

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

2021/HP/0856



BETWEEN:

**BERNARD FUNDI (Suing on his own
behalf and on behalf of 59 erstwhile
Police Officers seconded to the Bank of Zambia)
AND**

PLAINTIFFS

BANK OF ZAMBIA

DEFENDANT

**Before Honourable Mr. Justice C. Kafunda on the 21st day of
February, 2023**

For the Plaintiffs: Mr. M. Nkunika of Simeza Sangwa Associates
For the Defendant: Ms. S. Kaingu of Bank of Zambia

RULING

Cases referred to:

- 1. Veronica Lungu and 19 others v Bank of Zambia 2011/HP/561;**
- 2. Kabimba v Lusaka City Council SCZ Appeal No. 138 of 1998;**
- 3. Attorney General v Steven Luguru SCZ Judgment No. 20 of 2001;**
- 4. Yengwe Farms Limited and Masstock Zambia Limited, The Commissioner of Lands v The Attorney General S.C.Z. Judgment No. 11 of 1999;**
- 5. Faustine Mwenya Kabwe and Aaron Chungu v Justice Earnest Sakala Justice Peter Chitengi & Others SCZ Judgment No,25 of 2012**

6. *Steven Katuka and Others v Attorney-General and Others* 2017/CC/004
7. *Milford Maambo and Others v The People Selected Judgment* No.31 of 2017; and
8. *Matthew Namahalika Musokotwane v George Simundu Simukali and Others* [2018] ZMSC 412.

Other Works referred to:

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016;*
2. *The Bank of Zambia Act No.5 of 2022; and*
3. *The Rules of the Supreme Court of England, 1999 Edition (White Book).*

1.0 INTRODUCTION

The Plaintiffs commenced this matter by way of Writ seeking the following reliefs:

- (a) A declaration the contracts of secondment given to the plaintiffs by the Defendant to the extent that they contravened Cabinet Circular No.3 of 2001 were void;
- (b) A declaration that the Plaintiffs as officers on secondment were entitled to the same terms and conditions of service applicable to security officers of the Defendant;
- (c) An order for specific performance of the agreements between the Plaintiffs and the Defendant with respect to salaries, overtime allowances, shift differential allowances and gratuity as governed by Cabinet Circular No.3 of 2001;
- (d) Interest;

- (e) Any other relief the Court may deem fit; and**
- (f) Costs.**

On 30th March, 2022, the Plaintiffs by way of summons and accompanying affidavit, applied for the matter to be determined on a point of law. The application was made pursuant to Order 14A of the Rules of the Supreme Court of England (White Book) and the question for determination was couched as follows: ***“whether or not the Cabinet Office Circular No. 3 of 2001 was binding on the Defendant”***.

The Defendants did not file an affidavit in opposition but only filed submissions on 10th August, 2022.

2.0 PLAINTIFFS’ CASE

The deponent of the affidavit in support of the application was Bernard Fundi, one of the Plaintiffs herein, who deposed that sometime between 2008 and 2016, he and the other Plaintiffs were engaged by the Defendant under several written fixed term contracts of secondment and that the same were entered into in accordance with Cabinet Office Circular No. 3 of 2001 (“the Cabinet Circular”). The deponent stated that the Plaintiffs’ engagement with the

Defendant was further governed by the Defendant's terms and conditions.

It was deposed that paragraph (g) of the said Cabinet Circular stated that Zambian Civil Servants seconded to Statutory Bodies were not to be disadvantaged in any way when compared with the employees of the Statutory Bodies to which the Civil Servants were seconded. The deponent averred that however, despite the aforementioned requirement of the Cabinet Circular, the Defendant provided the following as express terms of the Plaintiffs' engagement:

- (i) seconded officers were not to be entitled to overtime allowance during the period of secondment; and***
- (ii) seconded officers were required to work in shifts but were not entitled to shift differential allowance.***

The deponent averred that the foregoing unfavourable terms and conditions only applied to the Plaintiffs notwithstanding the fact that they were of the same rank as the officers employed by the Defendant and to whom said unfavourable terms and conditions did not apply. Further, it was averred that the basic salaries that were being paid

to the officers of the Defendant were higher than the basic salaries paid to the Plaintiffs.

It was therefore asserted that the Defendant's unfavourable terms and conditions were void to the extent that they excluded the Plaintiffs from favourable terms and conditions that were available to the other officers employed by the Defendant.

In the skeleton arguments filed in support of the application, the Plaintiffs referred to the case of **Veronica Lungu and 19 others v Bank of Zambia**⁽¹⁾ and stated that the Court in that case dealt with Cabinet Circular No. 3 of 2001 and the question of whether the same was directed to and binding on the Defendant.

It was argued that in casu, the fact that the Defendant was a Statutory Body, meant that the Cabinet Circular was both directed to and binding on it. The cases of **Kabimba v Lusaka City Council**⁽²⁾ and **Attorney General v Steven Luguru**⁽³⁾ were cited as authority for this position.

The Plaintiffs further contended that the Cabinet Circular provided a directive on how seconded officers were to be treated and that according to the circular, the Plaintiffs were entitled to enjoy the same

conditions of service as those available to officers employed by the Defendant.

3.0 DEFENDANT'S SUBMISSIONS

In the submissions filed in opposition to the Plaintiffs' application, the Defendant averred that the Cabinet Circular was addressed to specific persons expressly stated therein and that the Defendant was not among the said addressees, and that therefore the Defendant was not bound by the said Cabinet Circular. As authority for this position, the Defendant referred to the case of **Yengwe Farms Limited and Masstock Zambia Limited, The Commissioner of Lands v The Attorney General**⁽⁴⁾ where the Supreme Court held that a particular circular was not binding on the Commissioner of Lands as it was not addressed to him.

Further, the Defendant contended that contrary to what has been asserted by the Plaintiffs, the Court in the **Veronica Lungu** case did not pronounce itself on whether or not the cabinet circular was binding on the Defendant. It was submitted that the ratio decidendi in that case did not concern the application of the subject cabinet circular to the Defendant. That the case dealt with an issue of the

letters of offer to seconded officers which expressly stated that, during their secondment to the Defendant, the officers would enjoy terms and conditions equivalent to those applicable to the Defendant Staff at salary grade BOZ3. The Defendant argued that it was misleading for the Plaintiffs to state that the **Veronica Lungu** case provided a directive on how seconded officers were to be treated.

The Defendant submitted that a careful reading of the Cabinet Circular reveals that the same was intended to curb irregularities in the procedures governing secondments as well as to provide for the conditions of service for employees during secondments. Further, the Defendant stated that the Cabinet Circular provided that seconded officers would serve on the conditions and services obtaining at the place of secondment.

4.0 ANALYSIS AND DECISION

I have carefully considered the Plaintiffs' application as well as the arguments advanced by the parties in respect thereof. Order 14A pursuant to which this application was made provides as follows:

“(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 cause or matter or any claim or issue therein.

(2) An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.

(3) The court shall not determine any question under this order unless the parties have either -

(g) had an opportunity of being heard on the question;
or

(h) consented to an order or judgment on such determination.”

This Court therefore has jurisdiction to determine this matter as issue that has been raised by the Plaintiffs is whether or not Cabinet Circular No. 3 of 2001 was binding on the Defendant. This question is suitable for determination without a full trial of the action, and such determination will determine the entire matter.

It has been asserted by the Plaintiffs that the Cabinet Circular was directed to and binding on the Defendant by virtue of the fact that the Defendant is a Statutory Body. Further, that the Cabinet Circular required that seconded officers enjoy the same benefits as those enjoyed by officers of the Defendant Bank.

The Defendant has counter-argued that the Cabinet Circular had specific addressees and that the Defendant was not among them. Further, that even if the Court was to find that the Cabinet Circular was binding on the Defendant, this would not entitle the Plaintiffs to the reliefs sought. This, the Defendant contends, is because nowhere in the circular does it state that the employees on secondment are entitled to the same benefits as those for officers employed by the Defendant Bank.

From the foregoing arguments, it is clear that the issues to be determined herein are twofold namely:

- i) whether the Cabinet Circular was binding on the Defendant; and*
- ii) whether by virtue of the conditions stipulated in the cabinet circular the Plaintiffs were entitled to the same conditions of service as employees of the Defendant.*

It is trite that Cabinet Circulars are issued by Cabinet Office which is an administrative office responsible for coordinating the effective implementation of government policies. The responsibility of cabinet office can be ascertained from **Article 176 of the Constitution of Zambia (Amendment) Act No. 2 of 2016**. According to the said

Article, the head of the public service is the Secretary to the Cabinet and his functions are to, *inter alia*, convey decisions made by Cabinet to appropriate authorities and to monitor the implementation of Government policies and Cabinet decisions.

Typically, cabinet decisions are conveyed through Cabinet Circulars such as the one subject of these proceedings, and once issued, it is expected that they will be adhered to. In the case of **Kabimba v Lusaka City Council** (Supra) for instance, the Supreme Court, in construing the provisions of Circular No. 2 of 1996 held that according to the said cabinet circular, the Appellant, who was employed in the local government service, was not allowed to buy another house.

Further, in the case of **Matthew Namahalika Musokotwane v George Simundu Simukali and Others(5)**, the Supreme Court in upholding the decision of the High Court to the effect that choosing of a chief should be done in accordance with the Cabinet Circular of 1972, stated as follows:

“paragraph (b) and (c) of the Cabinet Circular of 1972 require that meetings for the selection of a chief must be

held according to tribal custom and that all parties concerned should be invited to attend such meetings. In view of the foregoing, the lower court cannot be faulted for deciding that the meeting at which the Appellant was chosen as chief Musokotwane was illegal and that the royal family ought to have been included in the process of choosing the chief.”

Thus, in view of the foregoing, it is clear that Cabinet Circulars have a force of law as they place an obligation on the part of the persons they place an imperative to abide by them.

As earlier alluded to, the Plaintiffs’ contention in relation to the first issue is that, the fact that the Defendant is a statutory body means that the Cabinet Circular was binding on it. The Defendant, on the other hand has submitted that the cabinet circular was not directed to it and that it was therefore not binding on it. The Cabinet Circular in issue partly states as follows:

CABINET OFFICE CIRCULAR NO.3 OF 2001

To: Secretary to the Treasury

All Permanent Secretary

Principal Private Secretary, State House

Auditor General

Chief Administrator, Judiciary

Secretaries: All Service Commissions

Commissions for Investigations

Anti Corruption Commission

Directors: Electoral Commission and

Human Rights Commission

All Heads of Department

**SECONDMENT OF CIVIL SERVANTS TO
STATUTORY BOARDS AND OTHER INSTITUTIONS**

In casu, it will be noted that the purpose of the Cabinet Circular was to *inter alia* clarify the **procedure** for seconding civil servants to statutory bodies, and to restate the conditions of service on secondment. The necessary implication, therefore, is that even though the Cabinet Circular may not have been specifically addressed to any statutory body, the fact that the conditions it prescribed were to be applicable in the statutory bodies to which the civil servants were seconded, meant that the conditions were binding on all statutory bodies. The list of addresses was not meant to be exhaustive, as the subject reference and the contents of the Memorandum disclose that the Circular applies to all statutory boards and other institutions.

Article 213 of the Constitution of Zambia (Amendment) Act No.2 of 2016 provides for the establishment of the Defendant Bank as follows:

“(1) There is established the Bank of Zambia which shall be the central bank of the Republic.”

Article 215 goes on to provide as follows:

“The following shall be prescribed:

(a)....

(b)....

(c)...

(f) recruitment, and emoluments of members of staff of the Bank of Zambia;”

It is not in dispute in casu that the Defendant is a statutory body established by the Constitution of Zambia, whose additional functions, operations and management are prescribed in the Bank of Zambia Act No.5 of 2022. Further, the Defendant was designated as a statutory body under the Ministry of Finance pursuant to Government Gazette Notice No.836 of 2016. Therefore, I find that the Circular was binding on the Defendant.

Since the Defendant is a statutory body, and the Circular was addressed to all statutory bodies without exception, I find that the Cabinet Circular in question was binding on the Defendant.

Having so found, I will now proceed to determine the second issue which is; whether, as per the conditions stipulated in the Cabinet Circular, the Plaintiffs were entitled to the same conditions of service as the employees of the Defendant. The Plaintiffs' argument in relation to this issue is premised on condition 2 (g) of the Cabinet Circular which states thus:

“An officer on secondment will be subject to other terms and conditions of service applicable in the organization to which he/she has been seconded provided such terms and conditions of service are not to his disadvantage.”

It has been argued that the aforesaid condition entitles the Plaintiffs to the same conditions as the officers employed by the Defendant. The Defendant has refuted the Plaintiffs' contention in this regard and in its counter-argument, has averred that the provision merely entails that the seconded officers are not to be given lesser conditions than those enjoyed in the institutions from where they were seconded.

The question before Court is what was the intention of Clause(g) of the Cabinet Circular, and to understand its meaning, the cannons of statutory interpretation will be considered. In the case of **Faustine Mwenya Kabwe and Aaron Chungu v Justice Earnest Sakala Justice Peter Chitengi & Others** ⁽⁵⁾, the Supreme Court stated that

“whenever there is no ambiguity in the meaning of the Statute or indeed the Constitution itself, the primary principle of interpretation is that the meaning of the text should be derived from the plain meaning of the language used. In other words, the natural and ordinary meaning of the words used to convey the true intent of the originators of the text. Other principles of interpretation should only be called in aid where there is ambiguity or where such literal interpretation will lead to absurdity.”

This principle was reaffirmed in the cases of **Steven Katuka and Others v Attorney-General and Others** ⁽⁶⁾ and in **Milford Maambo and Others v The People** ⁽⁷⁾ where the Court held that:

“....Where the words of any provision are clear and unambiguous, they must be given their ordinary meaning

unless this would lead to absurdity or be in conflict with other provisions of the Constitution.”.

I have examined the aforesaid provision and a literal interpretation thereof is that officers on secondment were to be subject to the terms and conditions of service applicable in the Defendant bank and they were not to be disadvantaged by being given lesser conditions than those enjoyed in the place from where they were seconded.

As has been shown, the wording of clause 2(g) is very clear and unambiguous, and a literal interpretation of the section does not lead to any mischief, absurdity or any conflict with any other written law.

In the premises therefore, it is imperative that the words used are given their ordinary and natural meaning. In their ordinary and natural meaning, the words of clause 2 (g) place an obligation on the organisations of secondment to ensure that the seconded officers were entitled to and would enjoy the conditions that are applicable to officers employed in the institutions of secondment. I therefore find that the Plaintiffs were entitled to the conditions of the Defendant bank.

Thus, by providing unfavorable conditions for seconded officers and which conditions were different from those of the officers employed by the Defendant Bank, the Defendant was in contravention of condition 2 (g) of the Cabinet Circular, which as earlier alluded to was binding on the Defendant.

The only conditions which were not to apply to seconded officers were those conditions which if applied to a seconded officer would occasion a disadvantage to the officer in relation to the conditions applicable to the officer from the place they are seconded from.

The Cabinet Circular endeavoured to address any distortions between the conditions applicable to officers ordinarily in the employ of the organisation, the Defendant Bank in this case, and the officers on secondment, and not to set out conditions whose effect is to create distortions in conditions between the two types of officers in the organisation.

In view of the foregoing, I find that the Plaintiffs' application has merit and I accordingly allow it. The Plaintiffs are therefore awarded their claims stipulated in the statement of claim. The amounts due in

respect of salaries, overtime allowance, shift differential allowances and gratuity shall be assessed by the Deputy Registrar and the same shall attract interest at the average short term bank deposit rate from the date of Writ to date of Judgment and thereafter at the current lending rate as determined by the Bank of Zambia from the date of Judgment to date of payment. The Plaintiffs are further awarded costs to be agreed or taxed in default of agreement.

Dated the 21st day of February, 2023



C. Kafunda
HIGH COURT JUDGE