

IN THE COURT OF APPEAL OF ZAMBIA

APP/10/2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

THE ATTORNEY GENERAL

APPELLANT

AND

ANDREW PHIRI

1st RESPONDENT

MATTHEWS BWALYA

2nd RESPONDENT

WILLIAM PHIRI

3rd RESPONDENT

LAMECK HAMBOLE

4th RESPONDENT

**JOSEPH BWALYA (Suing as administrator
of the estate of the late Geoffrey Bwalya)**

5th RESPONDENT

JONATHAN NSHINDO

6th RESPONDENT

PETER NDUMBULO

7th RESPONDENT

CORAM: MAKUNGU, MULONGOTI AND SIAVWAPA, JJA

On 22nd and 24th May 2019

FOR THE APPELLANT: CAPTAIN M.B MUDENDA OF ATTORNEY
GENERAL 'S CHAMBERS

FOR THE 1st to 5th RESPONDENTS: NO APPEARANCE

FOR THE 6th and 7th RESPONDENTS: NO APPEARANCE

J U D G E M E N T

SIAVWAPA, JA delivered the Judgement of the Court.

Cases referred to:

1. Ringford Habwanda v Zambian Breweries Plc vol 3 (2012) ZR 7
2. The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a firm) v The Lusaka City Council and Zambia National Tender Board (2004) Z.R. 109

Legislation referred to:

1. The Defence Act Chapter 106 of the Laws of Zambia
2. The Public Service Pensions Act No 35 of 1996
3. Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia
4. Rules of the Supreme Court (white book) 1999 Edition

This is an appeal against the Ruling of the High Court delivered on 26th June, 2018 in which the lower court found that the Respondents' re-engagement contracts with the Zambia Army were not illegal.

The genesis of the matter in the court below is that the Respondents were warrant officers in the Zambia army, whose service was governed by Part IV of the Defence Act and the Defence Force (Regular Force) (Enlistment and Service) Regulations. The Respondents, upon reaching the age of 55, retired and were re-engaged on various dates in 2010. The Appellant re-engaged them pursuant to the Adjutant General's Instruction No 01/2003. The

Appellant however, terminated the Respondents' contracts on account of illegality as they were not supported by law.

Aggrieved by the Appellant's decision, the Respondents advanced a consolidated action pursuant to a consent order dated 1st December, 2017. The Respondents claimed inter alia that their contracts with the Appellant were wrongfully terminated.

During trial, the Appellant filed summons to dispose of the action on a point of law pursuant to Order 14A rule 1 of the Rules of the Supreme Court. The application was premised on the ground that the contracts that were the subject of the matter in the Court below were illegal and therefore unenforceable.

The Appellant filed an affidavit in support deposed to by Lieutenant Colonel Mwizukanji Namwawa, the director of legal services at the Zambia Army.

She deposed to the fact that the Respondents were erroneously re-engaged pursuant to the Adjutant General's Instruction No 01/2003 which had since been repealed, for erroneously raising the retirement age to sixty years after they reached the mandatory retirement age of 55 years.

In his Skeleton arguments, the Appellant argued that the Defence Act allows warrant officers to be re-engaged from the age of 50 up to 55 years and not beyond, although the Public Service Pensions Act had since increased the mandatory retirement to 65 years.

The Appellant however, noted that the Defence Force (Regular Force) (Enlistment and Service) Regulations, Regulations 8(7) and 8(8) which provide that an officer shall retire at the age of 50 but can be re-engaged for service until the age of 55 have not been amended to synchronize retirement with that in the Public Service Pensions Act.

The 6th and 7th Respondents filed an affidavit in opposition to the application in which they contended that they had applied to be re-engaged 12 months before their retirement and before they reached the mandatory retirement age of 55 pursuant to the Adjutant General's Instruction No 01/2003.

They argued that their contracts with the Appellant were within the ambit of the Defence Act as the Appellant had ignored section 16 of the Defence Act which provides that a soldier may be re-engaged for such further periods as prescribed.

They further argued that the Defence Force (Regular Force) (Enlistment and Service) Regulations 8(7) and 8 are inconsistent with the Public Service Pensions Act and could not supersede the provisions of the enabling Act which is the Defence Act.

The 1st to 5th Respondents also filed skeleton arguments in which they argued that they were engaged pursuant to section 16 of the Defence Act. They submitted that Regulation 8 of the Defence Force (Regular Force) (Enlistment and Service) Regulations provides the minimum number of years a soldier must serve in order to qualify for re-engagement but that it does not cover soldiers who have

served up to the retirement age of 55 years as those are covered under section 16.

The 1st to 5th Respondents contend that the only requirement under section 16 is that the competent military authority approves the contract. They argued that the Public Service Pensions Act cannot be the basis for finding a contract under the Defence Act unlawful as the two Acts rank equivalently.

They concluded by arguing that the Appellant had not cited any law that prohibited the contracts signed by the respondents.

In reply, it was the Appellant's assertion that Section 16 of the Defence Act refers to colour service which is no longer being practiced in the Zambian Defence Force.

After considering the above arguments, the tenor of the Learned Judge's ruling was that Section 16 of the Defence Act provides for re-engagement of an officer after retirement and the Public Service Pensions Act provides that retirement should be at the age of 55 years. The Defence Force (Regular Force) (Enlistment and Service) Regulations provide that an officer cannot be re-engaged beyond the age of 55 and as such, they should be amended as they are inconsistent with both the Defence Act and the Public Service Pensions Act.

The Learned High Court Judge relied on section 20(4) of the Interpretation and General Provisions Act to find that any Statutory Instrument that was inconsistent with any provision of an Act is

void to the extent of the inconsistency and as such the provisions in the regulations restricting engagement beyond the age of 55 were void.

The learned trial Judge further found that in accordance with section 35 of the Public Service Pensions Act, the Defence Act only applied to officers that served on pensionable conditions and once they retired, the Act was no longer applicable. She then came to the conclusion that the Public Service Pensions Act did not apply to the Respondents.

The Appellant, dissatisfied with the ruling, appealed to this court on two grounds as follows:

- (i) *That the Learned Trial Judge erred in law and in fact when she made a finding that the Respondents were properly re-engaged pursuant to the provisions of section 16 of the Defence Act chapter 106 of the Laws of Zambia.*
- (ii) *The Learned Trial Judge erred in law and in fact when she made a finding that the Respondents employment contracts made pursuant to the Adjutant General's Instructions 01/2003 were not illegal.*

The Appellants argued the two grounds together and repeated to a large extent, their arguments in the court below stating that section 15 of the Defence Act provides for colour service while the re-engagement provided for under section 16 was re-engagement after completion of the colour service and not after retirement.

After considering the arguments submitted by the parties and the ruling of the lower court, we find that the main question to be settled is the legality of the Respondent's contracts which in turn is dependent on the interpretation of Section 16 of the Defence Act.

First and foremost, we note that Section 16 is under Part IV of the Defence Act which provides for enlistment and service of the Respondents and that it ought to be read in conjunction with the preceding section.

Section 15 of the Defence Act states as follows:

“(1) The term for which a person enlisting in the Regular Force may be enlisted shall be such term beginning at the date of his attestation as is mentioned in the following provisions of this section.

(2) Where the person enlisting has apparently attained the age of eighteen years, the term shall be seven years' colour service and five years with the Reserve Force, or as may be prescribed from time to time by regulations.

(3) Where the person enlisting has not apparently attained the age of eighteen years, the said term shall be seven years' colour service commencing on the date upon which he attains such age, and a term of five years thereafter with the Reserve Force, or as may be prescribed from time to time by regulations.”

From the above provision, it is clear that a person recruited into the army as a soldier is supposed to serve for a term of seven years after which they are transferred into the reserve for five years.

Section 16, then provides for re-engagement and continuation of service in the following terms:

“Any soldier of the Regular Force who at any time has completed or is within one year before completing the term of his service with the Regular Force may, with the approval of the competent

military authority, re-engage for such further period or periods of service with the Regular Force and service in the Reserve Force as may be prescribed.

This means that, if after 7 years, a soldier wants to continue in service, they must apply pursuant to Section 16.

The Defence Force (Regular Force) (Enlistment and Service) Regulations provide for further periods of service stated in section 16 with Regulation 7 confirming what is provided for in section 15 that the period of service for a soldier shall be 12 years.

It is however, Regulation 8 which provides clarity to the whole question of re-engagement in the following terms:

“A soldier may, on completion of seven years' service in the Regular Force, as provided in regulation 7, or within one year before completing such service, apply to be re-engaged for a further period of continuous service in the Regular Force in accordance with the provisions of section sixteen of the Act.”

This affirms that the re-engagement provided for under section 16 is to be done after 7 years' service and not after retirement at 55. We therefore, agree with the Appellant on the argument that the lower Court erred in its interpretation of section 16.

Having found as above, we note that the Appellant did state in his skeleton arguments in reply that the procedure outlined in part IV of the Act is no longer practiced by the Army. However, the law has not been amended and as such, this is the procedure which should be adopted by this Court.

The Public Service Pensions Act provides for retirement at the age of 55 years and we have established above that the Defence Act

provides that the service of a soldier shall be for 7 years subject to re-engagement.

The first part of Section 33 of the Public Service Pensions Act is couched in the following terms:

“Subject to the other provisions of this section or any other written law, an officer shall retire on the fifty-fifth anniversary of the date of his birth” (underlining ours for emphasis)

This means Section 33 is subject to the provisions in part IV of the Defence Act on the service of soldiers.

We further find no inconsistency with the provisions of the Defence Act and agree with the Appellant that section 16 does not relate to re-engagement after retirement but re-engagement after the completion of the seven year colour service.

Reverting to the legality of the contracts, the Respondents in this matter have heavily relied on the Adjutant General’s Instructions. However, dominant to these are the Defence Act and the Regulations made pursuant to section 210 of the said Act.

This being the case, it is our considered view that the contracts were illegal as section 16 does not provide for re-engagement after retirement at 55 but after the end of service with the regular force.

In the case of The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a firm) v The Lusaka City Council and Zambia National Tender Board (2) the Supreme Court stated thus:

“We, without hesitation, accept that where in constructing a statue, the contract is rendered illegal, and unenforceable or void

by a provision in a statute, the court will not enforce such a contract.”

We therefore, find that the Respondents’ contracts, which were illegal, are not enforceable at law. We therefore, allow the appeal on both grounds and order that each party bears their own costs.


.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE


.....
J.Z. MULONGOTI
COURT OF APPEAL JUDGE


.....
M. J. SIAVWAPA
COURT OF APPEAL JUDGE