

**IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA**
(Constitutional Jurisdiction)

2021/CCZ/0034

**IN THE MATTER OF: ORDER IV OF THE CONSTITUTIONAL COURT
RULES 2016 STATUTORY INSTRUMENT NO. 37
OF 2016;**

**IN THE MATTER OF: THE PETITION PURSUANT TO ARTICLE 128 (1)
(a) AND (b) OF THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016;**

**IN THE MATTER OF: ARTICLE 187 (1), (2) AND (3) OF THE
CONSTITUTION OF ZAMBIA (AMENDMENT) ACT
NO. 2 OF 2016;**

**IN THE MATTER OF: ARTICLE 189 (1) AND (2) OF THE
CONSTITUTION OF ZAMBIA (AMENDMENT) ACT
NO. 2 OF 2016; AND**

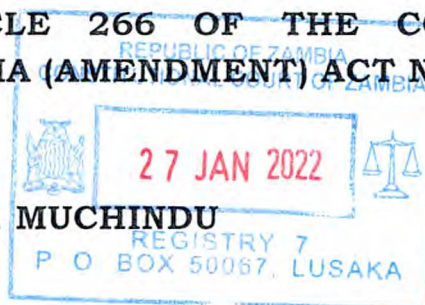
**IN THE MATTER OF: ARTICLE 266 OF THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016.**

BETWEEN:

LIEUTENANT CHRISPINE S. MUCHINDU

AND

THE ATTORNEY GENERAL



PETITIONER

RESPONDENT

Coram: Mulenga, Mulonda and Musaluke, JJC

On 8th December, 2021 and 27th January, 2022

**For the Petitioner: Ms. D. Chisengalumbwe of Messrs. K. Mwale
and Company**

**For the Respondent: Mr. N. Nyambe, Principal State Advocate and
Lt. Colonel S. Sikazwe, State Advocate of
Attorney General.**

J U D G M E N T

Mulonda, JC, delivered the Judgment of the Court.

Cases referred to:

1. Lubunda Ngala and Jason Chulu v Anti-Corruption Commission CCZ Selected Judgment No. 4 of 2018.
2. Levy Mwale v Zambia National Broadcasting Corporation 2019/CCZ/0012.
3. Owen Mayapi and 4 Others v Attorney General 2019/CCZ/003.
4. Anderson Mwale Bichisa Mwalongo, Kola Odubote v Zambia Open University 2021/CCZ/001.
5. Rosemary Chisala Molobeka v Attorney General 2019/ITK/399.
6. Khaled Mohammed v Attorney General (1982) Z. R. 49.
7. Wilson Masauso Zulu v Avondale Housing Project (1982) Z. R. 172.

Legislation referred to:

1. Defence Act, Chapter 1056 of the Laws of Zambia.
2. Public Service Pensions Act No. 35 of 1996.
3. The Constitution of Zambia (Amendment) Act No. 2 of 2016

INTRODUCTION:

[1] This Judgment follows a petition filed on 7th June, 2021 by one Lt Col Chrispine Siasinyanga Muchindu (Rtd) - the petitioner - pursuant to Article 128 (1) (a) and (b) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (Constitution) alleging violation of Articles 187, 188, 189 and 266 of the Constitution.

BACKGROUND

- [2] The petitioner underwent attestation upon joining the Zambia Air Force (ZAF) on 14th February, 2010 and subsequently went on to join ZAF as a commissioned officer on 15th July, 2011. He served in this role until he was retired from Regular Air Force with effect from 3rd February 2017 in accordance with the provisions of the Defence (Regular Force) (officers) Regulations; Regulation 9 (2) of the Defence Act Chapter 106 of the Laws of Zambia.
- [3] The petitioner was upon retirement entitled to a pension benefit calculated in accordance with section 41 of the Public Service Pensions Act No. 35 of 1996. In addition, to the pension benefit, the petitioner was to be paid other allowances, namely:
- (a) Six months salary in lieu of notice,
 - (b) Six months housing allowance,
 - (c) Six months service allowance,
 - (d) Six months utility allowance,
 - (e) Leave days, and
 - (f) Repatriation allowance.

- [4] Before the disbursement of the pension benefit, the petitioner was retained on the payroll from the 3rd February, 2017 to March, 2019, two months before the liquidation of the pension benefit in May, 2019 by the Public Service Pensions Fund (PSPF). The petitioner was not in receipt of a salary , housing and utility allowances for two months, April and May, 2019 respectively.

The Petitioner's case -

- [5] The petitioner commenced his case with a claim of a liquidated sum of ZMW116,687.85 being his alleged entitlement at retirement in accordance with section 41 of the Public Service Pensions Act No. 35 of 1996. The petitioner further alleges that the respondent has unlawfully withheld his constitutional entitlement to a pension benefit despite numerous demand letters to be paid or in the alternative to maintain him on payroll until such a time when pension benefits are paid in full.
- [6] It is alleged that the respondent has collectively violated Part XIV of the Constitution with respect to Pension Benefits.
- That in that respect, the petitioner is entitled to remedial measures against the respondent and in this regard prays for:

- (i) An order that the petitioner be retained on active payroll until he is paid all his pension benefits in full;
- (ii) An order that the petitioner be paid all salary arrears from the 3rd day of February, 2017 to date;
- (iii) Interest on the amounts so ordered by the Court;
- (iv) Costs; and
- (v) Such other order that may be made as the Court shall deem fit.

[7] The petitioner in his submissions requests the Court to determine the following questions namely:

- (i) Whether the petitioner was entitled to be retained on the Respondent's payroll following his retirement until payment of his pension benefit;
- (ii) Whether the petitioner is entitled to be paid his salary arrears from March, 2019 to date.

[8] In his submissions, the petitioner argued that having being retired in accordance with the Defence Act, he was entitled to a pension benefit calculated in accordance with section 41 of the Public Service Pension Act No. 35 of 1996 and that the respondent was under an obligation to pay terminal benefits in form of allowances due at retirement.

[9] The petitioner submitted that having been retired on 3rd February, 2017, he was retained on payroll until March, 2019 though he only received his pension benefit in form of a refund from the Public Service Pensions Fund (PSPF) in the sum of ZMW 59,569.18 in May 2019. That at the time of removal from the payroll, he had not yet received his retirement benefit in accordance with the Defence (Regular Force) Officers Regulations Reg 9 (2) of the Defence Act.

[10] That by removing the petitioner from the payroll while his pension benefit remained unpaid in full, the respondent acted contrary to Article 189 (1) and (2) of the Constitution. In this respect the case of **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**¹ was cited, where we observed as follows:

"The words "promptly" used in Article 189 (1) means that the benefit must be paid without delay while "regularly" means that it must be paid to the beneficiaries when due and not intermittently."

[11] It was the petitioner's submission that his pension benefits were not paid promptly and regularly as defined by this Court in the **Lubunda Ngala**¹ case above. That efforts to have his retirement benefits paid proved futile and that it was only after engaging Counsel and commencing these proceedings that the

respondent remitted a lump sum payment of K109,987.85 and followed by a payment of K6,700 on 15th July, 2021 as repatriation allowance. That the last pay certificate was issued on 20th July, 2021.

[12] That the none payment of the benefits upon retirement way after the petitioner was removed from the payroll was delayed and irregular entitling the petitioner's retention on the payroll. Our decision in the matter of **Levy Mwale v Zambia National Broadcasting Corporation**² was cited where we stated that if an employee was not paid his pension benefit on their last working day, they ought to be retained on payroll until the pension benefit is liquidated.

[13] The petitioner submitted that his pension benefits remained unpaid in full, from the date of his retirement, 3rd February, 2017 to the time these proceedings were commenced. That under the circumstances the petitioner was entitled by law to remain on the respondent's payroll until full payment of his pension benefits. Our opinion on retention on payroll in the **Owen Mayapi and 4 Others v Attorney-General**³ case was cited where in this Court stated that:

"The phrase "retained on payroll" means that such retirees will continue to be paid what they were getting through the payroll at the time of their retirement. This we opine, is premised on

the need to maintain the status quo of a retiree who, for no fault of his/her own, has not accessed his/her pension benefits."

- [14] That in the **Lubunda Ngala**¹ and **Mayapi**³ cases this Court pronounced itself on the rationale behind the enactment of Article 189 which is that the provision is meant to cushion pensioners and retrenchees from the hardships they were experiencing as a result of delayed payment of their pension benefits. That the respondent in its affidavit in opposition does in fact admit to the delayed payment of the petitioner's pension benefits. As a consequence the petitioner submitted that he had been subjected to hardships he never encountered before he was struck off the payroll in March, 2019.
- [15] The petitioner went on to submit that his removal off the payroll was unconstitutional and clearly went against the spirit of Article 189 as expressed in the **Lubunda Ngala**¹ case which was to cushion pensioners from financial hardships encountered as a result of delayed disbursement of pension benefits.
- [16] In conclusion, it was submitted that the petitioner having been retired without notice was entitled to his pension benefits from the respondent on the date of retirement.

- [17] In response to the petitioner's submissions, the respondent did not dispute the fact that the petitioner was on 3rd February, 2017 retired from the Regular Zambia Air Force in accordance with the provisions of the Defence (Regular Force) (Officers) Regulations; Regulation 9 (2) of the Defence Act Chapter 106 of the Laws of Zambia.
- [18] That the petitioner in addition to being entitled to a pension benefit in accordance with section 41 of the Public Service Pensions Act No. 35 of 1996 was also entitled to terminal benefits from the employer in form of allowances. The respondent submitted that the key question for consideration by this Court is whether or not in terms of Article 189 (2) of the Constitution a person who has not been paid his other terminal benefits outside the pension benefits is entitled to be retained on the payroll.
- [19] The respondent quoted Articles 187 (1), (2) and (3), 188 and 189 (1) and (2) of the Constitution and submitted that these provisions were clear on the fact that only a person who has not been paid his pension benefit on his last working day is eligible for retention on the payroll. That the petitioner was paid his pension benefit in full by PSPF as per his entitlement.

This, it was submitted , was followed by a directive from PSPF to ZAF to have the petitioner's name removed from the payroll in accordance with the law.

[20] The case of **Lubunda Ngala and Jason Chulu v The Anti Corruption Commission**¹ was cited where we had occasion to consider whether terminal benefits accrued in respect of a person's service fell within the contemplation of the definition of pension benefit under Article 266 of the Constitution. Secondly, whether a person who has not been paid his/her terminal benefits on that person's last working day is entitled to be retained on the payroll and lastly whether a failure or unwillingness to retain a person on the payroll not yet paid his/ her terminal benefits is an infringement on the rights of that person.

[21] The respondent submitted that this Court stated in the **Lubunda Ngala**¹ case at page J32 that;

" It would be wrong to say that all terminal benefits simply because they arise from the termination or coming to an end of the employment contract, should be considered or interpreted to be the same as a pension benefit and that a pension benefit is triggered by retirement due to age or other circumstances."

[22] It was submitted that, as was the case in the **Lubunda Ngala**¹ matter were the Court stated that leave days, uniform and

settling allowances do not amount to pension benefits, in casu, the petitioner is claiming for outstanding payments outside the ambit of pension benefits. It was submitted that pension benefits are separate and distinct from terminal benefits being claimed by the petitioner which are a basis for retention on payroll as envisaged by Article 266 of the Constitution.

[23] The respondent went to submit that terminal benefits are the outstanding monies due to the petitioner as outlined in his retirement letter on record in the Affidavit in Opposition marked **HM2**. That the said terminal benefits are within benefits that can be paid as one off payments and are distinguishable from pension benefits which require to be paid promptly and regularly.

[24] The respondent submitted that the petitioner's name could have been retained on payroll only if the credit balance due to him was falling within the ambit or part of pension benefits. That the petitioner has not canvassed this aspect before this Court. Further, that what the petitioner is owed by ZAF are terminal benefits falling outside the ambit of pension benefits.

[25] The case of **Anderson Mwale, Buchisa Mwalongo, Kola Odubole v Zambia Open University** was cited and particularly page J58 where this Court stated that the pension benefit referred to in Articles 187, 188 and 189 of the Constitution is a pension benefit granted by or under a relevant pension law or other law.

[26] The respondent cited our view on the burden of proof in civil actions as highlighted in the above case at page J63 where we agreed with the learned author Phipson on Evidence, 17th edition, paragraph 6 - 06 at page 157 on where the burden of proof lies and that the party with this burden who fails to discharge it must have the decision against him. This principle was also highlighted as settled in the cases of **Khaled Mohammed v Attorney General**¹ and **Wilson Masauso Zulu v Avondale Housing Project**⁷.

[27] In light of the above authorities, it was the respondent's position that the petitioner had failed to discharge the burden of proof that he was not paid his pension benefit. The case of **Levy Mwale v Zambia National Broadcasting Corporation**² was cited where we at page J17 stated that ;

" Retention on the payroll is meant for continued payment of one's salary until the pension benefit

is liquidated in full and not for the purpose of disbursing pension benefit by installment."

That the pension benefit from PSPF was paid in full and not disbursed in installments to warrant retention of the petitioner on payroll until full payment.

[28] Further, the case of **Rosemary Chisala Molobeka v Attorney General⁵**, was cited where we had occasion to pronounce ourselves that an employer could only remove an employee from the payroll after liquidating the employees' pension benefits and not any other benefit attendant upon retirement. That based on this authority, the petitioner was only entitled to be retained on payroll before the payment of the pension benefit by PSPF. That the pension benefit having been paid, the petitioner could not be retained beyond May 2019 when PSPF paid him the pension benefits.

[29] In conclusion, the respondent submitted that the petitioner had been in receipt of his salary for the entire period before payment of the pension benefit, save for two months of Housing and Utility allowances arrears for April and May 2019 due from ZAF which were still outstanding.

It was the respondent's prayer that we find that the petitioner does not qualify for retention on the payroll and should not

grant the reliefs sought and accordingly dismiss the petition with costs to the respondent.

[30] In his reply to the respondent's affidavit in opposition, the petitioner, acknowledges receiving payments towards his terminal benefits but insists these were sporadic and at the time of petitioning this Court had not been fully paid.

[31] The petitioner, while agreeing with the respondent that the Public Service Pensions Fund released ZMW60,279.00 as his pension benefit refund out of which ZMW59,569.10 was deducted as government debt and the balance of ZMW710.10 paid into his account said he was struck off the payroll in March, 2019.

[32] That he was struck off the payroll before payment of his pension benefit from Public Service Pension Fund and liquidation of his terminal benefits done under his letter of retirement.

[33] It was further averred by the petitioner that the outstanding amount of ZMW24,661.60 for the months of April and May, 2019 in respect of salary, housing and utility was correct save to say that this was not the only amount outstanding and as such this entitled the petitioner to be retained on payroll.

[34] The petitioner also averred that the payments of his terminal benefits were delayed, a fact admitted by the respondent, and were paid in instalments of ZMW10,000.00 over a long period of time.

[35] That following the institution of proceeding against the respondent on 7th June, 2021, the respondent made a payment of ZMW109,987.85 as 6 months pay in lieu of notice and last pay certificate.

DECISION

[36] We have considered the submissions by both parties and what requires our consideration is whether the matter before us raises any constitutional question for determination.

[37] This Court has had occasion to pronounce itself on the import of Articles 187(1) (2) and (3), 188(1) and (2), 189(1) and (2) and 266 being the articles alleged to have been collectively violated by the respondent.

[38] Article 187 provides that:

- (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 altered to that employee's disadvantage.**
- (3) The law to be applied with respect to a pension benefit -
 - (a) before the commencement of this Constitution, shall be the law that was in force immediately before the date on which****

the pension benefit was granted or the law in force at a later date that is not less favourable to that employee; and

- (b) after the commencement of this Constitution, shall be the law in force on the date on which the pension benefit was granted or the law in force at a later date that is not less favourable to that employee.

[39] Article 189 provides as follows:

- (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.

[40] Article 266 of the Constitution provides a definition of pension benefit as follows:

266. In this Constitution, unless the content otherwise requires -
"pension benefit" includes a pension compensation, gratuity or similar allowance in respect of a person's service.

[41] In the case at hand, it is not in dispute that the petitioner's pension benefit was to be calculated according to section 41 of the Public Service Pensions Act No. 35 of 1996. However, what appears to be in dispute is whether the terminal benefits at retirement equally constitute a pension benefit within the contemplation of Article 189 of the Constitution.

[42] This Court had occasion to pronounce itself on what a pension benefit amounts to in the case of **Anderson Mwale and Others v Zambia Open University**⁴ at paragraphs 116 - 117 where we stated as follows:

116. Therefore, in this case, the definition of pension benefit should be interpreted in the light of the substantive provisions of Articles 187 and 189 of the Constitution. As we already stated earlier in this judgment, Article 187(3) of the Constitution sheds clear light on what pension benefits the framers of the Constitution intended to provide for in Articles 187 and 189 of the Constitution by referring to the law to be applied to a pension benefit.

117. The framers of the Constitution provided for an employee's right to a pension benefit in broad terms in the Constitution and left the details of the pension benefit to be stated in an Act of Parliament as clearly implied by Article 187(3). The plain language of Article 187(3) reveals that the provisions of the Constitution relating to a pension benefit must be read together with relevant pension laws. This is because Article 187(3) makes it plain that there is a law to be applied to a pension benefit referred to in clauses (1) and (2) of Article 187 and clearly states which law that is in paragraphs (a) and (b) of clause 3 of Article 187.

[43] We further stated in paragraph 118 at page J58 that:

118. In that regard, we take judicial notice that there are several pension laws contained in Acts of Parliament including the Public Services Pensions Act, Chapter 260 of the Laws of Zambia, relating to pensions and other benefits for persons employed in the public service Our taking judicial notice

of the pension laws is based on the provision of section 6(1) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, which states that every Act, Applied Act or British Act shall be a public Act and shall be judicially noticed as such.

[44] We went on to state in paragraph 119 at page J58 as follows:

119. Given that the pension benefits referred to in Articles 187, 188 and 189 of the Constitution, is a pension benefit granted by or under a relevant pension law or other laws, it follows that for an employee to be retained on the employer's payroll under Article 189(2) of the Constitution, the pension benefit which is not paid to an employee on the last day of work should be a pension benefit granted by or under the relevant pension law or other law applicable to that employee's service.

[45] In the case of **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**¹ where the question of whether in terms of Article 266, terminal benefits due to a person at separation fell within the definition of a 'pension benefit'. We stated at page J32 that:

It would be wrong to say that all terminal benefits simply because they arise from that termination or coming to an end of the employment contract, should be considered or interpreted to be the same as a pension benefit and that a pension benefit is triggered by retirement due to age or other circumstances.

[46] The above cited authorities clearly demonstrate, firstly that a pension benefit within the contemplation of Article 189 of the

Constitution is that given under a pension law. Secondly that not all benefits accruing at termination of service are pension benefits.

[47] In the case at hand, the law applicable to the petitioner is the Public Service Pensions Act No. 35 of 1996, particularly section 41. This pension benefit until liquidated entitled the petitioner to be retained on payroll. As the record shows, the petitioner was retained on payroll from the 3rd February, 2017 to March, 2019, two months before the liquidation of the pension benefit in May, 2019. At the time when the petitioner was struck off the payroll, there was some outstanding pension benefit under the Public Service Pensions Act which entitled him to be retained on the payroll based on Article 189(2). This issue remained unresolved until the terminal benefit was liquidated in May, 2021.

[48] It follows therefore that at the time the petition was filed on 7th June 2021, no pension benefit was due and as such no constitutional question could arise. The argument that there was a violation of the Constitution due to the none liquidation of terminal benefits due at separation does not hold going by what we stated in the **Lubunda Ngala**¹ case.

[49] Under the circumstances, it is our considered view that the petition does not raise any constitutional question for our determination within the meaning of Article 187, 188, 189 and 266 of the Constitution. We accordingly dismiss it for want of jurisdiction.

Each party to bear their own costs.



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M.S MULENGA
CONSTITUTIONAL COURT JUDGE



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P.MULONDA
CONSTITUTIONAL COURT JUDGE



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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE