

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HP/1560

BETWEEN:

DONALD NGWIRA

AND

ATTORNEY GENERAL



PLAINTIFF

DEFENDANT

Before Hon. Mr. Justice M. L. Zulu on the 30th of August, 2017

For the Plaintiff: Messrs KBF and Partners

For the Defendant: The Attorney General's Chambers

J U D G M E N T

Case referred to:

1. Christopher Kanema vs The Attorney General (2013/HP/0760).

Legislation and Other Works referred to:

1. The Service Commissions Act, Chapter 259 of the Laws of Zambia.
2. Terms and Conditions of Service for the Public Service, 2003 Edition

On 1st October, 2014, the plaintiff commenced an action by way of Writ of Summons against the Defendant seeking the following reliefs:

- 1. Reinstatement and transfer of the Plaintiff by the Defendant in accordance with the minute dated 14th February;**
- 2. Damages for wrongful retirement in national interest, plus salary arrears with allowances or alternatively to be paid in full up to retirement age of 55 years;**
- 3. Interest on damages to be paid to the plaintiff at the current bank rate;**
- 4. Any other equitable reliefs; and**
- 5. The Plaintiff seeks costs.**

The Writ of Summons was accompanied by a statement of claim in which the Plaintiff expounded the basis of his claim for such relief.

However, before the matter could be heard on 9th February, 2017, counsel for the Plaintiff informed me that the parties had agreed that this action was to proceed by way of agreed facts and submissions of both parties. There being no objection from the Defendant to the settlement of agreed issues, I will accordingly render my judgment.

The following were issues not in dispute:

- 1. The Plaintiff was employed by the Defendant under the rank of Detective Chief Inspector, service number 8899;**
- 2. The Plaintiff joined the Police Service in 2000 and was attested on 1st September, 2009. After completion of the**

recruitment course, the Plaintiff was deployed to State House Police Special Division and over the years served and rose to the rank of Detective Chief Inspector;

3. The Plaintiff worked for the Defendant at State House in different sections ranging from Platoons, Armory, Commissioner Aid and Administration; and

4. The Plaintiff was retired on 18th February, 2013.

The question the Court is asked to determine is whether the plaintiff's retirement in National Interest on 1st February, 2013 was lawful or not.

The Plaintiff has submitted that the Defendant in retiring the plaintiff in National Interest had relied on **Terms and Conditions of Service for the Public Service** issued by the Secretary to the Cabinet, instead of the **Police and Prisons Service Commission Regulations (The Regulations) Statutory Instrument No. 65 of 1976** which provides the two forms of retirement as follows:

26. "If the responsible officer is of the opinion that an officer who is serving the Force and who holds a pensionable office should be called upon to retire from the Force on the grounds that he has attained the age at which he can, under the provisions of the appreciate Pensions Act, lawfully be required to retire from the Force, the responsible officer shall: -

a) Inform such officer that he intends to recommend that such officer be compulsorily retired from the Force;

- b) Ask such officer whether he wishes to make, within a period of time to be appointed by the responsible officer, any representations why he should be so retired; and*
- c) After the expiration of such period, forward his recommendations together with a copy of his letter to such officer and the latter's representations, if any, and his comments thereon to the secretary."*

Regulation 43 which provides for retirement in public interest states that;

43. (10 "Notwithstanding the provisions of these Regulations, if the responsible officer considers that an officer should be retired from the Force on the grounds of Public interest, he shall-

- a) Obtain and consider reports submitted on the officer as to his work and conduct;*
- b) Inform the officer of the tenor of such reports and allow him an opportunity within a period to be appointed by the responsible officer showing cause why he should not be retired from the Force.*

(2) If, on the expiration of the period allowed to the officer to show cause why he should not be retired from the Force, the responsible officer, after considering the statement of the officer, if any, and having had regard to all the circumstances of the case, is of the opinion that such officer should be retired from the Force, he

shall forward the reports obtained in pursuance of paragraph (a) of sub-regulation (1) and the statement of the officer, together with his comments thereon, to the secretary.

(3) If, upon consideration of the report made by the responsible officer in pursuance of sub-regulation (2), the Commission is of the opinion that the facts disclosed warrant the institution of the proceedings for the retirement in the interest of the dismissal of the officer or the imposition of some lesser penalty than dismissal, the Commission may direct the responsible officer to institute proceedings against the officer under the provisions of regulation 38.”

The Plaintiff submitted that a Police Officer can only be retired in accordance with the above provision: either be compulsorily retired or retired in the Public Interest, and not in the National Interest.

The Plaintiff cited the case of **Christopher Kanema vs The Attorney General (2013/HP/0760)** unreported, where the Court stated that:

“without going any further, the above provisions are so clear as to the mutual exclusivity of each commission under the Act. The different commissions including the Public Service Commission and the Police and Prison Commission are individually created under section 7 of

Cap 259. Each has its own members and each is governed by its own regulations. In fact, on this point when the Act says "relevant regulations" means the regulations made by the appropriate Commission under section 4, it implies in the instant case that regulations made under section 4 of Cap 259 for the Public Service Commission are only relevant to that commission and cannot be extended to the Police and Prison Service and, vice versa is also true. To interpret this otherwise would mean that all the Commissions are subsets of the Public Service Commission, a proposition which is so absurd as to merit no further discussion..... the Applicants were appointed by the Police and Prison Commission and have always received their rank elevation from the said Commission not from the President. It is unacceptable to me that while the hiring should be done by one entity the firing is by another..... what then of the Terms and Conditions of Service which provide for retirement in National Interest? My interpretation of section 9 (1) of the Service Commission Act is to the effect that there is a distinction between Public Service and inter alia the Zambia Police Service or Zambia Prison Service. The entities are mutually exclusive, the Applicants are not bound by the Terms and Conditions of Service for the Public Service issued by the Secretary to the Cabinet with regard to the issue of appointment and/or removal from employment of the Applicants when the Police and Prison Service has its own Commission."

Further, the Plaintiff submitted that the Defendant's decision to retire the Plaintiff in National Interest was unlawful as the Regulations do not provide for Retirement in National Interest, as such the Plaintiff should not have been retired in National Interest.

The Defendant in their submissions stated that the Zambia Police, is a Government Department in the Public Service regulated by various Ordinances, Acts, Orders and Regulations and are employed by the Police and Prison Service Commission established under section 7(c) of the Service Commissions Act, Cap 259 of the Laws of Zambia, which states;

“There is hereby established-

(c) a Police and Prisons Service Commission, which shall have responsibility under this Act, in respect of all Police and Prison Officers.”

The Defendant went on to cite section 9 (1) of the Act which states:

“..... subject to the constitution, powers to appoint persons to hold or act in any office in the public service, the teaching service, the Zambia Police Force or the Zambia Prisons Service, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove any such person from office shall vest in the President.”

It was the Defendant's argument that the Terms and Conditions of Service for Public Service (2003) Edition do apply to all Police Officers as all their terms and conditions of service are based on the same document, and therefore all members of the Zambia Police Service are Public Officers who are subject to the Terms and Conditions of Service for the Public Service and therefore can be retired in the National Interest just like any other Public Officer and urged this Court to frown on the case of **Christopher Kanema and Others v. The Attorney General** as it was erroneous when it stated that Police Officers cannot be tired in National Interest.

The Defendant stated that the Plaintiff was retired lawfully in accordance with section 38 (e) of the Terms and Conditions for the Public Service and therefore does not deserve any of the reliefs sought.

I have carefully considered the evidence on record and submissions by counsel for the Plaintiff and Defendant.

This Court is asked to determine whether Police Officers like any other public servants can be retired in the National Interest as provided by the **Terms and Conditions for the Public Service of 2003**.

It is settled that Police Officers are employed by the Police and Prison Service Commission.

Section 7 (c) of the Service Commissions Act states:

“a Police and Prisons Service Commission, which shall have responsibility under this Act, in respect of all Police and Prison Officers.”

It is therefore, important at this point to define who is covered under the Public Service Commission Act.

Section 7 (a) of the Service Commissions Act is instructive and it states: -

“Public Service Commission, which shall have the responsibility under this Act in respect of any office in the public service which does not fall within the responsibility of some other commission.”

Further, Section 9 (1) of the Service Commission Act brings out the distinction between Public Service and other Service Commissions including the Police and Prisons Service Commission. It is therefore, conclusive that the Commissions are exclusive of each other. Under the Act, as seen in section 7 (a) of the Cap 259, the Public Service Commission is mandated to deal with offices or officers not specifically provided for by any specific Commission.

The Police Officers are not such officers as they have their own Commission and Regulations, the Police and Prison Service Commission.

The Regulations that are applicable in one Commission cannot be applied or transferred to the other. It is thus clear that the Police and Prisons cannot be said to be one and the same as the Public Service Commission. It was not the intention of the legislature that the Police and Prisons Service Commissions be a subject of the Public Service Commission.

I want to believe, because of the unique role that officers under the Police and Prisons Service Commission have entitled them to their own Commission with own Regulations.

It would be wrong to ignore the Regulations formulated under the Police and Prison Service Commission and adopt the Administrative Terms and Conditions of Service for the Public Service issued by the Secretary to the Cabinet with regard to matters relating to Appointment or Removal from employment.

Section 7 (a) is clear with the categories of officers, covered by the Public Service Commission. The Plaintiff in this case is covered under the Police and Prisons Service Commission and therefore,

the attendant Regulations and in particular **Regulation 26 and 43 of Cap 159** of the Laws of Zambia should have applied when considering the removal of the Plaintiff from office.

Regulations 26 provides for compulsory retirement, while Regulation 43 provides for retirement in Public Interest. Clearly, retirement in the National Interest of any kind is not provided for by the Police and Prisons Services Commission Regulations.

Section 7 is very clear on the distinction that exists between the different Commissions including the Public Service Commission and the Police and Prisons Commission. Each Commission has its own members and self-regulated. This being the case, the Police and Prison Service cannot be said to be under the Public Service Commission. The inescapable conclusion is that the Terms and Conditions of the Service issued by the Secretary to the Cabinet relating to the appointment and removal are not applicable to the Plaintiff or other members of the Police and Prison Service Commission, as they have well articulated provisions laid down in the Regulations.

In my considered view, the Terms and Conditions of Service for the Public Service issued by the Secretary to the Cabinet are not applicable to the Plaintiff.

I accordingly find the decision to retire the Plaintiff in National Interest was unlawful, as this option is not available under the Regulations of the Police and Prisons Services Commission.

I accordingly award the Plaintiff Damages for wrongful retirement as sought in the statement of claim. Costs to the Plaintiff to be taxed in default of agreement.

Dated at Lusaka this 30th day of Aug 2017.



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M. L. ZULU
HIGH COURT JUDGE