

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2019/HP/1402

BETWEEN:

EVANS CHILUKUSHA
CLEMENT NGALATI
RICHARD CHIYANGI
ELIJAH CHITALU
VIVIAN MULENGA ZULU

1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF
5TH PLAINTIFF



AND

ENGEN PETROLEUM ZAMBIA LIMITED

DEFENDANT

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MR. M. LISIMBA OF MAMBWE, SIWILA & LISIMBA
ADVOCATES

FOR THE DEFENDANT: MR. M. J. KAWANA OF CORPUS GLOBE LEGAL
PRACTITIONERS

RULING

Cases Referred To:

1. *Zambia National Commercial Bank PLC v Martin Musonda & Others* SJ No. 24 of 2018.
2. *PC Cheelo & 9 Others v ZCCM SCZ* No. 27 of 1999.
3. *Nsofu Mandona v Total Aviation & Expert Limited & Others* Appeal No. 82 of 2009.

This is the defendant's application to set aside writ of summons for irregularity and for reference of the matter to the Constitutional Court for determination pursuant to Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia as read together with Order 2 Rule 2 of the Supreme Court Practice Rules 1999 Edition Volume 1 (White Book) and Section 8 (2) of the Constitutional Court Act No.8 of 2016.

The grounds raised are as follows:

That the plaintiff's action was incompetently filed in the Principal Registry after the establishment of the Industrial Relations Division by the Constitution of Zambia Amendment Act No. 2 of 2016 and; that since the matter involves the interpretation of Article 133 of the Constitution of Zambia, the matter should be referred to the Constitutional Court for determination.

This application is supported by an affidavit dated 3rd October, 2019, deposed to by one Jean-Blaise Ollomo the Managing Director of the defendant company, which is the Applicant in this case. It was deposed that the plaintiff herein commenced this action on 2nd September, 2019, by way of writ of summons and statement of claim. That as pleaded by the plaintiffs, all the plaintiffs are former employees of the defendant who served on written contracts of employment. It was also deposed that it appeared that the plaintiffs' cause of action was underpayment of their redundancy packages on

the basis that the plaintiffs never consented to the change of the terms of their employment.

The deponent went on to state that the defendant's position is that the plaintiffs were fully paid their redundancy packages when they exited, that is, two months pay for every year served in accordance with their amended conditions of service which amendment the plaintiffs expressly consented. That the plaintiffs' consent to the amendment of their conditions of service is confirmed by the 7th plaintiff in an affidavit filed in this Court under Cause Number Comp No. 84/2014 as evidenced by exhibit marked "JBO2".

It was further deposed that in view of this, this matter is purely an industrial related matter and the plaintiffs ought to have taken their grievance before the Industrial Relations Division of this Court for determination. It was also stated that the failure to do so by the plaintiffs rendered the writ of summons incompetent.

The deponent also stated that the question of competence of the plaintiffs' action herein cannot be adequately determined without interpretation of the relevant provisions of the Constitution of Zambia and that for that reason, this matter ought to be referred to the Constitutional Court for determination.

On the other hand, the plaintiffs filed an affidavit in opposition dated 16th October, 2019, deposed to by one Evans Chilukusha, the 1st plaintiff herein. He deposed that it is true that the plaintiffs served the defendant under contracts which were transferred from Chevron Zambia Limited which contract conditions existed up to the time they exited the defendant company. The deponent went further to state that the plaintiffs were underpaid their dues when the defendant only paid them two months' salary for each year served instead of five months' salary as per the contracts.

It was also deposed that it was mischievous for the defendant to argue that exhibit "JB02" shows that the 7th plaintiff confirmed that the plaintiffs had consented to the amendment of their conditions of service when in fact the trial Court and the Supreme Court ruled that there were no such consents as shown by exhibit marked "EC1". That pursuant to the said Supreme Court judgment, the defendant went on and paid the complainant in that case as shown by letter marked "EC2."

That the High Court has jurisdiction to hear matters arising out of a pure master and servant relationship as was the case between the plaintiffs and the defendant. Furthermore, the deponent stated that there is no serious constitutional question that needs to be addressed by the Constitutional Court to warrant referral of this matter. That

this is a claim for benefits due to all the plaintiffs under redundancy package as provided for under a contract. It was deposed that the writ is properly before this Court and the interest of justice dictate that the matter proceed in the manner commenced by the plaintiff and be decided on merit.

I have taken note of the skeleton arguments by the plaintiffs dated 11th November, 2019.

When the matter came up for hearing on 20th November, 2019, the Learned Counsel for the defendant, Mr Kawana, submitted that the gist of the defendant's application is that the writ of summons that was filed into Court was improperly before the Principal Registry. That the Constitutional amendment in 2016, led to the establishment of divisions in the High Court such as the Industrial and Labour Relations Division. Counsel submitted further that the plaintiff's affidavit in opposition shows that there is no dispute that this matter arises from purely a master-servant relationship and therefore, that this matter ought to have been commenced in the labour division of the High Court which by virtue of Section 85 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia, has the jurisdiction to determine a matter of that nature.

Mr Kawana also submitted that the Constitutional Court settled the issue of jurisdiction under the Industrial and Labour Relations Division in the case of **Zambia National Commercial Bank PLC v Martin Musonda & Others SJ No. 24 of 2018**¹. It was Counsel's submission that in that judgment, the Court held that by virtue of Section 6(1) of the Constitution of Zambia Act No. 1 of 2016, the laws which were existing at the time of the amendment of the Constitution should continue and should be construed with such amendments and adaptations to bring them into conformity with the amended Constitution. That the effect is that the rules of the IRC are applicable in the labour division of the High Court where this matter ought to have been commenced.

Mr Kawana went further to contend that the second limb of the application is for referral to the Constitutional Court for determination of the question whether a litigant has a choice on whether to commence a labour dispute in any other division of this Court other than the Industrial Relations Court especially in light of the Constitutional Court.

On the other hand, the Learned Counsel for the plaintiffs, Mr Lisimba, contended that in the Constitutional Court matter referred to by Mr Kawana, that is the **Zambia National Commercial Bank v Martin Musonda & Others**, the issue was whether a litigant could

commence an action in the labour division using a notice of complaint and instead of a writ as is the case in the High Court and the Constitutional Court guided that in as far as the practice in the IRC vis-à-vis commencement of action, the law had not changed in spite of the Constitutional Amendment Act No. 2 of 2016. Counsel submitted that the Constitutional Court did not discuss the issue of whether a party has to decide where to commence an action. Mr Lisimba further submitted that even assuming that the interpretation of the Constitutional Court judgment was as espoused by Mr Kawana, the law obtaining prior to the enactment of the Constitution Amendment Act was as provided under Section 85 (1) of Cap 269. Mr Lisimba went on to submit that the Supreme Court interpreted what IRC matters are in the case of **PC Cheelo & 9 Others v ZCCM SCZ No. 27 of 1999²** as follows:

“To give the expression Industrial Relations matters a wide interpretation so as to encompass cases of breach of contract, wrongful dismissal or claims which could be tried by the Subordinate or Local Courts would lead to absurdity.”

Counsel submitted that the issues in the matter in casu are purely a claim under a redundancy agreement and that this Court has jurisdiction to determine the issue therein.

On the second limb, Mr Lisimba submitted that since this Court has jurisdiction over master-servant relationship actions and in this regard on redundancy agreements specifically, there is no constitutional question that ought to be referred to the Constitutional Court as the law is settled. It was Mr Lisimba's further submission that in the case of **Nsofu Mandona v Total Aviation & Expert Limited & Others Appeal No. 82 of 2009**³ the Supreme Court stated as follows:

“where, however, a matter arises whose substance is primarily the interpretation of a provision of the Constitution, this Court will refer the matter to the Constitutional Court in terms of Article 28 (1) to which we have alluded. This does not in any case mean that that every time the Constitution is mentioned in arguments made before this Court, we shall close our records of appeal and rise until the Constitutional Court determines any such arguments. Making observations on obvious constitutional provisions as we determine disputes of a non constitutional nature is not, in our view necessary averse to the letters and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional Court. This Court, as any other Supreme Court for that matter, is made up of Judges of note capable in their own way of understanding and interpreting the Constitution.”

Counsel submitted that this Court is capable of interpreting the provisions of the Constitution and the provisions in the Industrial and

Labour Relations Act and further that this Court has jurisdiction over matters arising out of breach of contract and redundancy agreements in employment contracts therefore there is no need to refer the matter to the Constitutional Court as doing so will unnecessarily clog that Court with issues that this Court can competently deal with. Mr Lisimba prayed that the main matter be allowed to proceed unhindered by frivolous applications such as this one and that this matter be dismissed with costs.

In reply, Mr Kawana submitted that Article 133(1) of the Constitution is clear as it establishes one High Court. That Article 133 (2) establishes divisions of the High Court therefore the only question is which division of the High Court is competent to hear and determine employment matters or matters arising from a master-servant relationship. Counsel submitted that the proper division of the High Court to hear and determine this matter is the labour division in line with Article 133(2) of the Constitution. Counsel further submitted that it is not in dispute that this Court has jurisdiction to hear this matter but the question is which division of the High Court should hear the matter and which procedure.

Mr Kawana also contended that the effect of the Constitutional Court's finding in the **Zambia National Commercial Bank** case cited earlier is that the law applicable to the Industrial Relations Court as

established under the Industrial and Labour Relations Act is now the law that is applicable to the industrial and labour division of the High Court. That industrial or employment matters be brought under the labour division of the High Court in accordance with the rules of the Industrial Relations Court. It was further submitted that the merging of the Industrial Relations Court and the High Court in the Constitution Amendment Act of 2016, effectively outlawed the practice of choosing a fora.

In relation to reference to the Constitutional Court, Mr Kawana submitted that the Constitution gives exclusive jurisdiction to the Constitutional Court as established to interpret the effect of the Constitutional provisions and therefore to the extent that this Court is called upon to interpret the effect of Article 133 (2) of the Constitution, this Court will fall into error if it proceeded. It was Counsel's submission that the effect of the creation of the labour division in the High Court is a very important matter that ought to be determined in finality by the Constitutional Court.

I have carefully considered the affidavit evidence, skeleton arguments and oral submissions made by Counsel in this matter. The defendant, who is the Applicant herein, has made an application to set aside the writ of summons filed herein and that the matter be referred to the Constitutional Court on the following grounds: Firstly

that the plaintiffs' action was incompetently filed in the Principal Registry after the establishment of the Industrial Relations Division by the Constitution and secondly that since the matter involves the interpretation of Article 133 of the Constitution, the matter should be referred to the Constitutional Court for determination.

Article 133 (2) of the Constitution provides as follows:

“There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children’s Court.”

Section 3 of the High Court (Amendment) Act No. 21 of 2016 provides:

“The Court consists of the following divisions:

(a) The Industrial Relations Court....

(3) Subject to this Act and any other written law, the Chief Justice may, by statutory instrument, specify the categories of matters over which a division of the Court has jurisdiction.

(4) The Chief Justice may give practice directions to a division of the Court.

In the case of **Zambia National Commercial Bank PLC v Martin Musonda & 58 Others Selected Judgment No. 24 of 2018** the Constitutional Court had this to say:

“The reference before us requires us to interpret the provisions of Article 133 (2) of the Constitution as amended with regard to the processes and procedures to be adopted

by the Industrial Relations Court as a division of the High Court...

The framers of the Constitution when providing for the establishment of the divisions of the High Court, as specialised Courts were alive to the fact that the Courts so established would require their jurisdiction to be clearly defined and further, that specific processes and procedures tailored to the specialisation of each divisional Court should be carefully prescribed...

It follows that a specific Act of parliament to give effect to the processes, procedures, jurisdiction, powers and sittings of the divisions of the High Court as established under Article 133 of the Constitution has to be enacted...

We take judicial notice that the processes, procedures, jurisdiction, powers and the sittings of the created divisions of the High Court have not yet been prescribed after the enactment of the Constitution...

Until new legislation is enacted to provide for the processes and procedures and jurisdiction of the Industrial Relations Court Division pursuant to Article 120 (3) (a) and (b) of the Constitution as amended, the Court continues to use the existing processes and procedures and enjoys the same jurisdiction."

From the quotation above, the Constitutional Court seems to have interpreted Article 133 (2) of the Constitution by stating that the procedures, processes, powers and sittings of the created divisions of the High Court have not yet been prescribed after the enactment of

the current Constitution so unless and until that is done, I agree with Mr. Lisimba, that there is no need to refer the matter to the Constitutional Court as doing so will unnecessarily clog that court with issues that this court can competently deal with.

According to Article 128 (1) (a) of the Constitution, the Constitutional Court has original and final jurisdiction to hear a matter relating to the interpretation of the Constitution.

Article 128 (2) of the Constitution provides as follows:

“Subject to Article 28 (2), where a question relating to this Constitution arises in a Court, the person presiding in that Court shall refer the question to the Constitutional Court.”

Similarly, Section 8(2) of the Constitutional Court Act No. 8 of 2016 provides:

“Subject to Article 28 (2) of the Constitution, where a question relating to the Constitution arises in a Court, the person presiding in that Court shall refer the question to the Court.”

From what I can decipher from this, the issue for determination is whether the plaintiffs had a choice whether to file process in the Principal Registry or the Industrial Relations Court Division and I am of the considered view that this is not a constitutional issue for the Constitutional Court to answer. According to Article 134 of the Constitution, the High Court has, subject to Article 128, unlimited

and original jurisdiction in civil and criminal matters. I am alive to the fact that the High Court had jurisdiction to hear matters arising from employment cases even when the Industrial Relations Court was an independent Court. And I would like to believe that the **Zambia National Commercial Bank** case above, tackled this issue adequately.

In my view, the High Court being a court of unlimited and original jurisdiction also has the mandate to interpret certain Constitutional provisions as each case demands.

It is my understanding therefore that the legislature has not taken away the mandate of the High Court to hear Constitutional matters that have a bearing on the interpretation of the Constitution such as in election petitions, and other such cases. Article 133(2,) establishes the different divisions of the High Court, but it does not in my view state that the General list, as a division of the High Court, cannot hear matters that are of an employment or industrial relations nature. Until such a time when further legislation is enacted to enhance the applicability of Article 133(2), the General List of the High Court is competent to hear employment or industrial related matters.

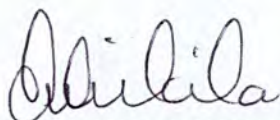
I further find that the merging of the Industrial Relations Court with the High Court has no bearing on the issue of choosing a fora. In

short, the merger of the 2 courts did not in any way prohibit the filing of employment or industrial related matters in the Principal Registry or the General List division of the High Court. There was therefore no anomaly on the part of the plaintiffs in filing the writ of summons in the Principal Registry of the High Court.

I therefore find this application to be frivolous and lacking in merit. I accordingly dismiss it with the contempt it deserves and order that the main matter be allowed to proceed to trial.

I award costs to the plaintiffs to be taxed in default of agreement.

Delivered at Lusaka in Chambers this 30th day of January 2020



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**ELITA PHIRI MWIKISA
HIGH COURT JUDGE**