

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

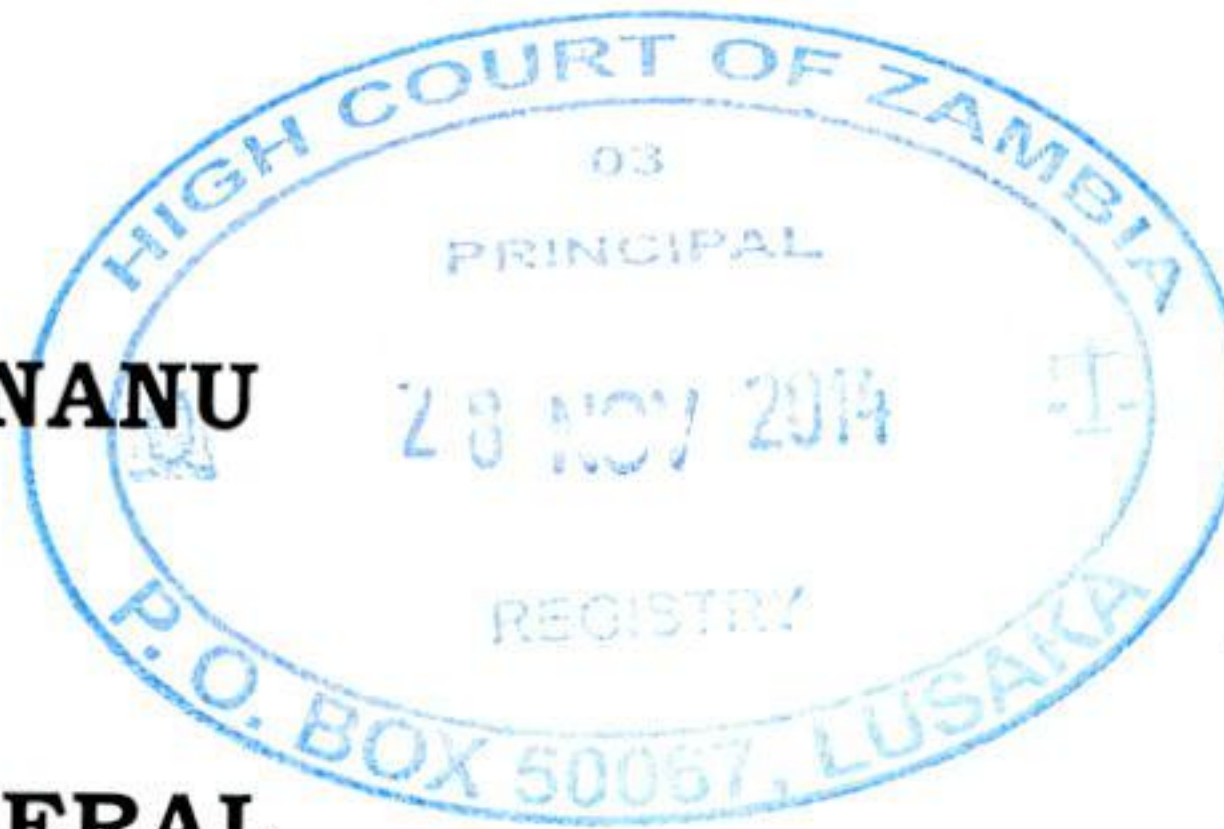
2002/HP/0762

BETWEEN:

DAVID MOOTO SIKANANU

AND

THE ATTORNEY GENERAL



PLAINTIFF

DEFENDANT

***Before The Honourable Mr. Justice I. C. T. Chali in Chambers at
Lusaka, the 28th day of November, 2014.***

For the Plaintiff: Mr. M. Z. Mwandenga of M. Z. Mwandenga
and Company

For the Defendant: Col. J. C. Chola with Major C. Hambote of
The Attorney General Chambers

R U L I N G

Legislation referred to:

1. Order 14A of the Rules of the Supreme Court (White Book) 1999 Edition.
2. Regulation 10(A) (1) of the Defence (Regular Force) (officers) Regulations 1960 Chapter 106 of the Laws of Zambia

On 21st August, 2002 the Plaintiff commenced an action for, *inter alia*, a declaration that his dismissal from the Zambia Air Force on 31st August, 1999 was unlawful and therefore null and void. He also sought an order

for reinstatement at an appropriate rank and/or to be retired thereafter. He further sought an order for the payment of his emoluments from the date of the purported dismissal to the date of reinstatement.

While matter was pending and at interlocutory stage, the case record got misplaced and was only reconstructed in July 2014 from documents held by counsel for the Plaintiff.

On 31st July 2014, the Plaintiff filed an application to amend the writ of summons and statement of claim so as to be allowed to include certain events which had occurred in the interim period. In his regard he referred to a letter dated 29th April, 2004 which had been written to him by the Zambia Air Force reversing his dismissal and replacing it with retirement backdated to 31st August, 1999.

That application was granted on 13th August, 2014 by the learned Deputy Registrar and an amended writ and statement of claim were then filed. The Defendant was granted leave to file an amended defence and counterclaim (if any), which was done on 29th August, 2014. The Defendant then filed a notice of motion pursuant to **Order 14A** of the Rules of the Supreme Court (White Book) 1999 Edition for the determination of the following issues;

- “1. Whether the Court can entertain this action in the light of Regulation 10A of the Defence (Regular Forces) (Officers) Regulations, 1960; and***

2. *Whether this Court should entertain a claim on retirement when such claim is statute barred by virtue of the Limitation Act, 1939."*

I must state here that the two issues raised in the motion were also pleaded in the Defendant's amended defence.

Order 14A Rule 1 provides;

- "(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –*
- (a) Such question is suitable for determination without a full trial of the action, and*
- (b) Such determination will finally determine (subject only to any possible appeal) the entire case or matter or any claim or issue therein.*
- (2) Upon such determination the Court may dismiss the cause of matter or make such order or judgment as it thinks just."*

On a preview of the issues raised and the written submissions filed by counsel for the parties prior to the oral arguments, I found this to be a suitable application to consider before a full trial of the action.

In respect of the first issue, on the facts as pleaded by the parties, I find that the Plaintiff was at the material time a commissioned officer in the Zambia Air Force holding the rank of Lieutenant. By letter dated 31st August, 1999, the Air Commander informed the Plaintiff that the Republican President and Commander-in-Chief of the Armed Forces had dismissed the Plaintiff from the Regular Air Force in accordance with **Regulation 10(A) (1) of the Defence (Regular Force) (Officers) Regulations 1960, Chapter 106 of the Laws of Zambia**. The Plaintiff appealed two times against the dismissal without success in September 1999 and June 2001, before his Advocates took up the case for him in July, 2001.

Regulation 10A provides thus:

- “(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 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.”*

Mr. Mwandenga, counsel for the Plaintiff, argued that in order for the President to invoke **Regulation 10A** there ought to be evidence about the conduct of the officer including the Commander's recommendation, and

that the Court ought to be satisfied that there was indeed such evidence before it can in turn uphold the President's decision.

However, I do not accept that argument. In my opinion, the Court cannot go behind the President's decision. The Court just has to take the decision as it stands. Read as a whole, **Regulation 10A** vests the powers of decommissioning and dismissal entirely in the President and it cannot be questioned at any forum, except, perhaps, for procedural impropriety. I therefore agree with Colonel Chola, counsel for the Defendant, when he submitted that **Regulation 10A** ousts the Court's jurisdiction. However, that notwithstanding, there is documentary evidence on the record alluding to the Plaintiff's misconduct while in service, including absenteeism and insubordination to superior officers.

The other argument advanced by Plaintiff's counsel on the first issue was that in its present form, **Regulation 10A** does not provide for an appeal.

The short answer to that argument is in the two letters the Plaintiff's wrote appealing against the President's decision. It appears to me from the documents filed into Court by both parties that the appeals were duly considered, and appear to have triggered the reversal of the dismissal to a retirement. In relation to the Plaintiff, therefore, the right to a hearing was exercised.

With regard to the second question raised in the motion, the Plaintiff, in

his amended writ and statement of claim pleaded thus, *inter alia*;

- “ 9. Furthermore, and/or in the alternative by letter dated 29th April, 2004 the Zambia Air Force reversed the dismissal ... and purportedly replaced it with retirement backdated to the 31st August, 1999*
- 10. The Plaintiff was not given the requisite 6 months notice or paid 6 months pay in lieu of notice in accordance with (the law).*
- 11. By reason of the matters set out in paragraph 10 hereof, it will be averred that the purported retirement was not done in conformity with (the law) pertaining to the retirement of an officer from the Zambia Air Force.*
- 12. In the circumstances the purported retirement was unlawful or wrongful and/or null and void.”*

Colonel Chola on behalf of the State pointed out, and rightly so in my view, that the starting point for the purpose of reckoning time with regard to the retirement ought to be April 2004 when the issue arose. Therefore, he submitted, and again rightly in my view, by the time the amendment was made to lay claim on it, it had taken 10 years, clearly outside the period of 6 years provided by the **Limitation Act, 1939** for bringing such an action. I did not find any ground upon which the limitation period ought to be extended in the circumstances of this case because the retirement was communicated to the Plaintiff timeously but he did not take any action upon it.

In the result, I find that both issues raised in the motion are valid and I hereby uphold them. I therefore dismiss the entire action.

In the circumstances of this case and particularly considering the tardy manner in which the motion was raised, I order that each party shall bear his own costs of the action.

Leave to appeal is granted.

DELIVERED IN CHAMBERS, THE 28TH DAY OF NOVEMBER, 2014.


I. C. T. CHALI
JUDGE