

**FOR YOUR SIGNATURE PLEASE**

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Sitali, JC ✓ 25/10/2018 .....

Mulenga, JC ✓ 25/10/2018 .....

Mulembe, JC ✓ 25-10-2018 .....

Mulonda, JC ✓ 25-10-2018 .....

Munalula, JC ✓ 25.10.18 .....



**IN THE CONSTITUTIONAL COURT  
AT THE CONSTITUTIONAL COURT REGISTRY  
HOLDEN AT NDOLA  
(CONSTITUTIONAL JURISDICTION)**

**2018/CCZ/006**

**IN THE MATTER OF: ARTICLES 187, 188 AND 189 OF THE  
CONSTITUTION OF ZAMBIA**

**AND**

**IN THE MATTER OF: THE UNCONSTITUTIONAL REMOVAL  
FROM THE PAYROLL SYSTEM**

**AND**

**IN THE MATTER OF: PAYMENT OF SALARY ARREARS  
FROM 30<sup>TH</sup> JUNE, 2016 UNTIL 30<sup>TH</sup>  
APRIL, 2018**

**BETWEEN:**

**MCQUEEN ZENZO ZAZA**



**PETITIONER**

**AND**

**ZESCO LIMITED**

**RESPONDENT**

**Coram: Sitali, Mulenga, Mulembe, Mulonda and Munalula, JJC  
On 17<sup>th</sup> July, 2018 and on 25<sup>th</sup> October, 2018**

**For the Petitioner: Ms K. M.Kabalata of Mesdames Chalwe and  
Kabalata Legal Practitioners**

**For the Respondent: Mr. M. V. Chiwale, Director Legal Services and  
Mr K. Mweemba, Principal Legal Officer, ZESCO  
Ltd**

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# **JUDGMENT**

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**Mulenga, JC delivered the Judgment of the Court**

**Cases referred to:**

- 1. Lubunda Ngala and Jason Chulu v Anti-Corruption Commission, Selected Judgment No.4 of 2018**
- 2. Noel Siamondo and 2 Others v The Electoral Commission of Zambia and The Attorney General Selected Judgment No. 24 of 2016**
- 3. Milford Maambo and 2 Others v The People Selected Judgment No.17 of 2017**
- 4. Khaled Mohammed v Attorney General (1982) Z.R. 49**
- 5. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172**
- 6. Chibuluma Mines Pic v Michael Samberger SCZ Appeal No. 125 of 1998 (unreported)**

The Petitioner commenced this action by way of a Petition and accompanying affidavit in support on 29<sup>th</sup> May, 2018. The Respondent equally filed its Answer and affidavit in opposition on 31<sup>st</sup> May, 2018.

The facts in this case are not in dispute. In summary, these are that on 10<sup>th</sup> July, 2015 the Petitioner was employed as Principal

Legal Officer on permanent and pensionable basis by the Respondent subject to a successful probationary period of six (6) months. He accepted the offer and reported for work on 8<sup>th</sup>September, 2015. The six months' probation period ended on 8<sup>th</sup>March, 2016. On 23<sup>rd</sup> May, 2016 the Petitioner's employment was terminated under clause 12.3 of the ZESCO conditions of service citing 'separation' attributed to improving the quality of service to its clients. The copies of the letters of offer and termination of employment were produced by both parties.

On 27<sup>th</sup> June, 2016 the Petitioner was paid a lump sum amount of K999, 509.75 as final terminal benefits including the redundancy package for the Petitioner's separation from the Respondent company as per statement of accounts marked 'DZK1' in the affidavit in opposition. The Petitioner was then removed from the payroll with effect from 1<sup>st</sup> July, 2016.

As a consequence, the Petitioner commenced proceedings before the Industrial Relations Division of the High Court on 22<sup>nd</sup> August, 2016 seeking orders that the redundancy or termination was wrongful and unlawful and for refund of the tax component

that was wrongly deducted from him contrary to the conditions of service. The Petitioner later added that he was underpaid his benefits in that the last salary used to compute the benefits was not the June, 2016 salary.

Judgment was delivered in his favour on 13<sup>th</sup> March, 2018 awarding him a total of twelve (12) months gross salary and interest for wrongful redundancy, punitive and exemplary damages. The High Court further ordered that the redundancy package for the Petitioner be re-computed using the June, 2016 salary and that the tax which was wrongly deducted be reimbursed. Based on the Judgment, the Respondent paid the Petitioner a total sum of K853,323.94, which included interest and costs, on 4<sup>th</sup> May, 2018 as per copy of the receipt marked 'MZZ4' in the affidavit in support.

The Petitioner subsequently commenced the current action claiming that since his benefits were only paid in full on 4<sup>th</sup> May, 2018 he was still entitled to have remained on the Respondent's payroll from June, 2016 to April, 2018 when his benefits were paid in full. The Petitioner, thus, seeks the following remedies:

- 1. An Order that he was entitled to remain on the Respondent's payroll until his benefits were paid in full;**
- 2. An Order that the Respondent pays the Petitioner salaries from 30<sup>th</sup> July, 2016 to 30<sup>th</sup> April, 2018 when his benefits were paid in full;**
- 3. An Order that the costs for this action be borne by the Respondent;**
- 4. Interest on any sums found due; and**
- 5. Any other relief the Court deems fit.**

At the hearing, the Petitioner's counsel, Mrs. Kabalata, relied on the Petitioner's skeleton arguments which were premised on Article 189 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution). It was advanced that the Petitioner's benefits were a sum total of what was due to him from the Respondent following the termination of his employment and since the Respondent did not pay the Petitioner his benefits in full, he ought to have been kept on the payroll until full settlement of the amounts due. Reference was made to the definition of pension benefit under Article 266 and as interpreted in **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**<sup>1</sup> to argue that the pension benefit includes funds due from an employer following termination of employment. It was submitted that the payment due from the

Respondent to the Petitioner was captured within this definition as it was a compensation following termination of his employment.

Further, that contrary to the requirement to pay the amount due to the Petitioner regularly and promptly as stipulated in Article 189 of the Constitution, the Petitioner was paid one instalment in June, 2016 and the final instalment was paid in May, 2018. And that this amounted to partial payment that does not exonerate an employer from retaining the employee on the payroll under Article 189. It was argued that had that been the case, an employer would only have to pay a portion of the pension benefit and take its time in paying the balance. It was posited that the Respondent's act of withholding and later taxing the Petitioner's benefits was in breach of Article 187(2) and Article 188 of the Constitution.

The Petitioner further submitted extensively on principles of statutory interpretation enunciated by this Court in **Noel Siamondo and 2 Others v The Electoral Commission of Zambia and The Attorney General**<sup>2</sup> and **Milford Maambo and 2 Others v The People**<sup>3</sup>. In so submitting, it was the Petitioner's position that Articles 187, 188 and 189 of the Constitution are precise and unambiguous. Hence,

that there was no need to resort to other interpretation rules to understand their meaning other than the literal interpretation rule.

In opposing the claims in the Petition, learned counsel for the Respondent, Mr. Chiwale, relied on the Respondent's skeleton arguments to the effect that the Respondent had satisfied Article 189 of the Constitution when it made the one-off payment to the Petitioner on 24<sup>th</sup> June, 2016 and that there was no justification for the Petitioner to be retained on the payroll. That Article 189 of the Constitution only becomes operative when the pension benefit is being paid in instalments as opposed to a one-off payment. That the Petitioner had not proved that the payment made on 24<sup>th</sup> June, 2016 was a partial payment and that this was fatal to his case in keeping with the principle espoused in **Khaled Mohammed v Attorney General**<sup>4</sup> and **Wilson Masauso Zulu v Avondale Housing Project**<sup>5</sup> that the person alleging must prove his case before he can be entitled to judgment in his favour.

It was argued that an interpretation to the effect that Article 189 (2) of the Constitution applies retrospectively to an underpayment which is subsequently discovered in a Court



Judgment violates the spirit and manifest intention of the Legislature which was to deal with inability by employers to pay as opposed to underpayments that are subsequently discovered after court action. That this literal interpretation of Article 189 as advanced by the Petitioner would result in an unreasonable state of affairs as it would entail that an employer must retain a retired employee on the payroll whenever the employee decides to go to Court alleging an underpayment on a pension benefit and that such employee must remain on the payroll as long as that dispute remains undetermined by the court of law, notwithstanding the passage of time.

It was further argued that construing Article 189 in the manner proposed by the Petitioner would produce uncertainty in as far as it requires an employer to retain an employee on the payroll. That while the matter may be straight forward where the pension benefit is found to have been improperly computed, it would be different where the converse is found as the employer will have need to pursue the employee, by court action or otherwise, to recover the salaries received during the period of litigation. The Respondent,

thus, urged this Court to employ the purposive rule of interpretation adopted in **Lubunda Ngala and Another v The Anti-Corruption Commission**<sup>1</sup>.

The Respondent further relied on the Report of the Committee on Economic Affairs and Labour as well as the Final Report of the Technical Committee on the Drafting of the Constitution to submit that the mischief that Parliament intended to cure was failure by the Government, pension schemes or private employers to pay pension benefits upon separation thereby subjecting the concerned employees to hardship.

It was further advanced that the construction of Article 189 sought by the Petitioner is also unreasonable on the facts of this case because there was no money that the Respondent had failed to pay prior to the delivery of the High Court Judgment in March 2018. Citing the Supreme Court decision in **Chibuluma Mines Pic v Michael Samberger**<sup>6</sup>, the Respondent implored this Court to construe Article 189 in line with the Supreme Court's construction of section 26B (3) of the Employment (Amendment) Act No. 15 of

1997 which was on similar lines as Article 189. The said section provided that:

**26B (3) An employee whose contract of service has been terminated by reason of redundancy shall -**

**(a) be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is greater;**

**(b) be paid the redundancy benefit, not later than the last day of duty of the employee;**

**Provided that where an employer is unable to pay the redundancy benefits on the last day of duty of the employee, the employer shall continue to pay the employee full wages until the redundancy benefits are paid."**

It was surmised that the Supreme Court held, in the **Chibuluma Mines<sup>6</sup>** case that in such circumstances, the employee was not entitled to salary payments during the period of delay occasioned by litigation.

It was added that Articles 187 and 188 of the Constitution were satisfied when the Petitioner obtained Judgment in his favour wherein his benefits were ordered to be re-computed. Having obtained the Judgment, he may not recover salary arrears for a time when the matter was under litigation as doing so would be contrary to the intention of the Legislature. It was thus prayed that the petition be dismissed with costs.

In augmenting the Respondent's skeleton arguments, Mr. Chiwale submitted that it was not in dispute that there was a Judgment of the High Court (Industrial Relations Division) which was to the effect that the Petitioner was wrongfully separated from employment. What stood to be determined was whether or not Article 189 of the Constitution applies where an employee has been wrongfully dismissed. He submitted that Article 189 did not apply in such an instance as it related to pension benefits which the Petitioner had not pleaded. Mr. Chiwale argued in the alternative that the Petitioner was paid his dues promptly and that the same were paid in full as opposed to being a partial or instalment payment.

In reply, Mrs. Kabalata submitted that the Petitioner was declared redundant and that Article 189 of the Constitution was applicable to the Petitioner by virtue of the definition of pension benefit which includes a similar compensation due on termination of employment. It was argued that the Petitioner's benefits were due at the time of termination of employment and as such Article 189 of the Constitution was applicable.

Mrs. Kabalata further surmised that the Petitioner was paid his dues in two instalments. The first installment was an underpayment as evidenced by the High Court's order for re-computation of the redundancy package based on the June, 2016 salary and reimbursement of tax wrongly deducted from the terminal benefits. The second installment was the said underpayment that was subsequently settled in May, 2018 after the court action. Therefore, that the Respondent failed to pay the Petitioner his rightful dues on the last day of employment in 2016 and was hence liable to have kept him on the payroll until he was paid in full in 2018 in accordance with Article 189 of the Constitution which has no qualifications.

We have considered the arguments by the parties. The issues in contention are firstly, whether the terminal benefits that were paid to the Petitioner following the termination of his employment were pension benefits as defined by Article 266; secondly, whether the terminal benefits were paid in two instalments in June, 2016 and May, 2018; and thirdly, whether as a result of the two

payments, the Petitioner was entitled to remain on the Respondent's payroll until the payment in May, 2018.

As regards the first issue, the Petitioner has argued that Article 189 was applicable to him by virtue of the definition of pension benefit which includes compensation due on termination of employment. The Respondent's position was that the Petitioner had not pleaded pension benefits and the High Court action was for wrongful dismissal to which Article 189 did not apply.

In determining the question whether the Petitioner's terminal benefits were the ones envisaged by Article 189 of the Constitution, it is imperative that we consider the relevant constitutional provisions.

We stated in the **Ngala**<sup>1</sup> case that in interpreting constitutional provisions, no single provision must be isolated from the other provisions but all provisions bearing on a particular subject must be considered and taken into account in interpreting a provision in order to give effect to the greater purpose of the Constitution.

We will first highlight the provisions cited in support of the petition. Articles 187 and 188 generally provide that an employee has a right to a pension benefit and that a pension benefit shall be tax exempt and be reviewed periodically in line with the actuarial assessments. Article 266 defines pension benefit as follows:

**“Pension benefit” includes a pension, compensation, gratuity or similar allowance in respect of a person’s service.”**

Article 189 upon which the Petitioner has anchored his claim provides:

**“189 (1) A pension benefit shall be paid promptly and regularly.  
(2) Where a pension benefit is not paid on a person’s last working day, that person shall stop work but the person’s name shall be retained on the payroll, until payment of the pension benefit based on the last salary received by that person while on the payroll.**

We extensively considered what constitutes a pension benefit in the case of **Lubunda Ngala and Another v Anti- Corruption Commission** when we construed Articles 188, 189 and 266 of the Constitution using both the literal and purposive interpretation. We stated that **“while a pension benefit can ‘loosely’ be considered to be a terminal benefit, it is not every terminal benefit that has qualities or**

**characteristics of a pension benefit”.** Thus, the nature of the terminal benefit in issue at any given time has to fall under the categories outlined in Article 266 and should be shown to qualify as such in order to get the benefit of Article 189.

The words used in defining pension benefit in Article 266 are pension, compensation, gratuity and similar allowance. Relevant in this case is compensation or similar allowance as stated in the definition of pension benefit in Article 266.

Based on the facts of this case, it is apparent that the Petitioner has sufficiently shown that the compensation due to him upon the termination of his employment, which was termed as a redundancy package, qualified for consideration under the provisions of Article 189 of the Constitution. This payment was asking to compensation or similar allowance listed in the definition of pension benefit.

The second issue that follows is whether the Petitioner’s terminal benefits were paid in two instalments, namely, June, 2016



and May, 2018 or put differently, whether the payment of June, 2016 was an instalment payment.

The Petitioner has argued that the money that was paid in May, 2018 as a Judgment sum, which mainly comprised general and exemplary damages for wrongful redundancy and interest, and included the tax that was wrongly deducted contrary to the provisions of his conditions of service and the underpayment following the re-computation of the redundancy package was a second instalment which entitled him to be maintained on the payroll until full payment. Therefore, that the payment of June, 2016 was a partial or part payment that brought him within the purview of Article 189 of the Constitution.

The Respondent on the other hand, submitted that the payment of June, 2016 was paid as a lump sum in full and final settlement of the separation package after which there were no terminal benefits owing to warrant retaining the Petitioner on the payroll. The Respondent's position was that Article 189 only applies when the terminal benefits are paid in instalments, unlike what transpired in this case, and that the Petitioner had not proved

that the June, 2016 payment was a partial payment. Further, that the spirit and manifest intention of Article 189 (2) was to deal with the employer's inability to pay as opposed to underpayments that are subsequently discovered after court action as was the case in this matter.

We have considered the arguments and documents filed. It is apparent that the Petitioner's employment was terminated with immediate effect on 23<sup>rd</sup> May, 2016. He was paid his terminal benefits on 27<sup>th</sup> June, 2016. From the date of termination of employment, the Petitioner was kept on the payroll and thus was paid salaries up to 30<sup>th</sup> June, 2016 which was a few days after he had been paid his terminal benefits. The payment invoice states that the June payment of K999,509.75 was full payment.

The Petitioner subsequently commenced a court action on 22<sup>nd</sup> August, 2016 alleging wrongful and unlawful redundancy and deduction of tax contrary to the conditions of service. On 31<sup>st</sup> January, 2017 he amended the claims to seek for re-computation of the terminal benefits using the June, 2016 salary. In its Judgment of 13<sup>th</sup> March, 2018 the High Court awarded the Petitioner twelve

(12) month's salary as general, punitive and exemplary damages. The High Court also ordered a re-computation of the redundancy package based on the June salary and re-imburement of the tax that was deducted from the terminal benefits contrary to the provisions in the conditions of service. The High Court further awarded the Petitioner interest on the re-computed underpayment and re-imbursed tax as well as on the damages awarded. The Respondent settled these sums in the May, 2018 upon payment of K853,323.94.

The Petitioner's argument is essentially that the re-imburement of the tax deduction and payment of amount found to have been underpaid following the re-computation constituted a second instalment payment which entitled him to have been kept on the payroll until May, 2018. Hence, what falls to be determined is what constitutes an instalment payment.

Black's Law Dictionary defines instalment payment and periodic payment as:

**"Instalment payment – one of a series of periodic payments made under an instalment plan."**

**“Periodic payment – one of a series of payments made over time instead of a one-time payment for the full amount.”**

These definitions show that payment in instalments is where the amount owed or to be paid is settled in smaller payments spread over a period of time. Thus, the amount is settled in at least two or more instalments as opposed to a one-off lump sum payment.

In this case the payment of June, 2016 was made on the basis that it was a full and final payment. This fact is also reflected in the conduct of the parties including the Petitioner who when commencing the High Court action was initially claiming for wrongful or unlawful redundancy and refund of the tax amount that was deducted contrary to the provisions in the conditions of service which were to the effect that the employer would bear the tax component. The claims were later amended to include the re-computation of the benefits using the June, 2016 salary. Upon re-computation, some amounts were found to have been underpaid and these were later paid together with the damages and interest in May, 2018.

The mere fact that some amounts were found to have been underpaid following litigation did not transform the June, 2016 payment into an installment payment. The onus was on the Petitioner to prove that the June, 2016 payment was indeed an instalment payment or partial payment envisaged under Article 189 (2) of the Constitution. In the absence of such proof, the Petitioner cannot succeed in his claim that he was entitled to remain on the payroll from July, 2016 to May, 2018 when the payment, based on the Judgment of the High Court, was made.

Having considered the facts of this case, we find that the payment of terminal benefits to the Petitioner was not made by way of instalment payments. The second payment that was made following the High Court Judgment did not constitute a second instalment.

It hence follows that the Petitioner was not entitled to remain on the Respondent's payroll until the payment of May, 2018.

Further, we do not agree with the interpretation of Article 189 advanced by the Petitioner that when terminal benefits are found to

have been underpaid after a court action, the concerned employee should be paid a salary for the period of the litigation up to the settlement of the judgment sum found to have been underpaid. We cannot discern this proposition from the Article in issue.

The Petitioner has in the main failed to prove the allegations in his petition. The petition is hereby dismissed with costs to the Respondent to be taxed in default of agreement.



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**A.M. SITALI**  
**CONSTITUTIONAL COURT JUDGE**



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**M.S. MULENGA**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**E. MULEMBE**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**P. MULONDA**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**M.M. MUNALULA**  
**CONSTITUTIONAL COURT JUDGE**