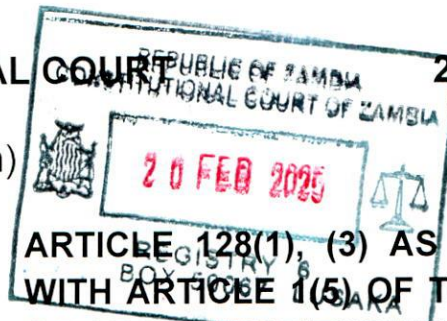


**IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA**
(Constitutional Jurisdiction)



2024/CCZ/005

IN THE MATTER OF:

**ARTICLE 128(1), (3) AS READ TOGETHER
WITH ARTICLE 1(5) OF THE CONSTITUTION
OF ZAMBIA (AMENDMENT) ACT NO. 2 OF
2016, THE JURISDICTION OF THE
CONSTITUTIONAL COURT**

IN THE MATTER OF:

**ARTICLE 1(1) AND (2) OF THE
CONSTITUTION OF ZAMBIA (AMENDMENT)
ACT NO. 2 OF 2016, THE SUPREMACY OF
THE CONSTITUTION**

IN THE MATTER OF:

**REGULATION 10A OF THE DEFENCE
(REGULAR FORCES) (OFFICERS)
REGULATIONS STATUTORY INSTRUMENT
NO. 127 OF 1960 AS AMENDED BY
STATUTORY INSTRUMENT NOS. 217 OF 1965
AND 81 OF 1992**

IN THE MATTER OF:

**REGULATION 40(B) OF THE DEFENCE
(REGULAR FORCE) (PENSIONS)
REGULATIONS STATUTORY INSTRUMENT
NO. 184 OF 1966 AS AMENDED BY
STATUTORY INSTRUMENT NOS. 102 OF
1988, 166 OF 1992, 176 OF 1993 AND 62 OF
1995**

IN THE MATTER OF:

**ALLEGED CONTRAVENTION OF ARTICLES
118 AND 122 OF THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016,
JUDICIAL AUTHORITY AND FUNCTIONAL
INDEPENDENCE OF THE JUDICIARY**

IN THE MATTER OF:

**ALLEGED CONTRAVENTION OF ARTICLES
187(1) AND (2) OF THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**



BETWEEN:

BRENDA MPASHI

PETITIONER

AND

ATTORNEY GENERAL

1ST RESPONDENT

PUBLIC SERVICE PENSION FUND

2ND RESPONDENT

**CORAM: Musaluke, Chisunka, and Kawimbe JJC on 7th November, 2024
and 20th February, 2025**

For the Petitioner: Major Patrick Mpundu (Rtd) of Messrs. A. Mbambara Legal Practitioners.

For the 1st Respondent: Captain C.N. Ngolwe – State Advocate, Attorney General’s Chambers.

For the 2nd Respondent: Mrs. M.M. Michelo – In House Counsel, Public Service Pension Fund.

J U D G M E N T

Chisunka, JC, delivered the Judgment of the Court.

Cases referred to:

1. Godfrey Miyanda v Attorney General (1985) Z.R. 185
2. Jack Mbewe and Another v Attorney General, 2018/HP/1176
3. S v Mamambolo (E.T.V and Others Intervening) 2001 (3) SA 409 (CC)
4. Resident Doctors Association of Zambia and Others v Attorney General S.C.Z. Judgment No. 12 of 2003
5. Christine Mulundika and 7 Others v The People (SCZ Judgment No. 25 of 1995)
6. Re Thomas Mumba v The Director of Public Prosecutions (1984) Z.R. 38
7. Attorney General v David Kabila Mwansa, CAZ Appeal No. 394/2023
8. Dr. Ludwig Sondashi v Attorney General SCZ Judgment No. 27 of 2000

9. **ZNPF Board v Attorney General and Others and In the Matter of Industrial Relations Courts Decision dated 29th October,1982 and an Application for Certiorari (1983) Z.R. 140**
10. **Zacharia Titus Zandamela v Management Committee of the Local Authorities Superannuation Fund (1978) Z.R. 144**
11. **Owen Mayapi and 4 Others v Attorney General, 2019/CCZ/003**
12. **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission, CCZ Selected Judgment No. 4 of 2018**
13. **Anderson Mwale and Others v Zambia Open University, 2021/CCZ/001**
14. **Attorney General v Thixton (1967) Z.R. 10**
15. **Lieutenant Chrispin S. Muchindu v Attorney General, 2021/CCZ/0034**
16. **Kesavananda Bharati v The State of Kerala, A.I.R. 1973 S.C. 1469**
17. **Citibank Zambia Limited v Suhayl Dudia, SCZ Appeal No. 6 of 2022**
18. **Anisminic Ltd v The Foreign Compensation Commission and Another (1969) 1 All ER 208**
19. **Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476**
20. **Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others (Petition 13A, 14 & 15 of 2013 (Consolidated) [2014] KESC 9 (eKLR) (Civ) (5 November 2014)**
21. **Hon. Muiywa Inakoju and 17 Others v Hon. Abraham Adeolu Adeleke and 3 Others (S.C. 272/2006) [2007] NGSC 47 (11 January)**
22. **Gervas Chansa v Attorney General, 2019/CCZ/004**
23. **Lloyd Chembo v Attorney General, CCZ Selected Judgment No. 15 of 2018**
24. **Gift Moyo v Attorney General, 2021/CCZ/0006**

Legislation referred to:

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 Public Service Pensions Act No. 35 of 1996

The Firearms Act Chapter 110 of the Laws of Zambia

**The Industrial Relations Court Act Chapter 517 of the Laws of Zambia
(repealed)**

The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

The Constitution of Zambia, 1964

The Zambia Independence Order, 1964
The Defence Act Chapter 106 of the Laws of Zambia
The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia
The Migration Act 1958 (Cth)
The Constitution of Kenya, 2010
The Constitution of the Federal Republic of Nigeria, 1999
The Defence (Regular Forces) (Officers) Regulations, Statutory Instrument No. 127 of 1960
The Defence (Regular Force) (Pensions) Regulations, Statutory Instrument No. 184 of 1966

INTRODUCTION

1. Brenda Mpashi (the “Petitioner”) filed a petition on 17th May, 2024, against the Attorney General (as 1st Respondent) and Public Service Pension Fund (as 2nd Respondent) (together the “Respondents”) pursuant to Articles 1(5) and 128(1) and (3) of the Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (hereafter “the Constitution”). The Petitioner seeks the following relief:
 - i. **A declaration that Regulation 10A of the Defence (Regular Forces) (Officers) Regulations 1960 is illegal and ultra vires the Constitution to the extent that it contravenes Articles 1(1) and (2), 5(1), 118, 122(1), (2) and (4) and 187 of the Constitution;**
 - ii. **An Order quashing Regulation 10A for being illegal and ultra vires the Constitution;**

- iii. A declaration that the decision by the President to withdraw her commission and dismiss her from the Zambia Army is illegal and unconstitutional *ab initio* and therefore, null and void;
- iv. An Order directing the 1st Respondent to restore the Petitioner to her employment;
- v. An Order directing the 1st Respondent to pay the Petitioner her salary arrears and accruing allowances from 5th July 2023 being the date she was removed from the payroll to date;
- vi. A declaration that Regulation 14(1) of the Defence (Regular Forces) (Pensions) Regulations is *ultra vires* the Constitution to the extent that it takes away a constitutional right to a pension as guaranteed under Article 187(1) and (2);
- vii. Interest on all sums ordered;
- viii. Costs; and
- ix. Any such Order as this Honourable Court shall deem just.

THE PETITIONER'S CLAIM

2. The Petitioner alleges that Regulation 10A of the Defence (Regular Forces) (Officers) Regulations, Statutory Instrument No. 127 of 1960 (hereafter "Regulation 10A") contravenes Articles 1(1), (2) and (3), 5(1), 118, 122(1), (2) and (4) and 187 of the Constitution. The Petitioner argues that Regulation 10A effectively subjects the judiciary to the control and direction of a person in authority, which interferes with the performance of judicial functions.
3. In her Petition and affidavit verifying facts before the Court, the Petitioner claims that she was enlisted into the Zambia Army on 4th

April, 2005 and commissioned to the rank of 2nd Lieutenant on 3rd March, 2006. Thereafter, she rose through the ranks to the rank of Lieutenant Colonel until the withdrawal of her commission and dismissal from the Zambia Army by the President of the Republic of Zambia ("the President") under Regulation 10A. At the time of her dismissal, she had served the Zambia Army as a finance officer for a period of 18 years.

4. The Petitioner stated that during the period she served the Zambia Army, she was a member of, and made a total of 219 contributions to, the 2nd Respondent's pension fund. The President's exercise of power dismissing her under Regulation 10A meant that she forfeited her right to a pension and violates the supremacy of the Constitution in the sense that it insulates itself from being a subject upon which the Judiciary through its constitutional duty can provide checks against the executive's decisions and actions. Thus, the President's exercise of power under Regulation 10A is illegal and contravenes the Constitution.
5. The Petitioner alleges that as a result of the foregoing, the decision to dismiss her under Regulation 10A contravenes Articles 1(1) and (2), 5(1), 118, 122(1), (2) and (4) and 187 of the Constitution.
6. In the Petitioner's written skeleton arguments filed on her behalf, it is submitted and argued that:

- 6.1. The cases of **Godfrey Miyanda v Attorney General**⁽¹⁾ and **Jack Mbewe and Another v Attorney General**⁽²⁾, show that there has not been any conclusive guidance on the status and effect of Regulation 10A and that it is for this reason that this Petition was filed before this Court.
- 6.2. While it is trite that every person has equal access to the law, Regulation 10A, however, takes away this inherent right and as such it is unjust, unlawful and unconstitutional because the power of a court to perform its judicial function cannot be taken away by a statute or subsidiary legislation such as Regulation 10A.
- 6.3. The jurisdiction of courts over executive actions has significant implications for the rule of law which is a fundamental tenet of democratic governance and is imposed on the President by Article 91(3)(f) of the Constitution.
- 6.4. Regulation 10A offends the rule of law for the reason that it ousts the courts jurisdiction to supervise decisions made by the President. This, therefore, leaves the courts without their constitutional guaranteed power to check the actions of the executive arm of government.
- 6.5. In the case of **S v Mamambolo**,⁽³⁾ cited for persuasive purposes, the South African Constitutional Court expressed the opinion that

the principle of the separation of powers is the basis upon which impartiality and judicial independence are anchored on.

6.6. While the Zambian Constitution places a strong emphasis on the principle of separation of powers, Regulation 10A, however, pierces the protective veil provided by the principle of separation of powers as it attempts to oust the jurisdiction of the courts. It is, therefore, not only illegal for offending the principle of the separation of powers but it is also outdated, archaic and colonial as it was promulgated in 1960 before independence.

6.7. Regulation 10A was anchored on Regulation 10. Regulation 10, was however, revoked by Regulation 40(b) of the Defence (Regular Force) (Pensions) Regulations Statutory Instrument No. 184 of 1966 (hereafter "the Defence Pensions Regulations"). Thus, since Regulation 10 was revoked, Regulation 10A cannot continue to stand on its own without the revoked Regulation 10.

6.8. Article 187 of the Constitution gives a person the right to a pension benefit which ought to be interpreted liberally and should not be limited or narrowed. This approach to interpreting rights and freedoms granted by the Constitution was stated in the persuasive Supreme Court case of **Resident Doctors Association of Zambia and Others v Attorney General** ⁽⁴⁾.

6.9. Regulation 10A as read together with Regulation 14(1) of the Defence Pensions Regulations, takes away a person's constitutional right to a pension benefit. Regulation 10A, therefore, contravenes Article 187 of the Constitution and ought to be declared unconstitutional on the principle that a statutory provision that violates the Constitution is invalid as pronounced in the Supreme Court cases of **Christine Mulundika and 7 Others v The People** ⁽⁵⁾ and **Re Thomas Mumba v The Director of Public Prosecutions** ⁽⁶⁾.

6.10. It is a cardinal principle of justice that no citizen or State organ should be above the law. Regulation 10A, however, places the President above the law and for this reason it is illegal and ought to be declared unconstitutional.

THE 1ST RESPONDENT'S CASE

7. The 1st Respondent filed an Answer, affidavit in support of Answer and skeleton arguments on 19th September, 2024. The affidavit in support of Answer was sworn by Lieutenant Colonel David Busiku Leonard Hachitapika, a Staff Officer (Grade One) for Manpower and Administration at the Zambia Army. The 1st Respondent's Answer and affidavit in support of Answer disclose that:

- 7.1. The President's cancellation of the Petitioner's commission as an officer of the Zambia Army was done in exercise of his executive power under Regulation 10A. The Petitioner was dismissed from the Regular Force of the Zambia Army after she was found unsuitable to remain in the Zambia Army for conduct likely to bring discredit upon the Defence Force.
- 7.2. In dismissing her from the Zambia Army, and cancelling the commission of the Petitioner the 1st Respondent followed due process and did not commit any constitutional breaches. Following her dismissal, the Petitioner was paid benefits under section 38 of the Public Service Pensions Act No. 35 of 1996 (hereafter the "PSPA").
- 7.3. The Petitioner's assertion that Regulation 14 of the Defence Pensions Regulations takes away her constitutional right to a pension benefit is inaccurate as Regulation 14 was repealed by section 18 of the PSPA. The Petition, therefore, does not raise any constitutional issues.
8. The 1st Respondent filed skeleton arguments in which it was contended that:
- 8.1. Regulation 10A contains an ouster clause which has been the subject of litigation in prior cases before the courts. To state, as the Petitioner has done, that there has not been conclusive

guidance from the courts on the effectiveness of Regulation 10A is erroneous as for instance the case of **Attorney General v David Kabila Mwansa** ⁽⁷⁾, the Court of Appeal held that the jurisdiction of the court is ousted in relation to a decision made by the President under Regulation 10A.

8.2. The ouster clause in Regulation 10A neither interferes with Article 118 of the Constitution nor the authority vested in the Judiciary under Article 119 of the Constitution. The Judiciary has authority over a matter if that authority is grounded in law.

8.3. Where a law ousts the Judiciary's authority, the Judiciary cannot purport to have the authority to entertain a matter.

9. To fortify the argument Counsel for the 1st Respondent explained that in the case of **Dr. Ludwig Sondashi v Attorney General** ⁽⁸⁾, the Supreme Court considered an ouster clause under section 12(7) of the Firearms Act Chapter 110 of the Laws of Zambia which stipulated that the decision of the Minister "*shall be final and shall not be questioned in any proceedings*". In that case, the Supreme Court held that:

Where the legislature has decided that certain matters should be solely for the executive, the court has no role to play as such issues contain no legal issues to be resolved.

10. In concluding the argument, the 1st Respondent's counsel submitted that:

- 10.1. Based on the foregoing cases, it was within the ambit of the Legislature to oust the jurisdiction of the courts where it deems fit and as such Regulation 10A is, therefore, an effective ouster clause.
- 10.2. Unlike Regulation 10 of the Defence (Regular Forces) (Officers) Regulations, Regulation 10A was not revoked and it is valid. Further, the argument that the Defence (Regular Forces) (Officers) Regulations were promulgated in 1960 before independence is not a legal argument.
- 10.3. On the strength of the cases of **Owen Mayapi and 4 Others v Attorney General** ⁽¹¹⁾, **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission** ⁽¹²⁾ and **Anderson Mwale and Others v Zambia Open University** ⁽¹³⁾, the Petitioner's separation from the Zambia Army was not triggered by retirement due to age or other circumstances akin to retirement. Rather, the Petitioner was dismissed and as the PSPA is the law applicable to the Petitioner, she is only entitled to a pension refund under section 38 of the PSPA, as a result of her dismissal.

THE 2ND RESPONDENT'S CASE

11. The 2nd Respondent filed an Answer, an affidavit in support of Answer and skeleton arguments on 10th June, 2024 and 3rd July, 2024. The affidavit in support of Answer was sworn by Joseph Banda, the 2nd Respondent's Manager for Pension Administration. The Answer and affidavit in support of answer were to the effect that:

11.1. The Petitioner was a member of the Public Service Pensions Fund and had been making contributions to the fund while she was in the service of the Zambia Army. The Petitioner was dismissed from the public service and that the PSPA adequately covers instances where a member has been dismissed from the public service.

11.2. The right to a pension benefit as guaranteed under Article 187 of the Constitution, is not absolute right but contingent upon the fulfilment of specific conditions including making mandatory contributions, reaching the mandatory retirement age and being retired as stipulated in the PSPA.

12. In its skeleton arguments, the 2nd Respondent submitted that:

12.1. Article 187 of the Constitution provides for a right to a pension to all employees. The framers of the Constitution, however, left the specifics, formula and manner of the payment of

pensions to the specific Act of Parliament that would be applicable to a particular employee.

12.2. The Supreme Court cases of **Godfrey Miyanda v Attorney** ⁽¹⁾ and **Attorney General v Thixton** ⁽¹⁴⁾, are authority for the proposition that rights are not abstract and some action or event must occur, for rights to accrue to a person. In view of the above-mentioned cases, the right to a pension envisaged under Article 187 of the Constitution is not an absolute right.

13. The 2nd Respondent further argues that:

13.1. Although Article 187 of the Constitution guarantees the right to a pension for all employees, that right is not absolute because employees or contributing members must meet certain conditions or criteria to qualify for a pension under their employer's scheme. Until certain actions or events have occurred, the right to a pension cannot reasonably be interpreted to have accrued.

13.2. In this case, the Petitioner was dismissed from the public service. The implication of the Petitioner's dismissal is that she no longer qualifies to retire under section 41 of the PSPA because dismissal is treated differently to other forms of exit under the PSPA. The benefits on dismissal are provided under

section 38 of the PSPA, which is punitive in nature for some presumed wrong done by an employee while in service. By operation of section 38, the Petitioner is only entitled to be refunded the sum of all the contributions that she made while in the public service.

THE PETITIONER'S REPLY

14. In reply to the 1st and 2nd Respondents' Answers, affidavits in support of Answers and skeleton arguments, the Petitioner reiterated her assertion that her constitutionally protected right to a pension benefit was infringed upon and taken away by the President's exercise of power under Regulation 10A when she was dismissed from the Zambia Army. Further, that contrary to the 1st Respondent's contention, the Petitioner has neither received nor been paid any benefits under section 38 of the PSPA.
15. The Petitioner's skeleton arguments in reply were to the effect that, in accordance with the cases of **Lieutenant Chrispin S. Muchindu v Attorney General** ⁽¹⁵⁾ and **Anderson Mwale and Others v Zambia Open University** ⁽¹³⁾ the relevant pension laws that applied to her are section 41 of the PSPA and Regulation 9 of the Defence (Regular Forces) (Officers) Regulations. When read together, these

laws permit a member of the Defence Force who has served for more than 10 years to retire and be paid a pension benefit.

16. The Petitioner argued that in her case she served the Zambia Army for 18 years, and therefore, meets the threshold to be paid a pension benefit under section 41 of the PSPA and Regulation 9 of the Defence (Regular Forces) (Officers) Regulations as these laws recognise her right to a pension benefit. She argued that section 38 of the PSPA infringes on her constitutional right to a pension benefit and similarly, Regulation 10A takes away her right to a pension benefit that is protected by the Constitution, which is unconstitutional.

THE HEARING

17. At the hearing, Counsel for the Petitioner informed the Court that he would rely on the Petition, Affidavit Verifying Facts, Skeleton Arguments and the Petitioner's reply to the 1st and 2nd Respondent's Answer, Affidavit in Support of Answer and Skeleton Arguments. In augmenting the written arguments, Counsel submitted that In the case of **Kesavananda Bharati v The State of Kerala**⁽¹⁶⁾, the Supreme Court of India considered an ouster clause and opined that an ouster clause cannot oust the jurisdiction of the courts in any subject as this would alter the basic structure of the Constitution.

18. Counsel further submitted that the Supreme Court, in the case of **Citibank Zambia Limited v Suhayl Dudia**⁽¹⁷⁾, also considered an ouster clause contained in section 85(3)(b) (ii) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia and held that the Industrial Relations Court does not lose jurisdiction on account of section 85(3)(b)(ii) aforesaid. That in this case, this Court ought to similarly be concerned by Regulation 10A which ousts the jurisdiction of the courts to question the President's decision.
19. On the other hand, Counsel for the 1st Respondent relied on the documents filed on behalf of the 1st Respondent in support of its case and the record before the Court. Counsel briefly augmented by submitting that Regulation 10A has never been revoked and that it is only Regulation 10 that was revoked. It was submitted that the 1st Respondent did not invoke Regulation 10A without due process as the Petitioner was accorded an opportunity to be heard prior to the cancelling of her commission and dismissal from the Zambia Army. Regulation 10A, therefore, does not abrogate the Constitution.
20. Counsel for the 2nd Respondent entirely relied on the document filed by the 2nd Respondent in support of its case and the record before the Court.
21. In reply, Counsel for the Petitioner submitted that the question of the Petitioner being heard is not a matter within the jurisdiction of this

Court but is a matter for determination by the High Court. Regulation 10A, however, effectively denies the Petitioner access to the Court by virtue of its ouster provision.

CONSIDERATION AND DETERMINATION

22. We have considered the Petition, the Answers, the accompanying affidavits together with the written skeleton arguments filed by the parties, the oral arguments and authorities cited by Counsel.
23. The main issue for determination in this case is whether or not Regulation 10A contravenes Articles 1(1), (2) and (3), 5(1), 118, 122(1), (2) and (4) and 187 of the Constitution. Flowing from the main issue is the question whether Regulation 10A ousts a courts' jurisdiction to consider or review the President's decision made thereunder.
24. Since the Petitioner alleges that Regulation 10A contravenes the Constitution, we have jurisdiction to determine the main issue in this case under Article 128(3)(a) of the Constitution which provides that:

128. (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;

contravenes this Constitution, may petition the Constitutional Court for redress. (emphasis added)

25. We will also determine whether or not we have the jurisdiction to entertain the rest of the relief sought by the Petitioner under Article 128(1)(e) of the Constitution which reads:

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.

Whether regulation 10A contravenes the Constitution

26. The Petitioner argues that Regulation 10A contravenes Articles 1(1) and (2), 5(1), 118, 122(1), (2) and (4) and 187 of the Constitution because it ousts the jurisdiction of the courts, undermines the judicial authority vested in the courts, the principles of the rule of law and the separation of powers which are provided for in the Constitution. The Respondents on the other hand, contend that the courts have no jurisdiction to determine a matter which Parliament has enacted that some other person, body or authority must determine.

27. We begin by addressing the Petitioner's arguments that Regulation 10A is unconstitutional because it was promulgated in 1960 before independence. It was also argued that Regulation 10A was anchored on Regulation 10 which has since been revoked and, therefore, Regulation 10A has no limbs to stand on.

28. We find these arguments to be misguided. Regulation 10A came into in operation in 1965 under Statutory Instrument No. 217 of 1965. At this time, Zambia had a Constitution, the Constitution of Zambia, 1964, which was set out in Schedule 2 of the Zambia Independence Order, 1964. Further, Regulation 10A was not anchored on the now revoked Regulation 10. Regulation 10 provided for the transfer of officers to and from other employment in the service of the Crown or a Commonwealth country. Regulation 10A, is therefore, a separate provision from the revoked Regulation 10.
29. We hasten to state that the Constitution contains provisions that provide for the Defence Force. Article 197 as read with Article 266 of the Constitution provides that the regulation of the Defence Force including the recruitment, appointment, discipline and retirement of the personnel of the Defence Force shall be prescribed in an Act of Parliament. Article 272 (a) and (f) of the Constitution bestow power on Parliament to enact legislation to give effect to a provision of the Constitution which confers a function or jurisdiction on a person or requires a decision to be taken and to be legislated on, in order to give effect to the Constitution. Thus, the Constitution gives Parliament the power to enact legislation in relation to the Defence Force. To this end, Parliament enacted the Defence Act Chapter 106

of the Laws of Zambia (hereafter the "Defence Act") and its subsidiary legislation including Regulation 10A.

30. Further, Article 91(1) provides that the President is the Commander in-Chief of the Defence Force. Section 10(1) and (3) of the Defence Act vests the power to grant commissions to officers in the Defence Force solely on the President and every commission granted is signed by the President only. Section 12(1) of the Defence Act confers power on the President to make regulations with respect to the appointment, retirement, resignation and removal from office of an officer in the Defence Force, amongst other things.
31. The foregoing provisions show that the power to, *inter alia*, appoint, commission and dismiss an officer in the Defence Force is reposed in the President. This is consistent with Article 91(1) of the Constitution which stipulates that the President is the Commander in-Chief of the Defence Force and section 26 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia which states that an authority conferred, under law, with the power to appoint also has the power to remove any person appointed in the exercise of the power.
32. The Petitioner contends that Regulation 10A is an ouster clause that ousts the jurisdiction of the courts and argues that such a provision is inconsistent with and contravenes the Constitution.

33. In order for us to sufficiently address the issue whether Regulation 10A ousts the jurisdiction of the courts and contravenes the Constitution, we deem it imperative to review comparative jurisprudence regarding ouster clauses in other persuasive jurisdictions. We will also review the position that superior courts have taken in this country with respect to ouster clauses found in legislation and, in particular, Regulation 10A.
34. In the United Kingdom, the House of Lords considered an ouster clause in the landmark case of **Anisminic Ltd v The Foreign Compensation Commission and Another** ⁽¹⁸⁾. The said ouster clause was contained in a statute that was enacted in these terms:

The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.

35. In their decision, the House of Lords stated that the ouster clause in question did not debar a court from conducting an enquiry into whether the body reposed with the power to make the decision or determination acted outside the authority or jurisdiction conferred on that body by the relevant statute. They opined that the ouster clause only operated to preclude an enquiry by a court into a decision or determination that was made within the confines of the authority or

jurisdiction of the decision-making body as provided by the relevant statute. The House of Lords stated that:

... that what has been called the “ouster provision” in s 4(4) of the Foreign Compensation Act 1950, does not exclude the court’s intervention in a case where there is a merely purported determination given in excess of jurisdiction.

36. In Australia, the leading case concerning ouster clauses is the case of **Plaintiff S157/2002 v The Commonwealth** ⁽¹⁹⁾. Australia’s apex court, the High Court of Australia analysed an ouster clause that was incorporated in a migration statute. In Australia, ouster clauses are commonly referred to as ‘privative clauses’, ‘preclusive clauses’ or ‘finality clauses’. The High Court of Australia referred to the impugned ouster clause as a privative clause as that term was consistent with the one used in the migration statute that had been challenged. In that case, a tribunal rendered a decision refusing to grant the plaintiff a protection visa. That decision was referred to as a ‘privative clause decision’ which was defined by section 474 of the Migration Act 1958 (Cth) as follows:

(1) A privative clause decision:

- (a) is final and conclusive; and**
- (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and**
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.**

(2) In this section:

***privative clause decision* means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act...**

37. It was recognised by the High Court of Australia that in countries with a written constitution that carefully separate executive, legislative and judicial power, courts are not the only final decision makers in all matters affecting the society. That due to the separation of powers underpinned by the vast majority of written constitutions, decisions affecting citizens are mostly made by administrators exercising statutory powers and performing statutory duties or functions.

38. In construing the impugned ouster clause, the High Court of Australia formulated a rule of construction which, in their view, is necessary for the proper interpretation and construction of an ouster clause. The rule of construction was a presumption against ouster clauses to the effect that ouster clauses must be construed:

...by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.

39. The High Court of Australia concluded that the impugned ouster clause was valid and effective as it, on a proper interpretation, did not attempt to oust the jurisdiction of the courts. It was articulated that:

the expression "decision[s] ... made under this Act" must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act.

40. In the case of **Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others** ⁽²⁰⁾, the Supreme Court of Kenya had occasion to assess an ouster clause contained in the Sixth Schedule to the Constitution of Kenya, 2010. In this case, decisions made by the Judges and Magistrates Vetting Board were challenged. Those decisions were the subject of an ouster clause which read that:

A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.

41. The Supreme Court of Kenya defined an ouster clause to be a provision in a constitution, legislation or subsidiary legislation that removes or purports to remove the jurisdiction of the courts to hear matters. The Supreme Court of Kenya outlined the reasons that justify Parliaments to insert ouster clauses into legislation by stating that:

Ouster clauses have been adopted for certain practical and procedural reasons: protecting the integrity of the relevant body, by separating it from the formal legal process; and ensuring finality, preventing unnecessary litigation, or interventionist judicial proceedings. The relevant tribunals, boards or other bodies are perceived as agents of justice in their special modes, and it is deemed unnecessary to review their decisions. By this

arrangement, these bodies or organs are seen to protect the integrity of the relevant system.

42. The Supreme Court of Kenya stated that the effectiveness of an ouster clause ought to be determined in the context of that clauses' special facts and circumstances and further stated that:

Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute, and not outside it.

43. In adjudging that the impugned ouster clause was valid and no superior court had the jurisdiction to consider or review the decisions of the Judges and Magistrates Vetting Board, the Supreme Court of Kenya considered the historical context of Kenya in relation to the subject-matter that the ouster clause applied to and the factual background that led to the enactment of the Constitution of Kenya, 2010, and the ouster clause in its Sixth Schedule.

44. The Supreme Court of Nigeria appraised an ouster clause set out in section 188(10) of the Constitution of the Federal Republic of Nigeria, 1999, in the case of **Hon. Muiwa Inakoju and 17 Others v Hon. Abraham Adeolu Adeleke and 3 Others** ⁽²¹⁾. This case concerned the removal of a Governor from office. Section 188(1) to (9) provided for the procedure relating to the removal of a Governor from office. That procedure included the Speaker of the House of Assembly appointing a panel of persons to investigate the Governor and report

its findings to the House of Assembly. Section 188(10) provided for the ouster clause. It read that:

No proceedings or determination of the panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.

45. The Supreme Court of Nigeria considered the question whether courts could entertain a matter challenging the removal of a Governor from office when section 188(10) of the Constitution of the Federal Republic of Nigeria, 1999, ousted the jurisdiction of the courts and reposed the power to remove a Governor from office in the National Assembly. They reasoned that section 188(1) to (9) aforementioned enacted conditions that had to be complied with before the ouster clause in section 188(10) could apply. It was, therefore, held that the ouster clause in section 188(10) could only be invoked or apply when the conditions in sections 188(1) to (9) were obeyed.
46. In this jurisdiction, the Court of Appeal had occasion to interpret Regulation 10A in the case of **Attorney General v David Kabila Mwansa** ⁽⁷⁾. In that case, an officer of the Zambia Army holding the rank of Lieutenant had his commission cancelled and was dismissed from the Defence Force by the President under Regulation 10A. The Court of Appeal determined the issue whether Regulation 10A ousts the jurisdiction of the courts to hear and determine an action that

challenged a dismissal of an officer of the Defence Force under Regulation 10A. The Court concluded that:

In the final analysis, it is plain that Regulation 10A states that the decision of the President in military matters, in the cancellation of an officer's commission, are final and cannot be questioned in any proceedings. This essentially means that the jurisdiction of the court is ousted in those specific circumstances.

47. The Supreme Court, in the case of **Dr. Ludwig Sondashi v Attorney General** ⁽⁸⁾, construed an ouster clause in section 12(7) of the Firearms Act Chapter 110 of the Laws of Zambia. That section provides that:

The decision of the Minister on an appeal in terms of this section shall be final and shall not be questioned in any proceedings.

48. In their interpretation of the ouster clause in section 12(7), the Supreme Court held that:

That section was correctly interpreted by the learned trial Judge as protecting the decision of a Minister from being challenged in any proceeding which includes any court proceedings. The clause completely ousters the jurisdiction of any court including this court.

49. What we discern from the comparative jurisprudence discussed above, is that apex courts in other jurisdictions have construed ouster clauses in a strict and narrow manner. They have, however, outlined justifiable reasons for placing ouster clauses into legislation. The comparative jurisprudence shows that each ouster clause must be construed within the context of the specific Act of Parliament within which it sits and with regard to the words used within the clause.

50. We now turn to consider the ouster clause that is the subject of this case under Regulation 10A. In order to determine the main issue and the question whether Regulation 10A ousts the jurisdiction of the courts and contravenes the Constitution, we must consider and determine the scope and legal effect of Regulation 10A in light of the Constitution.

51. Regulation 10A provides for the dismissal of an officer in the Defence Force. It states that:

10A. (1) The President may, upon the recommendation of the Commander, cancel and order his removal from office if he is satisfied that such officer is inefficient or unsuitable to remain in the Regular Force or that the conduct of such officer is likely to bring discredit upon the Defence Force.

(2) Any person whose commission has been cancelled by the President under the provisions of subsection (1) shall forthwith be dismissed from the Defence Force.

(3) Any decision of the President to cancel the Commission of an officer under subsection (1) shall be final and shall not be questioned in any proceedings whatsoever. (underlining supplied for emphasis)

52. Regulation 10A (1) confers discretionary power on the President to cancel and order the removal from office of a Defence Force officer if the President is satisfied that the officer is inefficient, unsuitable to remain in the Regular Force or that the officer's conduct is likely to bring discredit upon the Defence Force. Regulation 10A (2) provides that where an officer's commission is cancelled by the President

under Regulation 10A (1), that officer is immediately dismissed from the Defence Force.

53. Regulation 10A (3), which contains the ouster clause, states that any decision of the President made under Regulation 10A (1) shall be final and shall not be questioned in any proceedings. When read in isolation, the words "*shall be final and shall not be questioned in any proceedings*" connote that the President's decision, being final, cannot be subjected to some appeal process or to any proceedings before the courts to consider or review the President's decision under Regulation 10A (1).
54. It is significant to note that what Regulation 10A (3) envisages to be final and not to be questioned in any proceedings, is a decision of the President made under Regulation 10A (1) and not any other decision of the President. The effect of this is that the ouster clause in Regulation 10A (3) only applies to decisions made under Regulation 10A (1). This then begs the question: what is a decision under Regulation 10A (1)? Or to put it differently, what is a decision within the meaning of Regulation 10A (1). To answer this question, we must resort to the text within Regulation 10A(1).
55. An examination of Regulation 10A (1) shows that the discretionary power reposed in the President to cancel and order the removal of a Defence Force officer from office is not limitless. The lawful exercise

of that power is subject to at least two specific conditions found within Regulation 10A (1) itself.

56. Firstly, the President can only act upon the discretionary power "*upon the recommendation of the Commander*". This entails that even though the power to cancel and remove a Defence Force officer from office is vested in the President, that power can only be lawfully exercised when the Commander recommends the cancellation and removal of an officer. The effect of this is that where the power under Regulation 10A (1) is exercised and an officer's commission is cancelled and removed, without the requisite recommendation from the Commander, that decision will be improper and of no effect.
57. Secondly, for a decision to be properly made under Regulation 10A (1), the President must be satisfied of at least one of three conditions, namely, that an officer is (1) inefficient or (2) unsuitable to remain in the Regular Force or (3) that the conduct of an officer is likely to bring discredit upon the Defence Force. The import of this is that a decision that purports to dismiss an officer without the President being satisfied that the officer is inefficient, unsuitable or is likely to bring discredit upon the Defence Force, is improper and of no effect.
58. The foregoing analysis demonstrates that it is only when the aforementioned conditions are met that the power to dismiss under Regulation 10A (1) can be said to have been validly and lawfully

exercised. Consequently, the ouster clause in Regulation 10A (3) comes into operation.

59. The legal effect of the ouster clause in Regulation 10A (3), therefore, is that it is invoked where a decision is validly made under Regulation 10A (1). This means that once the conditions are complied with, the President's decision is lawfully protected and immune from legal challenge because it was made within the scope of and in conformity with Regulation 10A (1).
60. The proposition that the ouster clause in Regulation 10A (3) only applies to decisions that are validly made under Regulation 10A (1) is consistent with the purpose of ouster clauses, in particular, the need for ensuring finality to decision-making and preventing unnecessary litigation. We say so because where a decision is within the scope of Regulation 10A (1) and is valid, there would be no need for any legal challenge to a lawful decision. Allowing a legal challenge to a decision that was lawfully made would only serve to encourage unnecessary litigation which would be academic and a waste of scarce judicial resources.
61. We consider it that the legislative intention behind the ouster clause in Regulation 10A (3) was to provide for a lawful procedure for dismissals in the Defence Force. Where that procedure was complied

with, the decision made thereafter would be lawful and, therefore, non-justiciable.

62. For these reasons, we find that that the ouster clause in Regulation 10A does not contravene Articles 1(1), (2) and (3), 5(1), 118, 122(1), (2) and (4) and 187 of the Constitution because it does not oust the jurisdiction of the appropriate courts from scrutinising invalid decisions that are made in breach of the conditions in Regulation 10A (1)

Whether this Court has jurisdiction to entertain the rest of the relief sought in the Petition

63. We now deal with the rest of the relief sought by the Petitioner in the order below.

An Order quashing Regulation 10A for being illegal and ultra vires the Constitution

64. In this Judgment, we have found that Regulation 10A is not unconstitutional and does not contravene Articles 1(1) and (2), 5(1), 118, 122(1), (2) and (4) and 187 of the Constitution. This relief, therefore, has no basis and it is dismissed.

A declaration that the decision by the President to withdraw the Petitioner's commission and dismiss her from the Zambia Army is illegal and unconstitutional *ab initio* and therefore, null and void

65. Save for what we have stated above pursuant to Article 128(3)(a) of the Constitution regarding the Petitioner's allegation that Regulation 10A contravenes the Constitution, we have no jurisdiction to inquire into, investigate, review or adjudicate upon an alleged illegality of a decision made under Regulation 10A. This relief is hereby dismissed.

An Order directing the 1st Respondent to restore the Petitioner to her employment

66. Under this relief, the Petitioner is, in effect, seeking to be reinstated to her employment as an officer of the Defence Force in the Zambia Army. In the case of **Gervas Chansa v Attorney General** ⁽²²⁾, we stated that a constitutional question or issue is one resolvable by interpreting the Constitution rather than a statute. Further, in the case of **Lloyd Chembo v Attorney General** ⁽²³⁾ we stated that:

The nature and status of this Court is such that it deals with direct violations of the Constitution. By virtue of Article 1(5), a matter relating to the Constitution is heard by the Constitutional Court. The rest of the law is adequately handled by other courts. (emphasis supplied)

67. Our considered view is that this relief does not raise any constitutional questions or issues because reinstatement or restoration of employment is a concept of employment law. We, therefore, have no jurisdiction to entertain this relief and it is accordingly dismissed.

An Order directing the 1st Respondent to pay the Petitioner her salary arrears and accruing allowances from 5th July 2023 being the date she was removed from the payroll to date;

68. In light of what we said in the cases of **Gervas Chansa v Attorney General** ⁽²²⁾ and **Lloyd Chembo v. Attorney General** ⁽²³⁾ we have no jurisdiction to entertain matters pertaining to the payment of salary arrears and allowances stemming from one's employment.
69. We note, however, that the salary arrears and accruing allowances sought are for the period from the Petitioner's date of dismissal from the Zambia Army to date. Thus, if the Petitioner sought to be retained on the payroll in terms of Article 189(2) of the Constitution, she should have expressly alleged a contravention of Article 189(2) in her Petition. Be that as it may, in the case of **Gift Moyo v Attorney General** ⁽²⁴⁾ we stated that:

It is, however, clear that section 38 of Act No. 35 of 1996, provides that where a person is dismissed from employment that person is only entitled to a refund of the pension contributions made by that person at that point. Section 38 of Act No. 35 of 1996 reads:

“An officer who is dismissed shall be refunded the sum of the contributions the officer made.”

A declaration that Regulation 14(1) of the Defence (Regular Forces) (Pensions) Regulations is ultra vires the Constitution to the extent that it takes away a constitutional right to a pension as guaranteed under Article 187(1) and (2)

70. The Defence (Regular Forces) (Pensions) Regulations do not apply to the Petitioner. Regulation 5 as read together with Regulation 2 of the Defence (Regular Forces) (Pensions) Regulations provide that pension contributions, thereunder, must be made by an officer to the Civil Service (Local Conditions) Pensions Board.
71. Section 2 and 18 of the PSPA, however, dissolved the Civil Service (Local Conditions) Pensions Fund and the pension funds established under the Defence Act. Since the PSPA came into operation on 14th March, 1997, by virtue of the Public Service Pensions Act (Commencement) Order Statutory Instrument No. 31 of 1997, the Civil Service (Local Conditions) Pensions Fund and the pension funds established under the Defence Act were dissolved on that date.
72. As a result of this, there was no Civil Service (Local Conditions) Pensions Board or any pension fund under the Defence Act which the Petitioner could make pension contributions to at the time she was enlisted into the Zambia Army on 4th April, 2005.
73. Accordingly, there is no evidence on record to the effect that the Petitioner made pension contributions to the Civil Service (Local Conditions) Pensions Board to entitle the provisions of the Defence (Regular Forces) (Pensions) Regulations to apply to her. What is on record is that the Petitioner alleged that she was a member of, and

made a total of 219 contributions to, the 2nd Respondent's pension fund which is established under section 2 of the PSPA.

74. The long title and section 2 of the PSPA, provide that it consolidates the law relating to pensions and other benefits for persons employed in the public service including persons in the Defence Force. It is due to this consolidation of pensions and other benefits for public service employees that the Civil Service (Local Conditions) Pensions Fund and the pension funds under the Defence Act were dissolved by the PSPA.

75. It is, therefore, the PSPA that applies to the Petitioner for the reason that she made pension contributions to the pension fund under the PSPA and not to the dissolved fund under the Defence (Regular Forces) (Pensions). Thus, Regulation 14(1) of the Defence (Regular Forces) (Pensions) which the Petitioner impugns, has no legal effect in respect of the Petitioner because it is inapplicable to her. This relief has no merit and is dismissed.

CONCLUSION

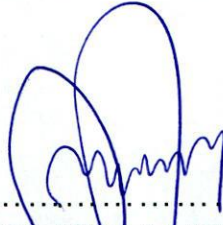
76. Taking all of the above into account, we are of the settled view that this Petition lacks merit.

ORDERS

77. Accordingly, we make the following orders:

77.1. The Petition is hereby dismissed.

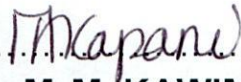
77.2. We order each party to bear their own costs.



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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



.....
M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE



.....
M. M. KAWIMBE
CONSTITUTIONAL COURT JUDGE