IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 79/2014
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PETER CHITI **APPELLANT**

AND

THE ATTORNEY GENERAL **RESPONDENT**

Coram: Mwanamwambwa, DCJ, Kaoma and Musonda, JJS
On the 1st November, 2016 and 21st December, 2016

For the Appellant: Capt. F. B. Nanguzyambo (Rtd.) F.B. Nanguzyambo & Associates

For the Respondent: Ms. S. C. Sakala, Senior State Advocate

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney-General -v- Achiume (1983) Z.R. 1**

Legislation referred to:

1. **The Defence Force Act, CAP.106**
2. **The Defence (Regular Force) (Enlistment and Service) Regulations**
3. **The Defence Force (Boarding Inquiry) Rules**

This is an appeal against a Judgment of the High Court of Zambia, sitting at Kabwe in terms of which that Court dismissed the Appellant's search for various reliefs of the nature of orders, a declaration and damages against the Zambia Army Commander and the Government of the Republic of Zambia consequent upon his discharge from the Zambia Army on medical grounds.

The background narrative leading to this appeal is of the plainest kind.

The Appellant was employed as a soldier in the Zambia Army on 31st May, 1989. He served in the Army and held several ranks until he was discharged in 2010 on medical grounds while holding the rank of Staff Sergeant (which rank the Appellant disputed and insisted on having been discharged at the rank of Warrant Officer).

The circumstances surrounding the Appellant's medical discharge were that, sometime in the year 2007 he started feeling unwell, was constantly feeling tired, fatigued, experienced dizziness, body hotness and general body malaise. In addition, the Appellant was coughing. Sometime in the year 2008, the Appellant submitted himself to medical tests, which revealed that he had tuberculosis and was HIV positive. During the course of that same

year (2008), the Appellant completed an Injury Report Form seeking to be discharged from the Army on medical grounds because he felt that the Army was not taking good care of him.

Following the completion of the Injury Report Form by the Appellant, and according to Zambia Army Regulations relating to discharge of Army or Defence personnel on medical grounds, a Medical Board had to be convened to consider the Appellant's case, among others. According to the evidence in the Court below, the Medical Board was only convened in 2009. In fact, the Appellant only attended the Medical Board examination on 9th March, 2010 by which time he felt that he had recovered but was on HIV medication.

Following his attendance before the Medical Board, the Board observed that the Appellant felt alright and could work normally.

It is worthy of note that, prior to his attendance before the Medical Board, the Appellant had resumed normal work and had even been sent to Kaputa District on operations as a driver. According to the Record relating to the proceedings below, following its determination as aforesaid, including its recommendation that the Appellant was fit for clerical work, the Board asked the

Appellant to attend another Medical Board examination after 12 months.

Following the recommendation of the Medical Board, its recommendations and proceedings were forwarded to the Defence Force Director of Medical Services for his final decision in accordance with Military Regulations.

According to the Director of Defence Force Medical Services' advice to the Army Command of June, 2010, the Command was advised to discharge the Appellant from the Army on medical grounds on the basis that the Appellant had freely made a statement to the effect that he was not in a healthy position to continue serving in the Army because he felt unwell, tired, fatigued, had general body malaise and was also coughing, experienced dizziness and body hotness.

The Defence Force Director of Medical Services even expressed surprise that the Medical Board had contradicted the Appellant's own statement, as quoted above, when it took the position that the Appellant had no (health) complaints, and could work normally and felt alright.

On 6th April, 2010 the Appellant was discharged from the Army on account of being unfit for military service. This was done under the signature of the Director of the Defence Force Medical Services.

By a letter dated 21st May, 2010, the Appellant wrote to the Commanding Officer, Central Command, Kabwe, questioning his medical discharge in spite of having told the Medical Board that he had fully recovered and was able to work normally.

Following his discharge, the Appellant received his pension in 2011, for the 21 years that he had served in the Army.

On 12th September, 2011, the Appellant instituted his Court action in the Kabwe High Court where he sought the following reliefs:

> **"(i) An order that the discharge of the Plaintiff from the Zambia Army was illegal and irregular.**
>
> **(ii) An order and declaration that the Plaintiff is fit for service in the Zambia Army having fully recovered from the illness that led to his discharge and that he should be reinstated in the Zambia Army at the rank of Warrant Officer.**
>
> **(iii) A declaration that the Plaintiff was discharged as Staff Sergeant when his rank was that of Mechanical Transport Warrant Officer as per confirmation of 19th February, 2010.**
>
> **(iv) Damages for wrongful discharge from the Zambia Army.**

(v) An order that the Plaintiff be entitled to serve in the Zambia Army for the remainder of the years prior to his retirement.

(vi) An order and declaration that the Plaintiff be deemed to have been on leave and that he should be allowed to serve in the Army with the Rank of Warrant Officer until his normal retirement age of 55 years.

(vii) An order that in the alternative the Plaintiff be paid his due for the remainder of the period he should have served in the Zambia Army until his retirement age of 55 years.

(viii) Exemplary and aggravated damages.

(ix) Any other relief the court deems fit.

(x) Costs."

When the action was tried before the Kabwe High Court, the Appellant testified on his own behalf. The gist of the Appellant's evidence has been revealed in the preceding narration suffice it to say that the Appellant felt very strongly that the Army ought not to have discharged him on medical grounds as he had fully recovered and had even resumed normal duties.

The Zambia Army, for its part, told the Court below, via its witnesses, that the Appellant was medically unfit to continue working as a soldier; that he had been properly and lawfully discharged and paid his pension benefits in full.

In arriving at its Judgment dismissing the Appellant's action, the Court below took the position that he, the Appellant, had

".....voluntarily applied to be discharged from the Army on medical grounds when he was diagnosed with HIV and the (Respondent) effected the (Appellant's) application accordingly."

With regard to the issue of whether or not the correct procedure was observed in effecting the Appellant's discharge, the Court below opined that the procedure, as laid down in the Defence Act and the applicable Regulations, was followed. The Court also opined that the Medical Board which had been convened to consider the Appellant's case was not empowered to make any final decision but that its role was simply to make recommendations to the Director of the Defence Force Medical Services, who possessed the relevant discretionary power to take the final decision which, in the present case, was to discharge the Appellant on medical grounds.

With regard to the issue of the Appellant's pension benefits, the Court below took the position that the Appellant could not maintain a claim for those benefits as he had been paid in full.

In sum, the Court concluded that the Appellant had failed to prove his case on a balance of probabilities and dismissed his action in its entirety.

The Appellant has now appealed to this Court advancing five Grounds of Appeal which are presented in the Memorandum of Appeal as follows:

1. **The Learned trial Judge misdirected herself by failing to properly balance the evaluation of the evidence and thereby fell in a grave error.**

2. **The Learned trial Judge erred in law and in fact in holding that the Medical Board merely passes recommendations to the Director of Medical Services when in fact it is the Medical Board that decided whether to discharge on medical grounds or not.**

3. **The Learned trial Judge erred in law and in fact in failing to address the issues that were not challenged in the Plaintiff's testimony.**

4. **The Learned Judge erred in law in holding that the Defendants followed the procedure in discharging the Plaintiff when on the other hand there was evidence that they disregarded the advice of the medical board.**

5. **The Learned trial Judge failed to consider the evidence that the Appellant had in fact cancelled his application for discharge on medical grounds.**

Learned Counsel for the Appellant filed written Heads of Argument to buttress the Grounds of Appeal as set out in the Memorandum of Appeal.

In relation to ground one, the Appellant's Counsel contended that the Court below misdirected itself when it ignored the Appellant's evidence which suggested that he had fully recovered

from the illness which had afflicted him and had even sought to have his earlier request to be medically discharged reversed. Counsel went on to contend that it was a patent misdirection for the Court below to have ignored the fact that the Appellant's full recovery was borne out by the fact that he had even resumed his duties and had served for a period of 9 months in Kaputa in the Northern Province of Zambia. According to Counsel, the evidence of the Appellant's (alleged) full recovery was not even challenged and that even the Court itself had the opportunity of seeing or noting the Appellant's apparent good health during the trial.

With regard to ground two, the Appellant's Counsel argued that it was totally erroneous for the Court below to have relegated the functions of the Defence Medical Board, which had examined the Appellant, to that of merely making recommendations. Counsel contended further that the Medical Board was a serious statutory creation which comprised three qualified medical practitioners and that the findings and recommendations of such a body should not have been disregarded in deference to the position or decision which the Director of the Defence Medical Services had taken in relation to the Appellant's illness.

According to Counsel for the Appellant, the intention of the Legislature in providing for the involvement of the Medical Board in matters involving the discharge of Defence personnel on medical grounds was to avoid arbitrariness whenever cases requiring the medical discharge of Defence personnel arose. It was Counsel's argument in this regard that a member of the Defence Force could only be medically discharged when the Medical Board was satisfied that there was real need to have such a member discharged for his own good.

In arguing grounds three and four, the Appellant's Counsel contended that it was a misdirection for the learned trial Judge to have held that the procedure for the discharge of the Appellant had been followed when the evidence before the Court had suggested that the Director of the Defence Medical Services had disregarded the favourable outcome of the Medical Board sittings. Counsel also argued that there was no basis on which the Director of the Defence Medical Services could have discharged the Appellant given that he did not personally examine the Appellant nor was he part of the Medical Board which had examined the Appellant.

In relation to ground five, being the last ground of appeal, Counsel for the Appellant argued that the learned trial Judge had misdirected herself in law and in fact when she ignored the fact that the Appellant was prematurely discharged before the expiry of the 12-month period which the Medical Board had given to the Appellant to be medically re-boarded. According to Counsel, it was a misdirection on the part of the trial Court to have taken the position that the procedure for the medical discharge of the Appellant had been followed given that the Medical Board did not even reconvene within the 12-month period that the Board had determined for the propose of having the Appellant re-boarded. Counsel further contended that the trial Court had misdirected itself in that it did not properly evaluate the evidence which had been deployed before it on behalf of the Appellant. According to Counsel, the trial Court ignored or deliberately failed to evaluate the testimony of two vital witnesses namely, DW1 and DW2 who had respectively testified to the effect that it was wrong for the Director of Defence Medical Services to have ignored the findings of the Medical Board and the Board's finding that the Appellant was fit for duty.

The Appellant's Counsel further contended that the Court below erred in that it did not state why it had opted to believe the evidence of the Director of Defence Medical Services and not that of the Medical Board when, in fact, it was the latter and not the former which had the opportunity of examining the Appellant.

The Appellant's Counsel went on to make reference to two Zambian decided cases which, with due respect to Counsel, we find totally irrelevant to the issues which were at play in the matter at hand.

The Appellant's final argument revolved around Regulations 12 and 18 of the Defence (Regular Force) (Pensions) Regulations, CAP. 106 of the Laws of Zambia which, among other things, entitles a soldier who, having previously requested to be medically discharged, may be required by the Army Commander to resume duty in the Defence Force.

Counsel for the Respondent did not file any Heads of Argument but sought to do so at the hearing of the appeal. However, the Respondent's Counsel's application to file the Respondent's Heads of Argument out of time was refused.

At the hearing of the Appeal, Mr. Nanguzyambo, the learned Counsel for the Appellant, informed us that he was relying entirely on the Appellant's Heads of Argument as filed.

In her brief oral arguments, Ms. Sakala, the learned Counsel for the Respondent informed us that the Court below would have fallen in error had it ignored what the Appellant himself had said when he sought to be medically discharged. Counsel also reminded us that, according to the evidence on record, the Appellant's CD4 Count was low and that he was not in a position to undertake the responsibilities of the job for which he had been employed. The Respondent's Counsel also confirmed the fact that the Appellant had been paid his terminal benefits and that he could not receive such benefits again.

We have given due consideration to the issues which arose and which were interrogated in the Court below in relation to the grounds of appeal which were canvassed before us.

In the view which we have taken, the central issue which fell to be determined by the Court below and upon which the success or failure of this appeal hinges is whether or not the Appellant's

medical discharge was warranted by the circumstances which had surrounded the same.

Having said the foregoing, we propose to address the grounds of appeal as they were canvassed before us.

As earlier noted, ground one attacks the learned trial Judge's handling of the evidence which had been deployed before that Court. The Appellant contends under this ground that the Court below failed to properly balance 'the evaluation of the evidence' which had been deployed before her.

Although this ground was not presented in the most elegant of ways, we have approached it from the premise that it attacks the evaluation of the evidence by the Court below. This is an issue which this Court had occasion to pronounce itself upon in **Attorney-General -v- Achiume**[1] when we said:

> **"An unbalanced evaluation of the evidence ... is a misdirection which no trial Court should reasonably make and entitles the appeal Court to interfere."**

When we examined the arguments which were canvassed by Counsel for the Appellant to buttress the Appellant's first ground of appeal, we were unable to discern therefrom as to what imbalance had arisen with regard to the trial Court's evaluation of

the evidence which had been deployed before it on behalf of the parties herein.

It was also somewhat confusing to us as to what the Appellant's real complaint was under this ground: Was it about the trial Court's findings of fact? Or the Court's misapprehension as to the findings of fact which the Court ought to have made? Or was it the Court's alleged unbalanced evaluation of evidence?

In the absence of sufficient clarity as to where or how the trial Court misdirected itself, it is extremely difficult for us to fault the approach which the Court below took. Indeed, having examined the Judgment appealed against, in relation to the evidence which was before the Court and the arguments which were advanced before us in relation to ground one, we cannot possibly uphold ground one. We dismiss it.

The second ground of appeal revolved around the Appellant's complaint that the trial Court erred in law and in fact when it held that the role of the Medical Board which is constituted in terms of the Defence Force Act, Chapter 106 of the Laws of Zambia in relation to a request by a member of the Defence Force who seeks to be discharged on medical grounds is merely to make an

appropriate recommendation to the Director of the Defence Force Medical Services and not to make the decision whether or not to discharge such a member. The contention of the Appellant's Counsel under this ground was that the Court below erred in having determined or arrived at the conclusion that the decision whether or not to discharge the Appellant on medical grounds lay with the Director of the Defence Force Medical Services. Although Counsel for the Appellant's arguments around ground two fall short of being categorical, the gist of his contention was that it was the Medical Board, as opposed to the Director of the Defence Medical Services which, under the statute earlier mentioned, played the decisive role with regard to the decision whether or not to medically discharge a member of the Defence Forces.

We have given anxious consideration to the arguments which were canvassed before us in relation to this ground. We have also taken the liberty to examine the provisions of the Defence Act, CAP. 106 so far as the same apply to the arguments which were canvassed before us in the context of the second ground of appeal.

In the view that we have taken, there is no dispute as to who, between the Board in question and the Director of the Defence

Medical Services, had made the decision to have the Appellant medically discharged. Consequently, the sole issue which falls to be determined is a legal one, namely, who, under the applicable law, and as between the Board and the Director in question, was entitled to make the decision which generated the disaffection which had prompted the action in the Court below and is now the subject of this appeal.

The procedure for the discharge of a member of the Defence Force is elaborately set out in the Defence Act, CAP. 106, the relevant provisions of which we now set out below:

Section 21 of the Defence Act, CAP. 106 enacts thus:

> **"A soldier of the Regular Force may be discharged by the competent military authority at any time during the currency of any term of engagement upon grounds and subject to such special instructions as may be prescribed."**

The *'special instructions'* referred to in the said Section 21 are described in Regulation 9(3) paragraph (xvi) of the Third Schedule to the Defence (Regular Force) (Enlistment and Service) Regulations which, when read together, provide as follows:

> **"9. (3) A soldier may be discharged from the Regular Force at any time during his service in such Force upon any of the grounds set out in column 1 of the Third Schedule, subject to the Special Instruction appearing opposite thereto in column 2 of the said Schedule shall be the competent military authority for the purpose specified in column 1 thereof.**

THIRD SCHEDULE

(Regulation 9 (3))

GROUNDS FOR DISCHARGE

1 **Cause of Discharge**	2 **Special Instructions**	3 **Competent military authority to authorise discharge**
(xvi) Permanently medically unfit for military service.	**(xvi) A soldier will be discharged under this serial if he is medically unfit for any form of service in the Regular Force and is likely to remain so permanently."**	**(xvi) Commander acting on advice of medical authorities.**

It is worthy of note that the competent military authority referred to in Regulation 9(3) above is defined in *Rule 2 of the Defence Force (Boards of Inquiry) Rules* as being:

> **"...in relation to a board, ... any Army or Air Force officer empowered by or under these Rules to convene a board..."**

It is also worthy of note that in the context of the Regulations in question, the *'authority'* with the responsibility of advising the Army Commander is the Director of the Defence Medical Services.

It is instructive to note that, for the purpose of rendering his advice to the Army Commander upon whether or not to have a member of the Defence Force medically discharged, the Director

would convene a Medical Board whose role is described in Rule 3 of the Defence Force (Boards of Inquiry) Rules as follows:

> **"3. It shall be the duty of a board to investigate and report on the facts relating to any matter referred to the board under these Rules and, if directed so to do, to make such declaration or recommendation and to express their opinion on any question arising out of any such matter."**

Once the Medical Board has completed its investigation, Rule 15(4) of the same Boards of Inquiry Rules requires that:

> **"A record of the proceedings [should] be signed by the president and other members of the board and forwarded to the authority."**

As earlier noted, reference to *'the authority'* in the Rules in question means the Director of the Defence Medical Services.

It seems to us that, on the basis of a careful examination of the provisions of the law which we have set out above, the person who plays the most crucial or decisive role whenever an issue of discharging a member of the Defence Force on medical grounds arises is the Director of the Defence Medical Services. This position is, indeed, clear even from a cursory reading of Rule 3 and sub-rule 4 of Rule 15 of the Defence Force (Boards of Inquiry) Rules. Indeed, it is the Director of the Defence Medical Services who, in terms of Rule 2 of the Defence Force (Boards of Inquiry) Rules convenes the Medical Board. It also seems clear to us that the role

of the Board is to *"investigate and report on the facts related to any matter referred to the Board ... and, if directed so to do, to make [a] declaration or recommendation..."*

In relation to the matter at hand, the Medical Board proceedings (i.e. Form FZA MED 2) were signed by the three members who had constituted the Board.

It is evident from that record of the proceedings in question that after the members of the Board had made their recommendation and signed the same, they forwarded it to the Director of Medical Services who, according to the manner in which the Form is structured, is entitled either to 'agree' or 'disagree' with any opinion that the Medical Board will have expressed upon any matter before it.

It is also self-evident from the record of the proceedings in question that although the Board had given a favourable recommendation for the Appellant, the Director of the Defence Medical Services expressed the opinion that he was unfit for military service.

As earlier noted, and, consistent with the Defence Force Regulations which govern the medical discharge of a member of the Defence Force, it is the opinion of the Director of the Defence Medical Services which is conveyed to the Army Commander (or the Command) and which ultimately forms the basis of the latter's decision. Accordingly, ground two of the Appeal fails.

Turning to grounds three and four of the Appeal, we note that these two grounds were argued together in the Appellant's Heads of Argument. We further note that while ground three in the Memorandum of Appeal attacks the trial Court's Judgment on account of failure to address the issues which were raised by the Appellant but were not challenged below, this attack is not appropriately argued in the Heads of Argument. That being the case, we have deemed ground three as having been abandoned.

With regard to ground four, we consider the issue which is raised in this ground as being a repetition of the second ground of appeal. Consequently, we reiterate the reflections we have made above in relation to ground two and dismiss ground four in its entirety.

With regard to the fifth and final ground of appeal which attacks the trial Court's alleged failure to consider the alleged evidence that the Appellant had cancelled his request to be medically discharged, our review of the duly signed Medical Board proceedings relating to the Appellant's request to be medically discharged did not suggest anything of the nature suggested by the Appellant.

What we noted from the Record relating to the proceedings in the Court below was that on 21st May, 2010, the Appellant wrote a hand-written letter to the Army Command questioning his discharge in spite of having informed the Medical Board that he felt alright and was able to work. A point worth noting from the said letter by the Appellant is that by the time the same was being written, he had already been discharged. Indeed, it is not in dispute that the Appellant received his full benefits consequent upon medical discharge.

Accordingly, we find no merit in the fifth ground of appeal.

In sum, this appeal stands dismissed in its entirety for want of merit.

Having regard to the circumstance of this matter, we make no order as to costs.

We wish to end, by confirming, (albeit in passing) that we have not ignored the fervent arguments which were advanced on behalf of the Appellant to the effect that he had fully recovered and was able to return to work. In our view, these arguments ignored the compelling medical evidence to the effect that the Appellant's immunity remains heavily suppressed for the purpose of having him remain in the employ of the Zambia Army.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

M. MUSONDA, SC
SUPREME COURT JUDGE