

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

2012/HP/0640



B E T W E E N:

NKANDU GREEN & THIRTEEN OTHERS

PLAINTIFFS

AND

THE ATTORNEY GENERAL

1st DEFENDANT

PUBLIC SERVICE PENSIONS FUND BOARD

2nd DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 20th day of
September, 2017**

For the Plaintiffs : *Mrs. N. Mutti, Messrs Lukona Chambers*
For the 1st Defendant : *Major C. Hara, Deputy Chief State Advocate*
For the 2nd Defendant : *Mrs. E. Kapuka, In-House Counsel*

J U D G M E N T

Cases Referred To:

1. *Louis Maimbo & 553 Others v The Attorney General & PSPFB*
2009/HP/1048
2. *Nicholas Mudenda & 257 Others v PSPFB & Attorney General*
2006/HP/0027

Legislation Referred To:

1. *Public Service Pension Fund Act No. 35 of 1996*
2. *Constitution of Zambia (Amendment) Act No. 2 of 2016*

I was approached in this matter by way of agreed facts and issue. The Plaintiffs commenced this action by Writ of Summons and Statement of Claim seeking the following reliefs:

- a) *A declaration that as they were retired, in the national interest, they are entitled to be paid pension benefits applying the formula most favourable to them under section 39 of the Public Service Pension Fund Act, 1996 namely section 39 (2)(b).*
- b) *Payment of the difference between what they were paid and what is due to them under the most favourable formula of section 39 of the Public Service Pension Fund Act.*
- c) *Interest on any amounts found due to the Plaintiffs.*
- d) *Costs*

The agreed facts disclose that the Plaintiffs are former employees of the 1st Defendant having worked in the Ministry of Defence as soldiers in the Zambia Defence Force. The Plaintiffs together with other soldiers between 1st July, 1995 and 28th October, 1997 were arrested and charged with the offences of Treason and Misprison of Treason contrary to section 43(1) and 44(b) of the Penal Code respectively and were remanded in custody without bail.

By a judgment of the Supreme Court dated 27th December, 2002, the Plaintiffs were acquitted of all the charges levelled against them and were reinstated in their employment. The Plaintiffs were

paid salary arrears for the period they were suspended and compensated two years salary for their lost and damaged property and other expenses incurred in renting alternative accommodation as a result of their eviction from the army quarters in the barracks.

On or about 24th August, 2004, the Plaintiffs were called to a meeting addressed by the servant of the 1st Defendant who informed them that they were to be retired as their services were no longer required with effect from 31st December, 2004. Following the retirement of the Plaintiffs in national interest, the 2nd Defendant paid them their pension benefits based on section 39(1) of the Public Service Pension Fund Act (the Act) instead of section 39 (2)(b) of the Act.

Both the 1st and 2nd Defendants contend that the Plaintiffs were correctly paid their pension benefits under section 39 (1) of the Public Service Pension Act.

The issue set for my determination is:

- (i) ***Whether or not the Plaintiffs are entitled to be paid their pension benefits under section 39 (2)(b) of the***

Public Service Pensions Act No. 35 of 1996 (as contended by the Plaintiffs) instead of section 39 (1) of the same Act.

In support of their contention, the Plaintiffs produced a schedule describing their underpayments as stated in the matrix herebelow:

NO.	NAME	AMOUNT DUE SECTION 39(2)(b)	AMOUNT PAID SECTION 39(1)	DIFFERENCE IN (K)
01	GREEN NKANDU	148,887,898.88	134,566,901.82	14,320,997.06
02	MWALE BERNARD	153,002,934.67	136,022,996.44	16,979,938.73
03	NGOMA RODRICK	122,911,676.40	67,134,872.42	55,776,803.94
04	KACHINGWE ANTHONY	118,682,529.92	66,038,800.30	52,643,729.62
05	MUKWASA JAMES	121,656,722.35	63,462,244.31	58,194,478.04
06	NGUNI KEAGAN	103,506,688.32	54,149,332.31	49,357,356.01
07	MULUSA BILLING MONZE	122,631,105.60	65,796,304.73	56,834,800.87
08	CHOLONGWE EZRA	123,905,921.25	71,074,289.87	52,831,631.38
09	KANGOMBE MULONGWE	104,641,353.60	56,020,591.67	48,620,761.93
10	MIYOBA HUMPHREY	105,666,938.40	57,072,433.59	48,594,504.81
11	TEMBO FRANK	105,578,138.40	58,213,457.81	47,364,680.59
12	SUZAH ANGEL	104,263,131.84	55,092,691.39	49,170,440.45
13	SWALA PAUL	105,334,760.16	58,059,516.61	47,275,243.55
14	MULENGA CORNELIUS	102,372,023.04	50,832,384.51	51,539,638.53

To support their respective positions, the parties filed written submissions. On behalf of the Plaintiffs, Learned Counsel submitted that pension benefits for civil servants upon retirement are regulated and managed in accordance with the provisions of the

Public Service Pension Fund Act. She cited section 39 of the Act which deals with benefits for officers retiring on abolition of post or to effect greater efficiency or economy also commonly referred to as national interest.

She submitted that subsection 39 (2) (b) of the Act provides parameters for the amount of pension payable where a person is retired on abolition of post or to effect greater efficiency in the economy. Further, that the parameters provided for under subsection 2(a) and (b) are for the benefit of the employee whose service has been prematurely interrupted and has to be construed according to what is best for the employee.

Counsel further submitted that the Plaintiffs' position resonated with the legal opinion, which was rendered by the erstwhile Chief Parliamentary Draftsman to then Permanent Secretary, Public Service Management Division, on 31st March, 2000. It appears at page 1 of the Plaintiffs Bundle of Documents. She submitted that the Chief Executive Officer of the 2nd Defendant was duly informed and advised of the contents of the legal opinion which stated that the 2nd Defendant was to employ the best option

for the calculation of benefits of employees retired in the national interest as spent out in section 39 (2)(d) of the Act.

Counsel referred me to page 2 of the Plaintiffs' Bundle of Documents, which illustrated the calculation of benefits of one of the Plaintiffs, namely Green Nkandu. She also referred me to the PSPF Document at page 2 of the Plaintiffs' Bundle of Document which revealed under the Final Pensional Emoluments that there were three options that could have been used to calculate the Plaintiffs' pensions namely, section 39 (2)(b), which is more superior than those provided under the other two options.

Counsel stated that the final gratuity due under section 39 (1) was K134,566,901.82, compared to what was due under section 39 (2)(b) calculated at K148,887,898.88. Counsel contended that Green Nkandu having been paid under section 39 (1) instead of section 39 (2)(b) experienced an underpayment of K14,320.997.06 which, like all the other Plaintiffs, was due to him from the Defendants.

Counsel cited Article 187(1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 as re-affirming the right to a pension benefit. In particular, Article 187 reads that:

**“187. (1) An employee, including a public officer and Constitutional office holder, has a right to a pension benefit.
(2) a pension benefit shall not be withheld or uttered to that employee’s disadvantage.”**

It was Counsel’s submission that pension is an accrued right protected by the Constitution and that the Plaintiffs were due their pension on the basis of the Chief Parliamentary Draftsman legal opinion; and the pension was supposed to have been calculated by the Defendants using the best option under section 39 (2)(b).

Counsel prayed to the Court to enter judgment in favour of the Plaintiffs and to declare that as the Plaintiffs were retired in national interest, they are entitled to be paid pension benefits in accordance with section 39 (2)(b) of the Public Service Pension Fund Act. Counsel also prayed for an order that the Plaintiffs be paid the difference in their pension between what they were paid under section 39 (1) of the said Act and what is due to them under section 39 (2). Counsel further prayed for interest on the amount found due and owing at the current bank rates and for costs.

In response, the 1st Defendant submitted that the formula provided for under section 39 (1) of the Public Service Pension Act was applicable to all officers retired in national interest and was the first point of reference in calculating retirement benefits. Counsel argued that section 39 of the Act employed mandatory terms and did not offer any room for discretion. It was his contention that the Plaintiffs' retirement benefits were rightly and lawfully calculated in accordance with the said provision.

Counsel submitted that the Plaintiffs misdirected themselves when they insisted that section 39 (2) was applicable to their circumstances. Counsel called in aid the case of **Louis Maimbo & 553 Others v The Attorney General & PSPFB¹**, in which the Court stated as follows:

“It is difficult to understand how the Plaintiffs understand these provisions as meaning that pension benefits could be calculated under either section 39 (2)(a) or section 39 (2)(b). The pleadings and agreed facts show that the Plaintiffs were retired prematurely as a result of some re-organisation in the civil service. This means that the Plaintiffs' benefits were to be calculated under section 39. The formula for use in calculating benefits under that section is, actually in section 39 (1) subsection (2) only provides the ceilings which the result in subsection (1) should not exceed.”

Counsel argued that Article 124 of the Constitution does not enable one to choose between sections and was inappropriately

cited. Counsel concluded by reiterating that the Plaintiffs were duly, rightly and lawfully paid their pension benefits as entitled. He prayed to the Court to dismiss the Plaintiffs' claim against the 1st Defendant for being misconceived.

Learned Counsel for the 2nd Defendant submitted that pension benefits were calculated on the formula set out under section 39 (1) and not section 39 (2)(b) as claimed by the Plaintiffs. She stated that the formula in section 39 (1) of the Act applies to officers who are retired in national interest. Section 39 (1) (2)(a) and (b) provided a capping on what could be paid under section 39 (1) and were not the basis for calculating pension benefits. It was her submission that the 2nd Defendant was on firm ground when it calculated the pension benefits for the Plaintiffs under section 39 (1) of the Act.

Counsel also cited the case of **Louis Maimbo & 553 Others v The Attorney General & PSPFB¹** and **Nicholas Mudenda and 257 Others v PSPFB²** on the effect of section 39 (1) and (2) of the Act. Counsel's arguments on Article 124 of the Constitution were no different from those of the 1st Defendant and will not be rehashed. Counsel prayed to the Court to dismiss the Plaintiffs' claims.

I have earnestly considered the pleadings and submissions of the parties. The issue to be determined squarely falls on a point of law and it is whether or not the Plaintiffs are entitled to be paid their benefits under section 39 (2)(b) of the Public Service Pensions Act instead of section 39 (1) of the Act.

Section 39 of the Public Service Pensions Act sets out thus:

“39. (1) Subject to the provisions of Part XI and of subsection (2), an officer who retires on the abolition of his post or to facilitate an improvement by which greater efficiency or economy could be effected in the organisation of the part of the service to which the officer belongs shall be entitled with effect from the date of the officer’s retirement to receive a pension calculated as follows:

$$\frac{KA \times B}{C} + \frac{KA \times D}{60}$$

Where KA = his pensionable emoluments;

B = the number of completed months of his pensionable service;

C = the age at which he retires, expressed in complete months;

D = the number of completed periods of three years in his pensionable service, to a maximum of ten.

(2) A pension payable under subsection (1) shall not exceed:

a) the pension, calculated with reference to the salary scale on which the officer was serving at the time of retirement, to which the officer would have been entitled if the officer had continued to hold the post the officer held at the date of retirement until the date on which the officer would otherwise have retired under the provisions of this Act having received all scale increments for which the officer would have been eligible by that date; or

(b) two-thirds of the highest annual rate of pensionable emoluments received by the officer at any time during the officer’s pensionable service.

In my view, the provisions of section 39 subsections (1) and (2) are conjunctive and do not give an option on their application. In other words, the operation of subsection 39 (2) is predicated by the requirements of subsection 39 (1) of the Act. Therefore, a pensioner's benefits should be calculated on the basis of section 39 (1) of the Act.

The Plaintiffs who were retired in national interest were paid under section 39 (1) of the Act. They challenge the payment on the basis that they should have been paid under section 39 (2) of the Act. To support their claim, the Plaintiffs placed reliance on a legal opinion rendered by the erstwhile Chief Parliamentary Draftsman, Mrs. Doris K.K. Mwinga to then Permanent Secretary Public Service Management Division, Dr. J.L Kanganja.

Mrs. Mwinga's opinion was to the effect that the provision of section 39 (2)(a)(b) of the Act employs the best option for the benefit of the employee. The opinion did not make any reference or comparison to section 39 (1) of the Act. In fact, the context in which the opinion was rendered was not explained. It appears to have been written in vacuum and without any particular reference

to the Plaintiffs' case. I find that it is of very little assistance and should not have been adorned by the Plaintiffs.

The Defendants contend that the Plaintiffs were rightfully paid their retirement packages. Further, that the 2nd Defendant is precluded from applying options on the payment of retirement benefits. In other words, the 2nd Defendant cannot opt to use either section 39 (1) or (2) of the Act. The Defendants also valiantly contended that all pension payments relating to retirement in national interest are calculated under section 39 (1) of the Act. On the other hand, section 39 (2) of the Act places a ceiling on the calculations made under section 39 (1).

After carefully considering the contested positions of the parties, I have come to the conclusion that section 39 (1) of the Act provides the basis upon which pension payments are calculated for those retired in national interest. Subsection 39 (2)(a) and (b) provide a ceiling in that the benefits must not exceed the parameter set by section 39 (1) of the Act. Put differently, the benefits due to persons retired in national interest should accord with the provision of section 39 (1).

In the result, I find that the Plaintiffs misconceived section 39 (1) and (2) of the Act. They have failed to prove any of their claims. I further find that the Plaintiffs' reference to Article 124 of the Constitution is inconsequential granted that there is no dispute on their entitlement to a pension payment.

I accordingly hold that the Plaintiffs claims lack merit and are hereby dismissed. I award costs to the Defendants to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 20th day of September, 2017.

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE