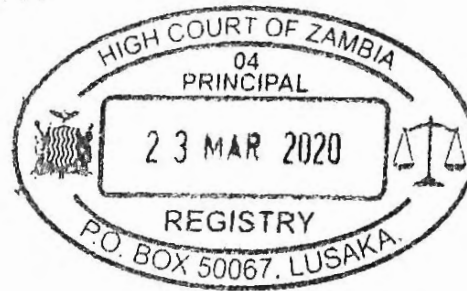


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2019/HP/0247



BETWEEN:

OGLY CHIBOMA

PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 23rd day of March 2020.

For the Plaintiff:

Mr. R. Chafwakale, Messrs Silweya & Company

For the Defendants:

Captain M. B. Mudenda, State Advocate, Attorney
General's Chambers

J U D G M E N T

Cases Referred To:

1. *Kapema v The Attorney General (1995) Unreported*
2. *Kioa v West (1985), 159 CLR 55*
3. *Commissioner of Police v Tanos (1985) 98 CLR 383, 395*
4. *Africa Supermarket Limited (Trading as Shoprite Checkers) v Mhone Appeal No. 162 of 2001*
5. *Abraham Nyirenda v Mulungushi Village Complex Appeal No. 37 of 2016*
6. *Krige and Another v Christian Council of Zambia (1975) Z.R 152*
7. *Bob Shilling Zinka v The Attorney General SCZ Judgment No. 9 of 1991*

Legislation Referred To:

1. *Defence Act Chapter 106*

Other Works Referred To:

1. *The AG Instructions to the Zambia Army No.5/73 of 9 May 1973*
2. *The Defence (Regular Forces) Officers Regulations 1960*

1. Introduction

1.1 This curious case involves the plaintiff who was enlisted into the Zambia Army on 22nd February 2012. He was commissioned to the rank of Captain on 2nd May 2012 and subsequently promoted to the rank of Lieutenant Colonel. In 2017, he was alleged to have contracted other employment with Systems for Better Health, (ABT Associates), a USAID project. He was summoned by the Army Commander to disciplinary interviews, which the plaintiff alleged were unfair. The latter recommended the plaintiff's dismissal on 29th November 2017. The issue for determination is *whether the conduct of the Zambia Army in terminating the plaintiff's employment amounted to a breach of the contract of employment?*

2. Pleadings

2.1 The plaintiff instituted this suit in Court on 15th February 2019 and by way of writ of summons and statement of claim sought against the defendant the following orders:

- “(i) An order that the plaintiff was unfairly dismissed from Zambia Army.*
- (ii) An order for the reinstatement of his commission.*
- (iii) Unconditional re-instatement into the Zambia Army at the rank the plaintiff should have been had he not been unfairly dismissed.*
- (iv) Full salary, benefits and allowances with interest from the date of the unfair dismissal.*

- (v) Damages for mental anguish, trauma, inconvenience and public odium suffered as a result of the unfair dismissal.
- (vi) An order for costs incidental to the proceedings
- (viii) Any other reliefs the Court may deem fit."

2.3 In the statement of claim, the plaintiff pleaded that he was enlisted into the Zambia Army on 22nd February 2012 and commissioned to the rank of Captain on 2nd May 2012. He was later promoted to Lieutenant Colonel (Consultant Obstetrician and Gynecologist) at Maina Soko Military Hospital till his unfair dismissal on 29th November 2017. His commission was thereafter withdrawn and as a result, suffered damage, inconvenience, loss of income, mental anguish, public odium and moral embarrassment.

2.4 In response, the defendant entered appearance and filed a defence into Court on 21st May 2019. It conceded that the plaintiff's commission was withdrawn but averred that the plaintiff committed a serious breach of his contract of employment. He was however, heard on two occasions before he was fairly dismissed.

3. Trial

3.1 The matter came up for trial on 26th September and 10th October 2019. In support of his case, the plaintiff (PW) testified that he joined the Zambia Army in February 2012 as a specialist officer cadet and served

for seven years. He was dismissed from employment sometime in November 2017 by the former Army Commander (General Paul Mihova) who accused him of engaging in other employment while serving in the Zambia Army. PW testified that prior to his dismissal, the Army Commander summoned him to his office in September 2017 and he was in the company of the Deputy Army Commander.

3.2 PW was told of his transgression and asked to stay away from his work. He was later summoned to report to the Army Commander's office in ceremonial dress on 30th November 2017, where he was handed a letter from the Republican President cancelling his commission and dismissing him from the Zambia Army. He was told to hand over the military vehicle, army equipment and to vacate the house. PW averred that he was not given an opportunity to defend himself and did not receive any benefits after his dismissal. He prayed to Court to grant him the reliefs against the defendant.

3.3 In **cross-examination**, PW testified that the allegations against him were that he was working for another organization and discouraging doctors from joining the Army. He admitted that he worked for ABT Associates, a project aimed at reducing maternal mortality whilst he was on vacation leave. He also admitted that he received a salary from ABT

Associates. PW contended that he did not breach his employment contract with the Zambia Army even though he did not get permission for his other work. He was aware of the procedure of secondment and averred that he told his superior staff officer Dr. Malyango the Commandant of Maina Soko and his Deputy Dr. Chisoko about his extra work with ABT. PW stated that his work with ABT Associates was in line with his employment at the Army.

- 3.4 It was PW's evidence that in the first interview the Army Commander, explained the offences he had committed. In the second interview, the allegations were amplified. PW stated that he resigned from ABT Associates between October and November 2017 and that in one interview, Mr. Ncube of ABT Associates was called to give evidence. PW averred that he was not given time to prepare his case because the Army Commander belatedly told him that a witness would testify against him. He did not agree with some of Mr. Ncube's observations against him but admitted his contractual relationship with ABT Associates.
- 3.5 In **re-examination**, PW responded that his contract with ABT Associates lasted nine months.
- 3.6 That marked the close of the plaintiff's case.

- 3.7 In response, the defendant called three witnesses. The first was **Lt Colonel Elias Zulu (DW1)** who testified that the Defence Act regulated the employment of personnel in the defence forces. Officers were commissioned by the Republican President and the mandatory age of retirement in the Zambia Army was 55 years, although an officer could resign or be retired in public/national interest or dismissed at the instance of the Commander in Chief.
- 3.8 It was DW1's further testimony that army officers were entitled to the condition of secondment to other organizations but had to apply through their immediate supervisors. The applications for secondments were subject to further approval of other senior rank and finally the Army Commander or the Ministry of Defence depending on the duration of the absence. DW1 stated that after approval, an officer could take up an assignment. In PW's case, his immediate supervisor was the Commandant Maina Soko and the next in line was the Director, General Medical Services.
- 3.9 In **cross-examination**, DW1 replied that an interview was part of the disciplinary procedure in the Zambia Army although it was not the end process. The Republican President was responsible for dismissing officers upon the recommendation of the Army Commander and after

erring officer's case was proven. He testified that PW was not charged with an offence because he was at the rank of Lt. Colonel. He however, added that procedure was followed in dismissing PW because he sought employment from another organization without approval from the Army Command. DW1 also stated that PW's case was not subject to trial by court martial.

3.10 The witness was not **re-examined**.

3.11 **Colonel Bryson Kapalu (DW2)**, the Commanding Officer Maina Soko Hospital testified that he received a message from the Army headquarters command informing him that PW was required to attend an interview before the erstwhile Army Commander General Paul Mihova. The interview was held on 17th September 2017 and according to Army's intelligence sources, PW had contracted full time employment with ABT Associates while in service. DW2 testified that he read the minutes of the meeting and it showed that PW denied the allegation and the Army Commander told him to quit the other employment.

3.12 DW2 stated that he received another phone call sometime in November 2017 from Army Headquarters summoning PW to another interview before the Army Commander. Accordingly, PW appeared before the army Commander on 14th November 2017 and the minutes of the

interview were availed to DW2. They showed that Mr. Ncube, ABT Associates Human Resources Manager attended the interview and informed that PW worked for the organisation. In addition, he presented PW's contract of employment dated January to December 2017.

3.13 Mr. Ncube also told the meeting that PW was employed on full time basis and promised to resign from the Zambia Army. The minutes further showed that General Mihova was displeased with PW's conduct. He warned PW to abandon his other employment because he was in active military service and had not obtained approval. He also told PW that he would write a letter to the Republican President and inform him of the outcome.

3.14 PW was removed from Maina Soko Hospital and attached to Army Headquarters Garison. In addition, the Army Commander further instructed Brigadier General Evans Malyangu who was in charge of Maina Soko Military Hospital and the Commandant to monitor PW. According to the witness, PW spent less time at the hospital inspite of the new measures.

3.15 In **cross-examination**, DW2 testified that the allegations against PW were proven at the second interview. PW did not call witnesses and was not dismissed during the interview. DW2 averred that the standing

operational procedures in the Defence forces gave an erring officer opportunity to exonerate him/herself during interviews. The decision to dismiss an erring officer included other procedures but he did not know if they were followed in PW's case. He also stated that PW was supposed to be charged and heard before his dismissal.

3.16 The witness was not **re-examined**.

3.17 **DW3** was **Elijah Sinywea**, the Chief of Party of USAID Systems for Better Health, ABT Associates. He testified that PW worked for his organization for nine months from 12th January 2017 and was on full salary till his resignation.

3.18 When **cross-examined**, DW3 testified that he did not attend PW's interview at the Army headquarters. PW applied for the job at ABT Associates online and assured the organization that he would be seconded. DW3 averred that if ABT Associates was aware that PW was still in employment, it would not have employed.

3.19 The witness was not **re-examined**.

4. Submissions

4.1 Learned counsel for the parties filed written submissions into Court for which I am grateful. In the plaintiff's case, counsel filed his submissions

on 17th October 2019 where he contended that the plaintiff was not given an opportunity to be heard during the interview and therefore his dismissal was unfair. Counsel submitted that while the plaintiff conceded that he was employed by ABT Associates at its invitation, he did not use the Army's time to work on the project. He in any case, resigned after stern warnings from his superiors but was unfairly dismissed.

- 4.2 Counsel further submitted that while the Army had power to dismiss officers under Regulation 10A of the Defence Act, it was bound by procedure of convening a Board of Officers to determine an officer's continued employment. Since a Board was not constituted, Counsel argued that the plaintiff's dismissal was null and void. He fortified his position by citing the case of **Kapema v Attorney General**¹, where in interpreting Regulation 10A, the Court stated that:

"As the law is at present, officers whose commissions are withdrawn and therefore dismissed from the Army are never given an opportunity to be heard when such decision to withdraw their commissions and to dismiss them is made. Obviously, this is a denial of one of the rules of natural justice that a person ought not to be judged unheard – *audi alteram partem*."

- 4.3 Counsel also asserted that the Respondent was bound by the AG Instruction 5/73 dated 9 May 1973 on conduct of administrative matters. Thus, the Army Commander's recommendation to dismiss the plaintiff

had no basis and was a blatant abuse of authority. Counsel called in aid the case of **Kioa v West**², where Mason J said:

“It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that general speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.”

- 4.4 He also referred the Court to the case of **Commissioner of Police v Tanos**³, where it was held that a person has a right to be heard and exonerate him/herself. Counsel argued that in this case, the Defendant failed to give reasons for the Plaintiff's dismissal.
- 4.5 Counsel went on to submit that although at common law, there was no general duty to give reasons for administrative decisions, courts were entitled to protect persons against arbitrary decisions and where the rules of natural justice were disregarded by the defendant. In concluding, counsel prayed to Court to grant the plaintiff the reliefs sought against the defendant.
- 4.6 In the responding submissions filed into Court on 1st November 2019, counsel referred the Court to the cases of **Africa Supermarket Limited (trading as Shoprite Checkers) v Mhone**⁴ and **Abraham Nyirenda v Mulungushi Village Complex**⁵, where the Supreme Court held in the earlier case that:

“The rules of natural justice do not have to be observed in an employer/employee relationship where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal. That in such a case, even if the employer dismisses such an employee without following the procedure in the contract of service prior to dismissal, no injustice is done to that employee by such failure to follow the stipulated procedure.”

4.7 Counsel went on to contend that the evidence of the plaintiff's employment with ABT Associates whilst working for the Zambia Army was overwhelming; that is from his pay slips, contract of employment and resignation letter. Counsel averred that the plaintiff was given several opportunities to be heard and exculpate himself. Therefore, the rules of natural justice were complied with. She argued that the appropriate punishment for the plaintiff's breach of employment was dismissal and fortified her assertion by citing Regulation 91 of the Defence (Regular Forces) (Officers) Regulations, 1960 that:

“Except with the written consent of the Minister and in accordance with such directions, if any, as the Minister may from time to time give him, an officer shall not-

(a) engage for profit in any business or occupation other than his official duties.”

4.8 Counsel added that Regulation 10A of the Defence Force (officers) Regulations empowered the Army Commander to take action against the plaintiff as follows:

“(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.

(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.”

4.9 Counsel also averred that the President's power in cancelling commissions of an officer was final and could not be tried in court. She cited the case of **Krige and Another v Christian Council of Zambia**⁶, where the Supreme Court held that:

“As to estoppel, the matter in my view concluded against the plaintiff by the principle that one cannot set up an estoppel against a statute and entertain no doubt that the same rule applied whether the basis upon which a party is alleged to be precluded from relying on the particular state of affairs is estopped properly so called or some analogous principles or “quasi-estoppel.”

4.10 In concluding, she prayed to Court to dismiss the plaintiff's case.

5. Determination

5.1 Having considered the pleadings, evidence adduced and submissions filed herein, this curious case concerns the plaintiff, an army officer, who applied and obtained employment from ABT Associates a USAID project whilst in active military service. The plaintiff was employed by the Zambia Army on 22nd February 2012 as a consultant obstetrician and commissioned to the rank of Captain on 2nd May 2012. He was subsequently promoted to the rank of Lieutenant Colonel and went on

nine months' vacation. During that time, he was employed by ABT Associates on 12th January 2017 on a contract with full benefits.

5.2 When the erstwhile Zambia Army Commander General Paul Mihova received information about the plaintiff's employment, he summoned him to three interviews. He subsequently recommended the plaintiff for dismissal from the Zambia Army to the Republican President and he was discharged on 29th November 2017. The issue for determination is **whether the conduct of the Zambia Army in terminating the plaintiff's employment amounted to a breach of the contract of employment?**

5.3 In support of his case, the **plaintiff** conceded that he was employed by ABT Associates while on vacation leave from January to September 2017. He was not using Zambia Army time because he was on leave and he subsequently resigned from the position. If at all he had breached any rules, he should have been subjected to a hearing before a Board of Officers and not the Army Commander. As such, he was not given an opportunity to be heard when he was interviewed by the Army Commander and was later unfairly dismissed from employment.

5.4 In response, the **defendant** argued that it had overwhelming evidence of the Plaintiff's breach of his contract of employment. The plaintiff was

given several opportunities to exculpate himself. However, the only punishment for the plaintiff's breach was dismissal.

- 5.5 After considering the rival positions, I find it sufficient to state that the well-known principles of natural justice are set out in a plethora of authorities. One of the leading cases is **Bob Shilling Zinka v The Attorney General**⁷, where the Supreme Court stated the following that:

"The principles of natural justice - an English law legacy - are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be a judge in his own cause, that is, an adjudicator shall be disinterested and unbiased (*nemo iudex in causa sua*); and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (*audi alteram partem*). As was quaintly stated by an eighteenth-century judge, Foretescue, J., in *R. v Chancellor of the University of Cambridge* [8] at page 567:

'Even God himself did not pass sentence on Adam before he was called upon to make his defence.'

The principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded expressly or by necessary implication. (See Halsbury's Laws of England, 4th ed., para. 64; and S.A. de Smith's *Judicial Review of Administrative Action*, 3rd ed.). In order to establish that a duty to act judicially applies to the performance of a particular function, it is now unnecessary to show that the function is analytically of a judicial character or that it involves the determination of a *lis inter partes*; however, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where a decision entails the determination of disputed questions of law and fact. *Prima facie*, moreover, a duty to act judicially will arise in the exercise of a power to deprive a person of his livelihood; or of his legal status where that status is not merely terminable at pleasure; or to deprive a person of liberty or property rights or any other legitimate interests or expectations or to impose a penalty. However, the conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation to act judicially (see *R. v Governor of Brixton Prison, ex parte Soblen* [9] and *Schmidt v Secretary of State for Home Affairs* [10]).

5.6 I have deliberately set out the lengthy dicta of the Court to demonstrate my grounded belief that it elucidates sound and correct legal principles applicable in our jurisdiction on administrative law; namely that, natural justice embodies the fundamental concepts of procedural fairness and justice. In other words, natural justice seeks to ensure that administrative decisions are only taken after procedures has been followed fairly. Accordingly, an affected party must be given an opportunity to be heard (*audi alteram partem* principle) by an impartial body in order for a decision-maker to substantively arrive at a correct decision.

5.7 The law in Zambia has however, evolved since 2001 and enunciates that while there is general recognition that natural justice espouses procedural administrative justice, it is not set in rigid, fixed and invariable terms. Stated differently, the procedures used to achieve fundamental fairness will vary from case to case and it may not necessarily follow that a person must for instance, be heard orally for it to be determined that there was a fair hearing. In the case of **Abraham Nyirenda (supra)** the Supreme Court reiterated its earlier decision in the case of *Africa Supermarket Limited (trading as Shoprite Checkers) v Mhone* when it held that:

“The rules of natural justice do not have to be observed in an employer/employee relationship where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal. That in such a case, even if the employer dismisses such an employee without following the procedure in the contract of service prior to dismissal, no injustice is done to that employee by such failure to follow the stipulated procedure.”

- 5.8 What emerges as a principle law from that case is that, where a claimant has committed a dismissible offence, the Court will not find the dismissal to be unfair merely because disciplinary procedure was not followed. Back to the case before me, the facts established by the defendant and not disputed by the plaintiff, clearly show that he entered into a contract of employment with ABT Associates whilst in active military service. During the course of trial or from his bundle of documents, the plaintiff failed to prove that he obtained permission for his extra employment. This was contrary to the Defence (Regular Forces) (Officers) Regulation 91 which reads as follows:

“Except with the written consent of the Minister and in accordance with such directions, if any, as the Minister may from time to time give him, an officer shall not-
(b) engage for profit in any business or occupation other than his official duties.”

- 5.9 In my view, the cited authority does not need further elaboration except to state that it proscribes defence force officers from profitably engaging in other businesses or occupation without the approval of their supervisors.

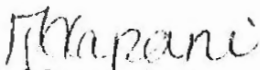
5.10 Accordingly, I hold that the plaintiff was not unfairly dismissed. His case lacks merit and it is dismissed.

6. **Final Orders**

These are the final orders of this Court:

- (i) The plaintiff's claims for unfair dismissal from the Zambia Army, reinstatement of commission, payment of full salary, benefits and allowances with interest and costs lack merit. They are dismissed in their entirety.
- (ii) Costs are awarded to the defendant to be taxed in default of agreement.

Dated this 23rd day of March 2020.


M. Mapani-Kawimbe
HIGH COURT JUDGE