

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

LT. GENERAL PETER ZUZE AND 11

OTHER EX-SERVICE CHIEFS

AND

THE ATTORNEY GENERAL

APPELLANTS

RESPONDENT

CORAM: Chashi, Siavwapa and Ngulube, JJA

ON: 28th March, 3rd April and 16th May 2018

For the Appellants: Dr. H. Mbushi, Messrs HBM Advocates

For the Respondent: D. M. Mwewa (Ms.), Assistant Senior State Advocate

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. *The Attorney General v Law Association of Zambia* (2008) ZR, 21
2. *Chikuta v Chipata Rural Council* (1974) ZR, 303 – Reprint
3. *Henry Kapoko v The People* – 2016/CC/0023
4. *New Plast Industries v The Commissioner of Lands and The Attorney General* (2001) ZR, 51
5. *South African Veterinary Council and Registrar v Grey Syzmanski* – Case No. 70 of 2001

Legislation referred to:

1. *The Defence Act Chapter 106 of the Laws of Zambia*
2. *The Supreme Court Practice (White Book) 1999*
3. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
4. *The High Court Act, Chapter 27 of the Laws of Zambia*

5. ***The Constitution of Zambia (Amendment) Act NO. 2 of 2016***
6. ***The Public Service Pensions Act, Chapter 260 of the Laws of Zambia***

This is an appeal against the Judgment of the High Court delivered on 12th April 2017.

The brief background to this matter is that the Appellants, who were the applicants in the court below, were all retired service chiefs, having been retired between 1977 and 1999. They were engaged in the service under employment conditions pursuant to ***The Defence Act¹ (Regular Force) (Officers) Regulations 1960.***

On 1st January 2002, ***The Public Service Management Division Circular No. B18 of 2002*** (Circular No. B18 of 2002) was introduced to cater for retirement packages for Defence and Security Chiefs as well as Director General, Office of the President and Directors (Special) Division. Subsequently, ***The Public Service Management Division, Circular No. B6 of 2006*** (Circular No. B6 of 2006) was issued to clarify the retirement package under circular No. B18 of 2002.

On 5th November 2015, the Appellants commenced an action in the court below by way of originating summons pursuant to Order 5/4 of ***The Rules of the Supreme Court (RSC)²*** against the Respondent, the Attorney General, claiming the following reliefs:

- That the Applicants had and are being discriminated by the Respondents.

(a) That being the initiators of the improved retirement benefits for retired Service Chiefs and Directors (Special) Division, should not be excluded from the provisions of Circular No. B6 of 2006.

(b) That Circular No. B6 of 2006 be applicable to their current retirement benefits effective from the dates of their retirement.

(c) Any other reliefs the court may deem fit.

(d) Interest and costs.

According to the Appellants, they are the ones, through their complaint to the late President F. J. T. Chiluba, who initiated what led to the President appointing a team to conduct a tour of SADC countries to find out the retirement benefits paid to ex-service chiefs, so that the ex-service chiefs in Zambia could be treated in similar fashion, which eventually led to the issuance of Circular B18 of 2002 and B6 of 2006.

The Appellants subsequently made representations to all the Presidents after President Chiluba to the current President in their quest to have their pension benefits improved.

Further according to the Appellants, the efforts they made gave them high expectations; as such they relied on the doctrine of legitimate expectation.

The Appellants felt that they had been discriminated against and unfairly treated by being excluded from the Circular without being heard on the same and without explanation.

In opposing the application, the Respondent averred that the 1st Appellant retired 37 years ago and the last Appellant 16 years ago.

That the Appellants did not qualify under Circular No. B18 of 2002 as they had not served for a period of at least 30 years and had not retired on or after 1st January 2002. Further, Circular No. B6 of 2006 did not have retrospective effect.

After considering the affidavit evidence and the submissions on behalf of the parties, the court below opined that the appellants claims were premised on discrimination in accordance with Article 23 (1) of ***The Constitution of Zambia***³, which deals with contravention of Articles 11-26 of the Constitution and directs any person affected to apply for redress to the High Court.

Reference was then made to ***Statutory Instrument No. 156 of 1969*** which prescribes the mode of bringing an application under Article 28 as being by way of Petition as prescribed.

After perusal of the endorsement on the Originating Summons, the court below was of the view that the approach by the Appellants was

to impugn Circular No. B6 of 2006 as being contrary to Article 23 (1) of ***The Constitution of Zambia***³.

The learned Judge went on to state that, that then being the case, the mode of commencement was wrong as it flouts the provisions of ***Statutory Instrument No. 156 of 1969***.

The learned Judge cited the case of **Attorney General v Law Association of Zambia**¹ where the Supreme Court confirmed that, by virtue of rule 2 of ***The Protection of Fundamental Rights Rules 1969***, an application under Article 23 (1) should be made by way of Petition. The effect of failure to commence the action as prescribed is that the court has no jurisdiction to grant the relief being sought.

Reference was then made to the case of **Chikuta v Chipata Rural Council**² and Order 6 of ***The High Court Rules***⁴.

The learned Judge then went on at page 28 of the record of appeal (the record) (J19, line17) to consider following issues; that, there was no evidence that the Appellants initiated the improvements to the retirement benefits; from the correspondence generated for and on behalf of the Appellants, they were lamenting the inadequacy of their retirement benefits which had reduced some of their colleagues to destitution. The learned Judge was unable to discern the alleged initiation as claimed.

The learned Judge also went on to address the issue of legitimate expectation, and after an analysis of several authorities found that it was not in our jurisdiction applicable to matters of contract. She opined that the doctrine applicable in casu was promissory estoppel. The learned Judge found that there was no evidence that the former President made representations to the Appellants to the effect suggested in promissory estoppel.

According to the court below, even had this action been properly commenced, it would have inevitably failed for the stated reasons.

The court below, then dismissed the Appellants' claim with costs to the Respondent.

Dissatisfied with the Judgment, the Appellants appealed to this Court advancing three grounds of appeal couched as follows:

1. The court below erred in fact and law by failing to appreciate that the Pension Scheme from which the Appellants are getting their monthly pension is the same Pension Scheme from which the newly retired officers are getting their monthly pension.
2. That the court below erred in fact and law by failing to consider the contents of the following documents:
 - (i) Document dated 12th March 2003;
 - (ii) Letter from Gen. G. K. Chikuli to the late Hon. E. Kasonde dated 17th March 2003.

- (iii) Letter from Gen. G. K. Chikuli to the late President Levy P. Mwanawasa, SC dated 23rd January 2004.
- (iv) Letter from Lt. Gen Peter Zuze to the late President M. C. Sata dated 12th September 2013.
- (v) Letter from Lt. Gen. Peter Zuze to President Edgar Chagwa Lungu dated 29th January 2015

3. That the procedural issue that the matter should have been commenced by way of Petition should not defeat the course of justice.

At the hearing of the appeal, Dr. Mbushi, Counsel for the Appellants relied on the Appellants' heads of argument.

In arguing ground one, Counsel submitted that all ex-service chiefs are paid from the same pension pot. It was contended that Circular No. 18 of 2002 and Circular No. B6 of 2006 were improvements on the pensions and should affect the old and newly retiring service chiefs. That from the practice which Government has carried on, of improving the benefits in the past, the Appellants had legitimate expectation, as such they do not understand why they should be left out.

As regards ground two, Counsel made reference to the documents referred to in the ground of appeal and submitted that there was abundant evidence that it was the Appellants who started the negotiations with Government over the retirement benefits which

gave the Appellants legitimate expectation as they were given express promises by the late President and Minister of Finance.

As regards the third ground of appeal, our attention was drawn to ***The Constitution of Zambia (Amendment) Act No. 2 of 2016***⁵ in particular Article 118 (2) (e), which states that justice shall be administered without undue regard to procedural technicalities.

Counsel cited the case of **Henry Kapoko v The People**³ and submitted that Article 118 (2) (e) is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to technicalities.

According to the Appellants, the Court should consider the matter on its merits and not on legal or procedural technicalities.

In response Ms. Mwewa, Counsel for the Respondent equally relied on the Respondents heads of argument.

Counsel addressed the third ground of appeal first and then proceeded to address the first and second grounds together.

In response to the third ground of appeal, Counsel submitted that the mode of commencement of the action in the court below was wrong and as such this Court has no jurisdiction to even entertain the grounds of appeal. Our attention in that respect was drawn to the case of **New Plast Industries v The Commissioner of Lands and The**

Attorney General⁴ where the Supreme Court reaffirmed the position which it took in the **Chikuta**² case and held inter alia as follows:

“It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute.”

According to Counsel, the relevant statute in casu is **The Constitution of Zambia**³ in particular Article 28 (1) which provides for commencement of actions by way of a Petition.

On the Appellant’s reference to Article 118 (2) (e) of **The Constitution of Zambia**⁵, Counsel submitted that the provision is not a licence for litigants to abrogate rules of procedure.

In response to the first and second grounds, counsel drew our attention to the meaning of “Officer” and “Public Service” under Section 2 of **The Public Service Pensions Act**⁶ and submitted that according to the law, the Appellants are former public servants and that explains why they receive a monthly pension from the State.

Counsel contended that the Appellants seem to be confusing the general pension fund with the one covered by the Circular.

On the issue of legitimate expectation, Counsel cited the South African case of **South African Veterinary Counsel and Registrar v Greg Syzmanski**⁵ at page 11, where Cameron, JA stated as follows:

*"The requirement relating to the legitimacy of expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher, J in **National Director of Public Prosecutions v Philips and Others (2002) (4 SA 60 (IN) para 28)** he said;*

The law does not protect every expectation but only those which are legitimate.

The requirements for legitimacy of expectation, include the following:

- (i) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification. The requirement is a sensible one. It accords with the principle of fairness in public administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations.*

It is also not unfair to those who choose to rely on such statements.

It is always open to them to seek clarification before they do so, failing which they act at their peril.

- (ii) *The expectation must be reasonable.*
- (iii) *The representation must have been induced by the decision maker.*
- (iv) *The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.*

It is worth emphasizing that the reasonableness of the expectation operates as a pre-condition to its legitimacy.

The first question is functional – whether in all circumstances the expectation sought to be relied on is reasonable. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose. Only if that test is fulfilled does the further question - whether in public law the expectation is legitimate.”

Counsel submitted that the aforestated authority is highly persuasive as it outlines thorough pre-requisites of what the Appellants seem to believe are entitled.

According to Counsel, the documents at pages 47 – 48 of the record are not at the Respondent's instance and therefore any representation therein was not induced by the Respondent.

The documents at pages 49 -54 of the record are after the fact and of no relevance in this matter.

It was further argued that the document at page 55 of the record is a newspaper article authored by an unknown person and the Appellants were merely tabling their concerns as had been done in the documents appearing at pages 56 -66 of the record.

Counsel further submitted that the law does not protect every expectation but only the legitimate ones, as the Respondent has limited resources to make such expectations to members of the public such as the Appellants, more so, that social, economic and political rights are actually not even guaranteed in this country.

It was Counsel's contention that the Appellants have all been paid their dues and there was no express undertaking or promise on the part of the Respondent and any expectations the Appellants would have is not legitimate and does not meet the required legal threshold to stand.

We have considered the arguments by the parties and the Judgment being impugned.

We will start by addressing the third ground of appeal as Counsel for the Respondents did, for reasons which will become obvious in due course.

The issue which arises on this ground is whether the court below had jurisdiction to entertain the Appellants cause of action.

The learned Judge in the court below as earlier alluded to, made a finding that it had no jurisdiction. We need not belabor this point as can be seen from the arguments by Counsel for the Appellants, that lapse on their part has been conceded. Their only contention is that the lapse was a procedural technicality, which should not attract dismissal of the cause of action. That in accordance with Article 118 (2) (e) of **The Constitution of Zambia**⁵, the Court should consider the matter on its merits and not on legal or procedural technicalities.

In resolving this issue, we are guided by what the Constitutional Court enunciated *inter alia* in the **Henry Kapoko**³ case in the interpretation of Article 118 (2) (e) of **The Constitution of Zambia**⁵ where they said the following:

“The approach we have taken is in our view broad enough to accommodate a range of legal questions and problems. While the facts and law in each case will vary, the principle laid out by this court on the meaning and application of Article 118 (2) (e) remains constant. The courts word is clear. Article 118 (2) (e) is not intended to do away with

existing principles, laws and procedure, even where the same constitute technicalities.

It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality.”

In adhering to the aforestated, we are of the view that it is in the interest of justice that procedural lapses should not be invoked to defeat applications or matters before courts of law unless the lapse went to the jurisdiction of the court or is likely to cause substantial injustice or prejudice to the opposite party.

In casu, the lapse went to the jurisdiction of the court.

We note from the record, as earlier alluded to, after finding that it had no jurisdiction, the court below went on to address various issues which were raised by the Appellants.

In the words of the learned Judge, that was done only as a courtesy to learned Counsel for the Appellant, in that he had raised them in his arguments.

Our view is that, the court below having found that it had no jurisdiction it should have stopped there and dismissed the action for lack of jurisdiction.

The court below erred in proceeding to address some of the issues which touched on the merits of the case, when it had no jurisdiction. In the view we have taken, we agree with Counsel for the Respondent, that this Court equally has no jurisdiction to entertain the grounds of appeal before us.

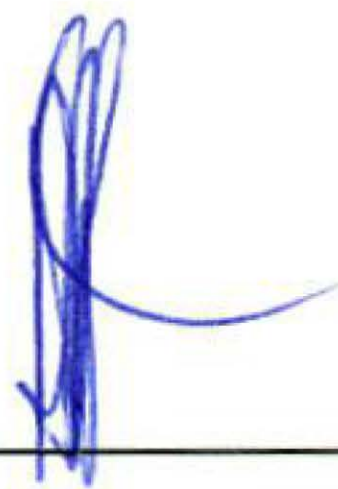
Consequently, grounds one and two of the appeal are otiose.

The sum total of this appeal is that it lacks merit and is accordingly dismissed with costs to the Respondent.

Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE