

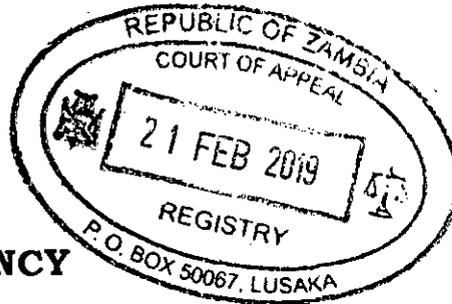
IT

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 94 OF 2018

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:



FOOD RESERVE AGENCY

APPELLANT

AND

HASTINGS PASI

RESPONDENT

CORAM: Mchenga DJP, Chashi, and Mulongoti, JJA

ON: 23rd January and 21st February 2019

For the Appellant: K. Mwondela, Messrs Lloyd, Jones and Collins

For the Respondent: In Person

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. **Christopher Besa v Zambia National Building Society - SCZ/08/160/2013**
2. **Nathaniel Nawa Inambao v Zambia Railways Limited - 2013/HP/1459**
3. **Jefford and Another v Gee (1970) 1 All ER, 120**
4. **Zambia Consolidated Copper Mines Limited v Richard Kangwa and Others - (2000) ZR, 109**

Legislation referred to:

1. **The Food Reserve Act, Chapter 225 of the Laws of Zambia**
2. **The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**
3. **The Constitution of Zambia (Amendment) Act, No. 2 of 2016**
4. **The Constitution of Zambia Act, Chapter 1 of the Laws of Zambia**
5. **The Public Finance Act, Act No. 15 of 2004**

This appeal arises from the Judgment of the High Court which was delivered on 2nd March 2018.

The brief background to the matter is that, the plaintiff in the court below, now the Respondent, was on 1st November 2012, employed by the defendant, now the Appellant, as a Legal Officer. The Respondent resigned on 28th February 2014, whereupon he commenced proceedings against the Appellant by way of writ of summons claiming the following reliefs:

- (1) K30,000.00 being underpaid daily subsistence allowance.
- (2) K8,533.32 being underpaid education allowance
- (3) A declaration that he was entitled to non-private practice allowance as per Government circular, policy and directive.
- (4) K80,640.00 being unpaid non-private practice allowance
- (5) Any other reliefs the court shall deem fit
- (6) Interest and costs

After settling its defence, the Appellant counterclaimed against the Respondent the following declaratory Orders:

- (1) A declaration that the Respondent is not captured within the ambit of the Public Service Management Division Circular No. B4 of 2006 – PSMD/101/18/18
- (2) A Declaration that the Appellant is not obliged to pay non-private practice allowance to legal practitioners employed by the Appellant.

After considering the evidence, the learned Judge in the court below, dismissed the claims for subsistence allowance, education allowance, and the Appellant's counterclaim. The Learned Judge upheld the Respondents claim for non-private practice allowance.

In dismissing the claim for underpayment of subsistence allowance, the learned Judge noted that the rates for subsistence allowance as contained in Circular No. B12 of 2012 were only approved by the Appellant's Board on 20th March 2014, after the rationalisation of the grading structure between Government and was of the view that the period it took to implement the allowance was not inordinate. Further that by the time the Respondent resigned, the circular had not yet been effected and had not become part of the conditions of service. Therefore, it was not applicable to the Respondent at the time he was employed.

In addressing the issue of payment of non-private practice allowance, the learned Judge found that the claim was premised on the Public Service Management Division Circular No. B4 of 2006 as read with Circular No. B12 of 2012 and the Attorney General's opinion to National Savings and Credit Bank, a statutory body. The learned Judge observed that, the gist of the two circulars is that non-private practice allowance shall be payable to all legal practitioners in Government service who are not allowed to engage in private legal practice.

Relying on the Attorney General's opinion and the case of **Christopher Besa v Zambia National Building Society**¹ the learned Judge opined that payment of the allowance to lawyers in public service and statutory bodies is a matter of Government policy.

Further that, the Appellant cannot claim that Circular No. B12 of 2012 does not apply to the Respondent because he was not in Government service, when they have implemented the guidelines on subsistence allowance from the same circular.

According to the learned Judge, the Appellant is a statutory body created by Government and as such is mandated to implement Government policy whenever it is pronounced by taking the requisite steps to actualize the policy.

Based on the aforesaid consideration, the learned Judge was of the view that the Respondent was entitled to the allowance, being a legal practitioner

working in a statutory body. Accordingly, that he be paid the allowance for the duration he worked for the Appellant.

Dissatisfied with the learned Judge's award of non-private practice allowance, the Appellant has appealed to this Court, advancing seven grounds of appeal couched as follows:

- (1) The learned trial Judge erred in law and fact when she failed to find that the Appellant is entitled to employ members of staff upon terms and conditions approved by the Appellant's Board and that, therefore, only such conditions of service as had been approved by the Appellant's Board were payable to the Respondent.
- (2) The learned trial Judge misdirected herself in failing to find that members of staff of the Appellant are not public officers and thus are not ordinarily amenable to conditions as stipulated under the public service.
- (3) The learned trial Judge erred in law and fact when she found that Public Service Management Division Circular No. B12 of 2012 was applicable to the Respondent in the absence of the Appellant Board's approval.
- (4) The learned trial Judge fell into error when she failed to find that non-private practice allowance was not a condition within the conditions of service offered by the Appellant and therefore, was not payable to the Respondent.

- (5) The learned trial Judge erred when she failed to find that the conditions of service of the Appellant did not preclude the Respondent from private practice outside of his normal service.
- (6) The learned trial Judge misdirected herself when she held that the Respondent was entitled to payment of non-private practice allowance.
- (7) The learned trial Judge erred by directing that the unpaid non-private practice allowance due, be assessed by the Registrar and that the same attract interest to be determined.

At the hearing of the appeal, Mr. Mwondela, Counsel for the Appellant relied on the Appellant's heads of argument which he augmented with brief oral submissions.

Counsel argued the first and second grounds of appeal together.

In arguing these two grounds, Counsel drew our attention to Section 3 of ***The Food Reserve Act***¹ which provides that the Appellant is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and that, subject to the provisions of the Act, it has power to do all such acts and things as a body corporate may by law do or perform.

Reference was also made to Section 4 (5) of the same Act which empowers the Appellant to enter into a contract with any person for purpose of performing any of its functions under the Act.

Our further attention was drawn to Regulation 8 (4) and 8 (5) Part 1 of the Schedule on administration of the Agency which provides as follows:

“8 (4) – The Agency may appoint on such terms and conditions as it may determine, such other staff as it considers necessary for the performance of its functions under the Act.

8 (5) – Notwithstanding any other law, the Director and the employees of the Agency shall not be considered as public officers.”

Counsel submitted that the learned Judge at page J16-17 made inference that the Respondent is a public officer when she cited the case of **Christopher Besa**¹ where a consent settlement Order was entered in favour of the appellant to recover non-private practice allowance.

It was Counsel’s contention that the learned Judge in determining that the Appellant is a public body and the Respondent a public officer did not make reference to ***The Interpretation and General Provisions Act***² and Article 139 (1) of ***The Constitution of Zambia (Amendment) Act***³ which defines public office and public officer.

Counsel further contended that, the Appellant is a statutory body with capacity to contract privately and the staff it employs are those which it considers necessary for the performance of its statutory functions on its

terms and conditions of service as it deems fit and as approved by the board.

That its staff are therefore not public officers as Government policy is not applicable to the Appellant unless and until expressly extended by the Appellant in terms and conditions of employment.

According to Counsel, non-private practice allowance was not a condition of service approved by the board and was therefore not available to the Respondent.

Grounds three, four, five and six were also argued together. It was Counsel's argument that where the terms of the contract have been embodied by the parties into a written document, extrinsic evidence is not admissible to add, vary, subtract from or contradict the terms. It was submitted that the contract of employment and the conditions of service did not provide for payment of the allowance. That it is therefore in contradiction with existing law to add the payment of the allowance as one of the conditions of service.

As regards Circular No. B12 of 2012, it was submitted that it was not applicable to the Appellant. Reliance was placed on the High Court case of **Nathaniel Nawa Inambao v The Attorney General and Zambia Railways Limited²** and submitted that even though the Appellant is a statutory

body, not all Government circulars are applicable to it. That a statutory body has to be an addressee of a particular circular. Furthermore, that the Appellant's creating statute prescribes not only how the Appellant is governed but also how the Appellant interacts with Government.

Our attention in that respect was drawn to Section 27 of the **Food Reserve Act¹**.

According to Counsel, the Director in consultation with the Ministry of Agriculture puts forward policy direction. The Minister responsible for Agriculture in consultation with the Appellant is the one in the position of directing the Appellant by Statutory Instrument.

That the Statutory Instrument was not issued by the Minister directing or prescribing to the Appellant, the payment of non-private practice allowance in its conditions of service.

The seventh ground was argued separately. In arguing this ground, reliance was placed on the case of **Jefford and Another v Gee⁵** where it was held that a plaintiff who has been deprived of his money must be paid a reasonable rate of interest from the time when he was first deprived.

Counsel submitted that only a party who has wrongfully been deprived of an allowance is entitled to the deprived allowance and a reasonable interest. It was Counsel's contention that the Respondent was never entitled to the allowance and it is therefore contrary to the law to order that

money which was never an entitlement be assessed and that the same attracts interest.

In turn, Mr. Pasi, the Respondent equally relied on the Respondent's heads of argument. In response to the first and second grounds of appeal, he submitted that, the question should not be whether or not the Appellant had powers to enter into a contract of employment with the Respondent, but whether Government policy could override or prescribe conditions of employment over and above what the Appellant had agreed in the contract of employment.

According to the Respondent, the Appellant is a Government agency as defined under the **Public Finance Act**⁵ and therefore subject to Government policies. The Respondent in that respect cited the case of **Zambia Consolidated Copper Mines Limited v Richard Kangwa and Others**⁴, which dealt with the rights of shareholders and stated that they have and enjoy as of right, overriding authority over the company's affairs and even over the wishes of mere nominees or directors. The Respondent further submitted that, the Appellant being a statutory body which is wholly owned and funded by Government is bound by policy decisions.

As regards the argument that members of staff are not public officers, the Respondent contended that the Circular applied to all institutions which

private practice allowance, states that, non-private practice allowance shall continue to be paid to legal practitioners in Government service who are not permitted to engage in private legal practice.

We note that the words Government service and Public service are interchangeably used in these Circulars.

However, the definition of Government service is not provided for under any of our statutes. We shall therefore restrict ourselves to the definition of public office.

Section 3 of ***The Interpretation and General Provisions Act***² defines Public office as:

“Public office, “Public officer” and “the Public service” have the same meaning as in the Constitution”

Counsel for the Appellant drew our attention to Article 139 (1) of ***The Constitution of Zambia (Amendment) Act***³ on the definition of public office and public officer. The Respondent resigned in 2014 and the said Constitution was only amended and assented to in January 2016 and therefore the same cannot be applied to this matter retrospectively. In our view, the applicable Constitution is the one before the amendments of 2016 (***The Constitution of Zambia Act***⁴). Article 139 (1) of the said Constitution, the interpretation clause defines public office and public officer as follows:

“Public office means an office of emolument in the public office. Public officer means a person holding or acting in any public office.”

Article 139 (4) goes on to state that:

“For the purposes of this Constitution, a person shall not be considered as holding a public office by reason only of the fact that he is in receipt of a pension or other like allowance in respect of service under the Government of Zambia or its predecessor Government.”

The Food Reserve Act¹ in particular Regulation 10 (1) part II of the Schedule which caters for financial provisions of the Agency, provides for setting up of a fund for the Agency and source of financing. Regulation 10 (3) provides as follows:

“There shall be paid from the funds of the Agency –

(a) Salaries, allowances, loans, gratuities and pensions of staff of the Agency and other payments for the recruitment and retention of staff.”

It is evident from the provisions of Regulation 10, that the Appellant administers its own funds from which it draws its employees' emoluments. It therefore follows that; the Appellant's employees are not in public office to qualify to be public officers as their emoluments are not in public office

nor drawn from the Government's general revenue account.

We further note that Regulation 8 (5), Part 1 of the Schedule, expressly precludes the Director and the Appellant's employees from being considered as public officers. The said Regulation states as follows:

"Notwithstanding any other law, the Director or the employees of the Agency shall not be considered as public officers."

We further note that in arriving at the decision that the Respondent was eligible and entitled to payment of non-private practice allowance, the learned Judge opined that the Appellant cannot claim that Circular No. B12 of 2012 does not apply to the Respondent because he was not in public service, when they have implemented the guidelines on subsistence allowance from the same circular.

We agree with Counsel for the Appellant that the provisions of the Circular as regards non-private practice allowance could only have been applicable, if they were expressly extended by the Appellant and approved by the board; so as to be part of the Respondent's conditions of service as was the case with subsistence allowance. It will be noted from page 98 of the record that the Appellant provided for payment of subsistence allowance and the rate as per Government guidelines

and therefore, to that extent, the Circular was applicable but not in its entirety as the Appellant had neither provided for non-private practice

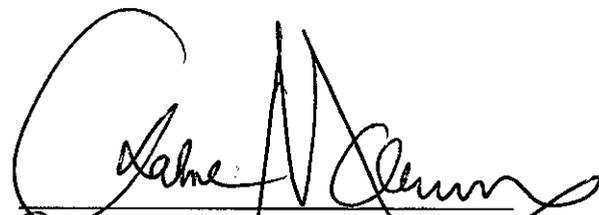
rights Government had as a shareholder to enjoy, as of right overriding authority over the company's affairs.

Equally here, we see no bearing that the said case has over this matter.

In view of the aforestated, the learned Judge erred in finding that the Respondent was entitled to non-private practice allowance. It therefore follows that grounds one to six of the appeal are accordingly dismissed for lack of merit.

As regards the seventh ground of appeal, having dismissed grounds one to six, this ground becomes otiose.

As regards the costs, the Respondent shall bear the costs in this Court. same to be taxed in default of agreement.



C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



J. CHASHI

COURT OF APPEAL JUDGE



J. Z. MULONGOTI

COURT OF APPEAL JUDGE