent Mobility Solutions Limited v Lamise Trading Limited CAZ Appeal No. 14 of 2022
2. Milingo Lungu v Attorney General, Administrator General and Gilbert Andford Phiri (Alleged contemnor) 2022/CCZ/006
3. Professor Luke Evuta Mumba and Dr. Tamala Tonga Kambikambi v Council of the University of Zambia 2022/CCZ/0012
4. John Sangwa v Sunday Bwalya Nkonde SC, SCZ Appeal No. 2 of 2021
5. African Banking Corporation Zambia v Mubende Country Lodge Limited, SCZ Appeal No. 116/2016

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 Rules, Statutory Instrument No. 37 of 2016
3. The Rules of the Supreme Court 1965 (White Book) 1999 Edition Volume 1

Introduction

[1.1] The petitioners are former employees of the respondent and filed the petition to which, this Ruling relates on 8th December, 2023. The petition disclosed that they retired from employment between the years 2012 to 2015. They alleged that after their retirement, the respondent failed to pay their pension and other contractual benefits. They contended that the respondent, therefore, should have retained them on the payroll after Article 189(2) came into effect, following the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016 in January, 2016. The respondent denied the allegations through its answer that was filed on 28th December, 2023. The answer though was not accompanied by an opposing affidavit.

The application

[2.1] On 26th December, 2023, the respondent moved this Court by way of a notice of motion raising issues *in limine* pursuant to Order IX rule 20 and Order X rule 2 of the Constitutional Court Rules (CCR) as read with Order 14A of the Rules of the Supreme Court

(RSC)1965 (White Book) 1999 Edition, Volume 1 challenging the petition.

[2.2] The issues raised were as follows: -

- i) Whether or not the provisions of Article 189 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 apply to the petitioners?*
- ii) Whether or not the Constitution of Zambia (Amendment) Act No. 2 of 2016 can be applied retrospectively in the absence of an express provision or intention for it to be applied retrospectively? and*
- iii) Whether or not a benefit paid pursuant to a pension scheme created by contract between an employer and an employee and managed by a 3rd party (the Zambia State Insurance Corporation) as Fund Manager is a pension benefit envisaged under Article 189(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 for purposes of retention of an employee on the payroll?*

[2.3] The notice of motion was supported by an affidavit dated 26th December, 2023, replying affidavit and skeleton arguments dated 11th January 2024. The affidavits were all deposed to by Ms. Theresa Chipulu Chalwe, the Registrar at the respondent University. She averred that all the 15 petitioners retired between 2012 and 2015. That, on their last respective working dates, the respondent was not obliged to retain them on the payroll for the alleged outstanding pension or other contractual benefits. She also

stated that at the time the petitioners retired, the Constitution of Zambia (Amendment) Act No. 2 of 2016 had not been enacted; and they could not seek refuge under a law that had no retrospective application.

[2.4] It was also deposed that the Local Authorities Superannuation Fund (LASF) Act, which the petitioners sought to rely on for their pension claims was inapplicable to their case. Additionally, that the respondent was not responsible for implementing the LASF Act, according to the exhibit marked “**TCC1**”, an extract of clause 9 of the conditions of service of the Superannuation Scheme, proving that the pension fund that they had subscribed to, under the Zambia State Insurance Corporation (ZSIC) was independently managed.

[2.5] The deponent further averred that, the Trust Deed and Scheme Rules exhibited as “**TCC2**” were developed to provide for the terms and conditions of the pension fund, which the petitioners accepted. In addition, that those documents showed that the petitioners’ superannuation benefits were only regulated by their conditions of service and not an Act of Parliament. That since these benefits were actualized through ZSIC, they remained in the realm of private law, and there was no constitutional issue for this Court to determine.

Petitioners’ response

[3.1] In opposing the application, the petitioners filed an affidavit on 9th January 2024, wherein they deposed that they had rightfully invoked the Court's jurisdiction. They contended that the respondent did not enter a valid "notice of intention to defend" because its answer was filed without an opposing affidavit. Further, that the respondent contemptuously ignored the Court's order for directions dated 14th December, 2023 and therefore, had no right to move the Court for any relief.

[3.2] The petitioners further contended that the respondent's affidavit in support of the notice of motion transgressed *Order 14A* of the *RSC*. It contained statements of information or belief, which the deponent had no personal knowledge of but was derived from her advocates. They contended that without the impugned information, there was nothing of substance in the affidavit that would justify the respondent's application. That in the premises, the notice of motion, which had offended the rules of practice and procedure, was incompetently before Court.

Hearing

[4.1] The matter came up for hearing on 16th April 2024. Learned counsel for the parties relied on their respective affidavits, lists of authorities and skeleton arguments. In augmenting the respondents' position,

Ms. Nkhoma submitted that the Court had already interpreted Article 189 (1) and (2) of the Constitution. Further, that the respondent was never a member of the ZSIC pension fund. Lastly, that the petitioners failed to prove their case before Court.

[4.2] In response, Mr. Songolo on behalf of the petitioners argued that the orders in the CCR, which the respondent relied on, did not apply to its notice of motion. That their matter was not interlocutory and therefore, the Court had been wrongly moved. As such, the respondent was prohibited from seeking any remedy through the purported notice of motion. In addition, the petitioners contended that the respondent's skeleton arguments sought to give evidence at the bar contrary to the rules of practice. To support that submission, counsel cited the Court of Appeal case, *Intelligent Mobility Solutions Limited v Lamise Trading Limited*¹.

[4.3] It was counsel's further argument that the affidavit filed in support of the notice of motion, contained statements attributed to third parties and that pertinent information was based on facts that the deponent had no personal knowledge of. Placing reliance on the case of *Milingo Lungu v Attorney General, Administrator General and Gilbert Phiri (Alleged Contemnor)*², the petitioners urged us to dismiss that evidence.

[4.4] Counsel drew the Court's attention to the *Report of the Technical Committee on Drafting the Zambian Constitution* and averred that the driving objective behind Article 189 of the Constitution was to protect the rights of all pensioners in the country irrespective of the dates of their retirement. Against that background, he argued that the petitioners were entitled to their superannuation benefits under the LASF Act as amended in 2015 and protected by Article 189 of the Constitution.

[4.5] To fortify his argument, counsel cited the case of *Professor Luke Evuta Mumba and Dr. Tamala Kambikambi v Council of the University of Zambia*³, wherein Dr. Tamala Tonga Kambikambi, was awarded superannuation benefits under the LASF Act. He contended that since the petitioners were similarly circumstanced, they were entitled to be paid their pension benefits. In concluding, counsel reiterated the petitioner's prayer.

[4.6] In reply, Ms. Nkhoma contended that the Court's orders for directions dated 14th December, 2023, did not affect the directions for filing the notice of motion because at the material time, the respondent had not expressed its intention to raise issues *in limine*. It was averred that, the respondent's failure to adhere to the Court's order for directions was not meant to disrespect the Court. Notwithstanding, she averred that the respondent was entitled to file

the notice of motion under Order 14A of the RSC because the Court suspended its order for directions in the main matter.

[4.7] Ms. Nkhoma conceded that Order 14 A of the RSC provides for the filing of a notice of intention to defend as a prerequisite for invoking the summary procedure thereunder. However, she contended that Order 1 rule 4 of the RSC on the definition of notice of intention to defend merely pointed to filing of an answer only.

[4.8] She further argued that it was not obligatory for an answer to always be accompanied by an affidavit. Rather, that an answer was sufficient to signify intention, because all that was required under Order 14 A of the RSC was a show of opposition, such as, through an answer. For that assertion, counsel cited the case of *John Sangwa v Nkonde SC*⁴ where the Supreme Court held that:

On the facts of this case which show that: the action was commenced by a petition under Article 28; a preliminary issue raised under Order 14A as read with Order 33 Rule 7 of the White Book; and there being no opposition filed by the petitioner, it was a misdirection on the part of the High Court when it found the preliminary objection to be on firm ground and the Court of Appeal when it refused to consider the propriety of the preliminary objection. Similarly, in matters involving petitioners under the Bill of Rights we do not see why a judge cannot entertain a preliminary objection. The idea is that only matters which are deserving of a trial and full hearing should proceed to such trial or a full hearing. Where, for instance, a petition under the Bill of Rights is so flawed in its presentation or a wrong party named, we see no reason why the High Court cannot hear an interlocutory objection and spare the aggrieved party unnecessary costs by halting the proceeding against the party at interlocutory stage.

[4.9] Counsel argued that in matters commenced by way of petition and objected to under Order 14A of the RSC, the filing of an answer only, constituted a valid notice of intention to defend. Hence, the respondent's notice of motion was properly before Court. On the petitioners' submission that the respondent's supporting affidavit was defective, Ms. Nkhoma contended that where the information relied on was gathered from a third party, the position was indicated therein. However, that since the deponent believed the information relied on to be correct, there was no reason to exclude it.

[4.10] It was further argued that the *Intelligent Mobility Solutions Limited case*¹ was distinguishable and did not apply to the respondent's case because the skeleton arguments in that case were expunged as no opposing affidavit had been filed by the concerned party. In counsel's view, the petitioners had failed to substantiate their allegations and could not rely on the judgment in the *Luke Evuta Mumba*³ case. She concluded by reiterating the respondent's prayer.

Analysis and decision

[5.1] We have considered the notice of motion, the affidavits, the contentions and submissions made before us by the respective

parties. We will begin by addressing the issue whether or not, we have jurisdiction to entertain the respondent's notice of motion.

[5.2] It is trite that the rule of law requires all power to be exercised in accordance with the law. Through this notice of motion, the respondent is substantially looking for relief under Order 14A of the RSC White Book which would be dispositive of the petitioners' case.

The Order provides that:

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks fit.

[5.3] The requirements for invoking the procedure under Order 14A are spelt out in paragraph 14A/2/3 of the RSC that:

(a) The defendant must have given notice of intention to defend; and

(b) The question of law or construction is one that can be resolved without a full trial of the action.

[5.4] The petitioners' contention before us is that the respondent was not entitled to file its notice of motion seeking to dispose of the petition on a point of law under Order 14A of the RSC because its answer to their petition, was not supported by an opposing affidavit. In

essence, they contend that the respondent had not entered a valid notice of intention to defend thereby depriving the Court of jurisdiction to entertain the application. The respondent challenged the petitioners' contention, by insisting that its answer, which, was not supported by an opposing affidavit constituted sufficient notice of intention to defend.

[5.5] What amounts to a notice of intention to defend was expounded by the Supreme Court in the persuasive case of *African Banking Corporation Zambia v Mubende Country Lodge Limited*⁵. In reference to Order 1 rule 4 of the RSC, the Court opined that for the purposes of Order 14A of the RSC, it is intentionally provided, that a person who intends to defend an action must give notice.

[5.6] The Supreme Court went on to explain that the term "*notice of intention to defend*" does not appear in the Zambian High Court Rules. However, that Order 11 rule 1 of those Rules provides for what constitutes a notice of intention to defend. Further, that what has become acceptable as constituting a notice of intention to defend is the filing of a memorandum of appearance accompanied by a defence.

[5.7] As a Constitutional Court, our jurisdiction is stated in Article 128(1) of the Constitution which provides: -

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 the President;*
- (d) Appeals relating to election of Members of Parliament and Councillors;*
- (e) Whether or not a matter falls within the jurisdiction of the Constitutional Court.*

[5.8] Article 128(3) of the Constitution further provides that: -

Subject to Article 28, a person who alleges that –

- (a) An act of Parliament or Statutory Instruments;*
- (b) An action measure or decision taken under any law; or*
- (c) An act, omission, measure or decision by a person or an authority;*

Contravenes this Constitution, may petition the Constitutional Court for redress.

[5.9] Accordingly, this Court enjoys exclusive jurisdiction in settling constitutional disputes. However, this is limited by Article 28. Under Article 128(3) of the Constitution, a person who alleges constitutional breach may approach the Court by way of petition. This provision is further elaborated in Order IV rule 1 of the CCR on commencement of proceedings as follows:

- (1) Except as otherwise provided in the Constitution, the Act and these Rules, all matters under the Act brought before the Court shall be commenced by a petition in Form 1 set out in the schedule.*
- (2) A petition shall disclose –*
 - (a) the petitioner's name and address;*
 - (b) the facts relied upon;*
 - (c) the constitutional provision allegedly violated; and*
 - (d) the relief sought by the petitioner*

(3) *A petition shall be signed by the petitioner or the petitioner's advocate.*

(4) *A petition shall be filed with an affidavit verifying facts*

[5.10] Of significance to this matter is, Order IV rule 4(1) of the Constitutional Court Rules, which stipulates that: -

4. (1) *The respondent to a petition shall, within fourteen days of service of the petition, respond to the petition by way of an answer and opposing affidavit. (Emphasis added)*

[5.11] In their plain and ordinary meaning, the words used in Order IV rule 4(1) entail that there is a mandatory requirement that a respondent in filing an answer to a petition should ensure that it is supported by an opposing affidavit. In other words, a respondent cannot opt to file an answer without an opposing affidavit and anything short of that requirement does not comply with Order IV rule 4(1) of the CCR.

[5.12] In this case, the respondent did not comply with the mandatory requirements of Order IV rule 4(1) of the CCR when it filed its answer without an opposing affidavit. The respondent, therefore, did not give proper notice of its intention to defend the petition for purposes of Order 14A of the RSC.

[5.13] The respondent's notice of motion is therefore improperly before us and cannot be entertained.

[5.14] Further, we note that the allegations raised in the petition and affidavit verifying facts are not suitable for determination under Order 14A of the RSC without a trial.

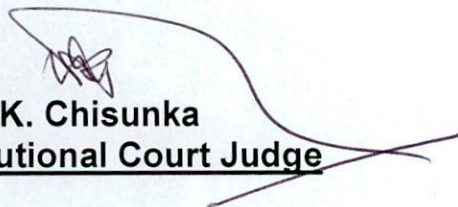
Conclusion

[6.1] We hereby dismiss the notice of motion and remit this matter to the single Judge for the continued scheduling of the petition.

[6.2] Each party will bear their own costs.



A.M Sitali
Constitutional Court Judge



M.K. Chisunka
Constitutional Court Judge



M.M Kawimbe
Constitutional Court Judge