



ILERA AFRICA

10TH REGIONAL CONGRESS

3 – 4 APRIL 2024



Sub-Theme: Collective Labour Law - Social Dialogue in the Public Service

**Topic: Conformity of the Emoluments
Commission Act No.1 of 2022 with ILO C87 and
C98 relating to freedom of association and
collective bargaining rights in Zambia**

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STRUCTURE OF PRESENTATION

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- **Brief background of Zambia's membership to ILO**
- **Role of EC**
- **Scope of ECA**
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INTRODUCTION

This presentation focusses on the research study relating to the conformity of the Emoluments Commission Act No.1 of 2022 of the Laws of Zambia with ILO C87 and C98 relating to freedom of association and collective bargaining rights in view of the fact that Zambia is a member of the ILO and therefore its conduct and or action ought to be in conformity with the spirit, object and purport of the ILO principles and guidelines which international law through ILO legal framework directs that all members even if they have not ratified the conventions in question have an obligation, arising from the very fact of the membership in the organization, to respect, promote and realize in good faith ... the principles concerning the fundamental rights of FoA & CB....” (The 1998 ILO Declaration of Fundamental Principles and Rights at Work)

BRIEF FACTS ABOUT ZAMBIA'S MEMBERSHIP TO ILO

- Zambia joined ILO in December of 1964
- The country ratified the two fundamental ILO Conventions No. 87 on Freedom of Association and the Right to Organise (FOA) and No. 98 dealing with the Right to Organise and Collective Bargaining (CB) on 2nd September, 1996 (See ILO normlex)
- These two (2) Fundamental ILO Conventions have attained the status of *Jus Cogens* being: **“a norm accepted and recognized by the International community of states as a whole as norms from which no derogation is permitted”**

CONT'D

- They transcend national sovereignty . For instance:

“All members even if they have not ratified the conventions in question have an obligation, arising from the very fact of the membership in the organization, to respect, promote and realize in good faith ... the principles concerning the fundamental rights of FOA & CB....” (The 1998 ILO Declaration of Fundamental Principles and Rights at Work)

CONT'D

- **The Judiciary in Botswana has recognized FOA as a principle of Jus Cogens :**
- case study: **BOTSWANA PUBLIC EMPLOYEES UNION AND 3 OTHERS V THE MINISTER OF LABOUR HOME AFFAIRS AND THE ATTORNEY-GENERAL** which held that under international law, the Convention on Freedom of Association has attained the status of Jus Cogens.
- The two fundamental ILO Conventions on FOA and CB constitute the most potent arsenals in the hands of workers for shattering the colossus of inequality of bargaining power standing between an employer and employee and interconnect with other ILO Conventions animating them
 - **eg- it is through these two fundamental ILO Conventions that the Fundamental Conventions on Child and forced Labour are enforced at work.**

CONT'D

Zambia is a Dualist State: International Conventions and Treaties have no force of Law until they are domesticated (Article 92 of the Constitution)

- The Ratification of International Agreements Act No. 34 of 2016 requires Parliamentary approval before these can become domestic law. However ratified conventions are of persuasive value only as expounded in the case of Attorney General v Roy Clarke, and the guide the SCZ has given in interpreting local law- Zambia Sugar v Fellow Nzaluka, also in the case of Standard Chartered Bank v Peter Zulu and 118 others.

ROLE OF THE ECA

- Gives effect to **Article 232** of the Constitution Act No. 2 of 2016 which creates the EMOLUMENTS COMMISSION - EC.
- Principal function of the EC under the Emoluments Commission Act- ECA- is to determine emoluments – salaries, allowances, pension benefits and remuneration which form an integral part of an Individual's service , and benefits on retirement - **Section 5 (1) of the ECA**
- The EC shall employ Equity when determining emoluments
- The ECA also gives statutory powers to EC to conduct a concurrent review of emoluments every two years and a special review of emoluments within two years if circumstances e.g.- increased cost of living dictate – Ss.16&17 of ECA

SCOPE OF ACT

- The EC shall determine emoluments, salaries allowances, benefits, pension benefits and rights that form an individual's remuneration for services rendered including benefits on retirement for all employees in State organs defined as legislature, executive and judiciary and for chiefs and officers in State Institutions expansively defined as inclusive of a “ **Ministry or Department of Government, a Public Office, Agency , Institution, Statutory Body, Commission or Company in which the Government or Local Authority has a Controlling Interest other than a State Organ- Article 266 of Constitution Act No.2 of 2016.**”

TO SUM UP ON THE SCOPE ACT...

The EC will determine salaries allowances, remuneration for one's services pension and retirement benefits for :

- All Public Service Workers or individuals who receive salaries from the Consolidated Account of the Republic
- Workers in Statutory Bodies, Agencies, Commissions, Parastatal Organisations and State Institutions
- Private companies in which the Government or local Authorities have controlling interest

COMPOSITION – SECTION 6 OF ECA

- **A Chairperson**
- **Representatives** from the three organs of Government- Legislature, Executive AND the Judiciary
- A **representative** from the most representative of the Public Service Management Division
- **One nominated representative** from the most representative Federation of Trade Unions.

DETERMINATION OF EMOLUMENTS- GUIDING PRINCIPLES

- **S.15 OF THE ECA** contains the guiding principles for determining emoluments namely:
- Affordability and sustainability of the proposed emoluments
- Efficient performance in state organs and institutions
- Enhancement and maintenance of macro- economic stability of the country
- Need for emoluments to reflect level of responsibility of the persons affected
- Retention of officers in State Institutions and State Organs

DETERMINATION OF EMOLUMENTS- GUIDING PRINCIPLES

- **S.20** provides factors which the EC must take into account when determining emoluments :
- Fixed and variable components of emoluments, equity and competitiveness, legal social, economic and environmental issues
- Existing Collective Agreements, Results of job performance and productivity evaluations, affordability and sustainability of Proposed emoluments, emoluments of similar regional and international organisations.
- The relevant authorities must also consider these factors when making proposals to the EC for determination of emoluments- authorities on whose behalf the EC determines Emoluments

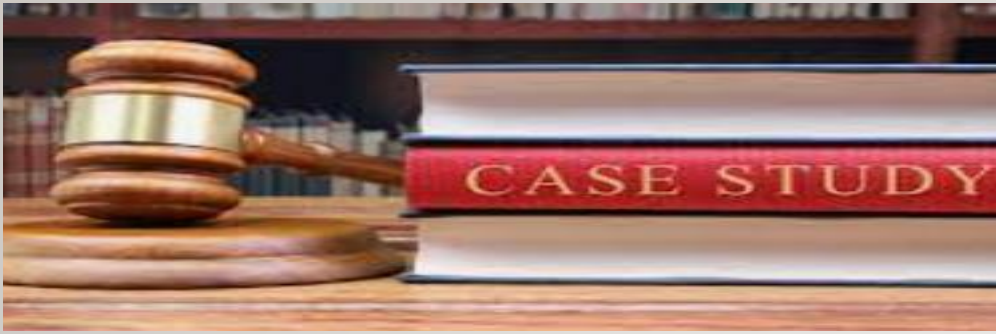
IS THE ECA UNIQUE TO ZAMBIA?

CONT'D

- **Determining the conformity of the ECA with ILO Conventions Nos. 87 and 98 on FOA and CB.**
- The ECA is an indispensable piece of legislation aimed at **BALANCING** public interest with the welfare of public service workers by taking into account the special features of the public service which is allowable under the fundamental ILO conventions on FoA and CB.
- The Salaries of public service workers are an integral part of the national budget

IS THE ECA UNIQUE TO ZAMBIA?

- The need to balance the welfare of public service workers and the national population
- Case study: **NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION V MINISTER OF PUBLIC SERVICE AND ADMINISTRATION AND 17 OTHERS**, in which the Concourt of South Africa refused to invalidate the Judgement of the Labour Appeal Court which had declined to enforce a duly negotiated and cabinet-approved collective agreement which had exceeded the allocated budget by R13.2 billion at the time when the country was experiencing the worst effects of the Covid-19 pandemic. It was held that it would not be in the public interest to order payment of such a huge amount of money to the small Cohort of the national population.



NOBILITY OF THE ECA

The ECA PROTECTS PUBLIC INTEREST - PROTECTS PUBLIC PROPERTY AND FINANCES AGAINST ABUSE AND WASTAGE.

When determining emoluments , the EC should consider:

(i) Affordability and sustainability of proposed emoluments

(ii) THE LEGAL POSITION BEFORE ENACTMENT OF ECA.

Case study: The Council of the University of Zambia UNZA Researchers and Allied Workers Union in which the Apex Court held that the Labour commissioner had no powers to inquire into the ability of the employer to pay what was agreed in a duly negotiated collective agreement. This is now reversed by section 15 of the ECA

NOBILITY OF THE ECA CONT'D

(iii) The ECA only requires that state organs and institutions take into account their productivity, performance, national and departmental budget constraints when making recommendations to EC on determination and reviews of emoluments

Guidance from ILO: “ Collective Bargaining in the Public Sector calls for verification of the availability of resources in the various public bodies and undertakings and the resources are dependent on national budget.” (see 2006 Digest para.1036 and 2018 Digest paras.1486).

NOBILITY OF THE ECA CONT'D

- It fortifies the Zambians' collective permanent sovereignty over their national wealth. Currently 42% of the national budget is spent on emoluments. (Times of Zambia 2024). The EC needs to take into account national development objectives before determining emoluments.
- **Guidance from ILO: “ *In so far as the income of public enterprises and bodies depends on State Budgets,.. it would not be objectionable for wage ceilings to be fixed in State budgetary laws and neither would it be a matter for criticism that the Ministry of Finance prepare a Report prior to the commencement of collective Bargaining with a view to ensuring respect of such ceilings.*” (2018 DIGEST para.1486).**
- Without the Government intervention, payment of emoluments would take a lion's share of the national budget

AREAS OF CONFORMITY CONCERNS

- Determination of emoluments-salaries, allowances , remunerations , pension and retirement benefits by EC renders nugatory and meaningless free collective bargaining in Zambia.
 - ✓ Case Studies: Bangladesh and Peru. - The Committee on Freedom of Association(COFA) Guided that emoluments determined in Government appointed commissions contravene article 4 of ILO Convention No. 98 on CB
 - ✓ The COFA has further guided:“ Matters which might be subject to Collective Bargaining may include, wages, benefits, allowances, working time, annual leave, redundancy...and these matters should not be excluded from the sope of Collective Bargaining by law,” (Digest of Decisions 2018 para.1291).

AREAS OF CONFORMITY CONCERNS

CONT'D

- The ECA has limited or abrogated the entrenched right of FoA and CB:
 - ✓ case study statutory: limitation vs statutory regulation of an entrenched right of FoA and CB
 - ✓ in the case of *One Movement South Africa NPC v The President of South Africa*, the Concord Court held that a statutory provision which completely or totally denies the exercise of an entrenched rights limits that right whereas a statutory provision which permits or prohibits the exercise of the entrenched right only conditionally or temporarily regulates it”
 - ✓ Thus applying the SA Concord Court legal reasoning, it means therefore that in Zambia, S.5 of the ECA has completely denied bargaining parties the right to determine wages in the state organs and institutions private companies in which the government has controlling interest- this is a limitation or abrogation of an entrenched right of FoA & CB - fixing salaries collectively is an essential element of FoA intrinsically linked to CB.

AREAS OF CONFORMITY CONCERNS CONT'D

- The ECA has reduced the right to CB to a mere right to make recommendations(Section 5 as read with section 20 of the ECA)
- The scope of the ECA has gone beyond what is allowable under ILO Conventions No, 87,98,151 by being eclectic in character to include even workers in parastatal organisations or statutory bodies, agencies and private companies in which the Government or local authority has controlling interest.
- Guidance from COFA: “Only armed forces, the police and Public servants engaged in the administration of the state may be excluded from collective bargaining... Convention No.98 applies both to private sector, nationalised undertakings and public bodies.” (Digest of Decisions 2018 paras.1230-1240).

AREAS OF CONFORMITY CONCERNS CONT'D

- The composition of EC with only one nominated representative for workers contravenes the principles of autonomy of bargaining parties and constitutes a serious act of interference in Union affairs as it is intended to bring the labour movement under the domination of the State

RECOMMENDATIONS

- **ECA IS INDISPENSABLE FOR THE PROTECTION OF PUBLIC INTEREST** – thus must consider special features of public service as the principal legislative purpose.
- **ON COMPATIBILITY**- sections 5, 15, and 20 of the ECA on the determination of emoluments by the EC are incompatible with Article 4 of ILO Convention No. 98 and strike a discordant note with the guidance of Supervisory Bodies of ILO and must be re-aligned therewith.

CONCLUSION

It is a rule of the thumb under ILO principles and guidelines that determination of emoluments-salaries, allowances, remunerations, pension and retirement benefits ought to be conducted through established rules and principles governing free and voluntary collective bargaining mechanisms as agreed by the parties to the collective bargaining agreements by workers and employers themselves without any interference whatsoever by any public authority as doing otherwise renders nugatory and meaningless of free collective bargaining in any ILO member State including Zambia.

- ✓ As can be concluded from the case studies: Bangladesh and Peru. - The Committee on Freedom of Association (COFA) guidance that emoluments determined in Government appointed commissions contravene article 4 of ILO Convention No. 98 on CB
- ✓ And as can be borrowed from the expert opinion of the COFA which has further guided: “Matters which might be subject to Collective Bargaining may include, wages, benefits, allowances, working time, annual leave, redundancy...and these matters should not be excluded from the scope of Collective Bargaining by law,” (Digest of Decisions 2018 para.1291).

REFERENCES

- The Zambian Constitution, Cap 1 as amended by Amendment Act No 2 of 2016 of the Laws of Zambia.
- Emoluments Commission Act No.1 of 2022 of the Laws of Zambia.
- The Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.
- Ratification of International Agreements Act, No 34 of 2016 of the Laws of Zambia.
- The Employment Code Act No.3 of 2019 of the Laws of Zambia

INTERNATIONAL LAW

- UN Charter, 1945
- Freedom of Association and Protection of the Rights to Organize Convention, 1948 (No. 87).
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98).
- 1944 Declaration of Philadelphia.
- 1998 ILO Declaration on Fundamental Principles and Rights at Work.

CASE LAW

- Zambia Sugar PLC v Fellow Nanzaluka Judgment No.82 of 2001
- Legan Equipment Supplies V Zambia National Building Society – Appeal No. 17 of 2000.
- George Peter Mwanza and Another V Attorney General – Appeal No. 153 of 2016.

CASE LAW

- Sean Tembo V The Attorney General – 2023/CCZ/0014.
- Roy Clarke V The Attorney General – (2008) ZRP.
- Cosmas Mukuka (sued as Secretary – General of Zambia Congress of Trade Unions) V Jason Mwanza (suing in his capacity as General Secretary of the University of Zambia Lecturers' and Researchers Union – Appeal No. 99/2016