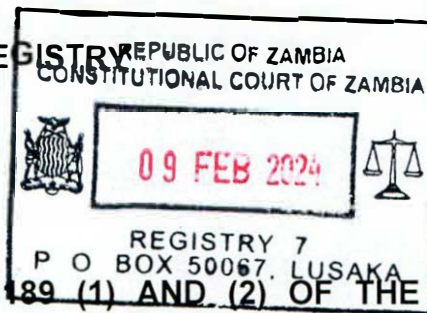


IN THE CONSTITUTIONAL COURT  
AT THE CONSTITUTIONAL COURT REGISTRY  
HOLDEN AT LUSAKA

2023/CCZ/0013



(Constitutional jurisdiction)

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

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 189 (2) OF  
THE CONSTITUTION (AMENDMENT) ACT NO. 2 OF  
2016

IN THE MATTER OF: SECTION 25 OF THE LOCAL AUTHORITIES  
SUPERANNUATION FUND ACT, CHAPTER 284 OF THE  
LAWS OF ZAMBIA

BETWEEN:

HASTINGS MWILA

PETITIONER

AND

LOCAL AUTHORITIES SUPERANNUATION FUND

RESPONDENT

CORAM: MUSALUKE, KAWIMBE, AND MULIFE, JJC. ON 13<sup>TH</sup> OCTOBER, 2023  
AND 9<sup>TH</sup> FEBRUARY, 2024.

For the Petitioner: Mr. M. C. Hamachila of Messrs. M.C. Hamachila  
Legal Practitioners.

For the Respondent: Messrs. D. M. Chakoleka, M. Nalishuwa and D. M.  
Silavwe of Mulenga Mundashi Legal Practitioners.

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## JUDGMENT

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**Cases Referred to:**

1. **Dickson Ndhlovu and Others v Road Development Agency 2022/CCZ/005**
2. **Lubunda Ngala and Another v Anti-Corruption Commission CCZ Selected Judgment No. 4 of 2018**
3. **Levy Mwale v Zambia National Broadcasting Corporation 2020/CCZ/012**
4. **Owen Mayapi and 4 Others v The Attorney General 2019/CCZ/003**
5. **Luke Evuta Mumba (Professor) and Another v The Council of the University of Zambia 2022/CCZ/012**
6. **Dr. Oscar Mwiinde v The Attorney General and National Pension Scheme Authority 2021/CCZ/048**
7. **Anderson Mwale and Others v Zambian Open University 2021/CCZ/001**

**Legislation Referred to:**

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Local Authorities Superannuation Fund (LASF) Act, Chapter 284 of the Laws of Zambia**
3. **The Local Authorities Superannuation Fund (LASF) (Amendment) Act No. 8 of 2015**

**Introduction**

[1] This is a Judgment on the petition filed by Hastings Mwila (the Petitioner) on 11<sup>th</sup> May, 2023, made pursuant to Article 189(1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution). The Petitioner alleges that the Respondent's decision to remove him from the payroll on 15<sup>th</sup> June, 2021 while his pension benefits arising out of the Local Authorities Superannuation Fund

(LASF) pension scheme stood outstanding, contravenes Article 189(2) of the Constitution.

[2] The Petitioner therefore, seeks the following reliefs:

- (i) A declaration and an order that section 25 of the Local Authorities Superannuation Fund Act Chapter 284 of the Laws of Zambia is subject to article 189(1) and (2) of the Constitution (Amendment) Act No. 2 of 2016 in relation to the manner in which the pension benefit is paid under the Act;
- (ii) A declaration that the decision by the Respondent to remove the Petitioner from the payroll without paying the said Petitioner pension benefits arising out of the LASF pension scheme is unconstitutional and contrary to the provisions of article 189(1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016;
- (iii) An Order that the Petitioner be paid his withheld salary arrears in the total sum of ZMW 1, 220, 297. 25 (Gross) from the period he was removed from the payroll (15<sup>th</sup> June 2021) until 26<sup>th</sup> August 2022 when his last payment from his outstanding LASF pension benefits was made;
- (iv) Interest on all sums granted from the period of the cause of action to the date of full payment at the current commercial bank lending rate;
- (v) Costs occasioned by this application to be borne by the Respondent;
- (vi) Such other that this Honourable Court deems fit.

### **Petitioner's case**

[3] The petition states that the Petitioner is a former employee of LASF the Respondent herein, having worked for the Respondent from 2<sup>nd</sup>

November, 1998 to 31<sup>st</sup> July, 2020 when he retired upon attaining the age of 55 years old.

- [4] Evidence from the Petitioner shows that during the time of his employment with the Respondent, he was mandated to contribute to the LASF pension scheme. This pension scheme pays out retiring employees using a defined formula as provided for under section 25 of the Local Authorities Superannuation Fund Act (LASF Act). Under the said provision, a member can either commute one-third or two-thirds of his or her pension benefits at retiring. Where a member commutes either one-third or two-thirds of his or her pension benefits, one portion is paid out as a lump-sum whereas the other portion is paid as annuity, which is a life time pension to be paid annually.
- [5] The Petitioner testified that he commuted two-thirds of his pension benefits to be paid as a lump-sum while the remainder would be paid as annuities. Consequently, upon his retirement, the Petitioner was to receive a total sum of sum of ZMW 2, 639.267.06 as his two-thirds lump-sum pension benefit from the LASF Pension scheme and the remainder to be paid as annuities. That he was further entitled to a sum of ZMW 5, 498, 664.80 as his conditions of service terminal benefits payable at retirement from his employer.

- [6] On 15<sup>th</sup> June, 2021 upon full payment of the Petitioner's conditions of service terminal benefits in the sum of ZMW 5, 489,664.60, the Respondent removed him from the payroll. It is alleged that at the time of the Petitioner was removed from the payroll, the Respondent was still owing him two-thirds lump-sum pension benefits arising out of the LASF pension scheme which he commuted in the sum of ZMW 2, 139, 267.06.
- [7] Aggrieved by the Respondent's decision to remove him from the payroll, the Petitioner took out an action against the Respondent by way of a complaint before the High Court, Industrial Relations Division 6<sup>th</sup> October, 2021.
- [8] On 13<sup>th</sup> December, 2022 the Respondent filed a preliminary application to dismiss the complainant's claims at the High Court claiming that the court lacked jurisdiction to adjudicate on matters that were constitutional in nature. On 21<sup>st</sup> February, 2023 the High Court ruled that it lacked jurisdiction and that the Petitioner's claims could only be resolved by this Court.

#### **Petitioner's evidence at trial**

- [9] In addition to the petition, the Petitioner also filed a witness statement. The said witness statement contains the same material facts upon



which, the petition was premised as outlined in the petition. As such, we found it unnecessary to repeat the contents of the said witness statement.

[10] When the matter came up for hearing on 13<sup>th</sup> October, 2023 the Petitioner took oath and relied on the petition, affidavit in support and his witness statement as his evidence in chief.

[11] In cross - examination, the Petitioner testified that he was entitled to two sets of retirement benefits firstly; as an employee of LASF, benefits under the LASF conditions of service as provided for under the Administration Manual for Management and Non-unionized Employees and secondly, the benefits under the LASF staff pension scheme.

### **Petitioner's submissions**

[12] On 27<sup>th</sup> October, 2023 the Petitioner filed his submissions in support of the petition. The Petitioner coined the legal issue to be resolved by this Court as being the following:

**Whether or not the Petitioner should have been placed on payroll as provided under Article 189(2) of the Constitution while his pension benefits which he commuted to be paid out as a lump-sum as provided under section 25 of the LASF Act were still outstanding.**

[13] In addressing the above question, it was the Petitioner's submission at the outset that the benefits that were payable to him upon his retirement were two-fold namely;

- i. **benefits under the Administration Manual for Management and Non-Unionized Staff (Conditions of Service);**
- ii. **benefits under the LASF Act;**

[14] The Petitioner went on to highlight the law that governed the benefits under the LASF Act. Reference was therefore, made to section 25 of the LASF Act, which prescribes the formula to be adopted for purposes of computing the sums due to the Petitioner. The said section 25 enacts as follows:

**For purposes of this Act, "retirement benefit" means an annuity at the rate of one six hundred and sixtieth of the retiring pensionable emoluments of the member for each completed month of his continuous service of which either one-third or two-thirds may, at the option of the member, be commuted at the date of his retirement, for lump-sum -**

- a) **If the member is retired under section twenty – seven, at the rate of K28.00 for each K1 of annuity commuted; or**
- b) **If the member retires or is retired under section twenty-six, twenty-eight or twenty-nine, at the rate laid down for his age at the date of his retirement in the appropriate Schedules.**

[15] The Petitioner also made reference to section 2 of the LASF Act for the definition of a benefit. The said section 2 defines a 'benefit' as "a

*retirement benefit, additional retirement, annuity, lump-sum or other benefit payable to a member or his dependants out of the Fund.”*

[16] In light of the above provisions, it was the Petitioner’s submission that the computation of a ‘retirement benefit’ under section 25 of the LASF Act, gives rise to two types of terminal benefits, namely: -

- (a) Lump-sum; and
- (b) Annuity

[17] The Petitioner submitted that he <sup>was</sup> removed from the payroll despite not having been paid the two-thirds lump-sum due to him by the Respondent in breach of Article 189 (2) of the Constitution.

[18] In justifying the Respondent’s alleged breach of the Constitution, the Petitioner contended that Article 189 of the Constitution requires that whenever one is entitled to a pension benefit that cannot be paid on their last working day, that person ought to remain on the payroll until such a time that they receive their pension benefit.

[19] Further, it was contended that the Petitioner having been an employee of the LASF as well as a member of the LASF Pension scheme, the retirement benefits that he was entitled to by virtue of section 25 of the LASF Act, were a pension benefit. In support of this proposition, reference was made to Article 266 of the Constitution which defines a



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

[20] The Court’s attention was further drawn to decisions of this Court in the cases of **Dickson Ndhlovu and Others v Road Development Agency<sup>1</sup>** and **Lubunda Ngala and Another v Anti-Corruption Commission<sup>2</sup>** wherein the term ‘pension benefit’ was aptly applied. The Court guided that that pension benefits were those envisaged under Article 187, 189 and 266 of the Constitution, granted under or by a relevant pension law or other law. Further, that pension benefits related to those who had reached the retirement age or retired early for some reason.

[21] Premised on the above authorities, it was submitted that the retirement benefit that the Petitioner is entitled to under section 25 of the LASF Act, is a pension benefit by virtue of the fact that the Petitioner herein retired from active employment and the pension benefit is provided for by law. Further, that the pension benefit he is claiming is envisaged by Article 266 of the Constitution.

[22] The Petitioner submitted that he opted to commute two thirds of his pension benefits in the sum of ZMW 2, 639, 267.06 to be paid as a lump-sum and the other one third to be paid as annuity. This was within

his rights as provided for by section 25 of the LASF Act. That the pension benefits commuted to be paid as a lump-sum of ZMW 2,639, 267. 06 was paid slightly over two years after his retirement in August, 2022.

[23] In summation, the Petitioner submitted that the correct course of action should have been for the Respondent to maintain the Petitioner on the payroll until his pension benefits, which he commuted to be paid as a lump-sum were paid in full. That the Respondent only paid the Petitioner the two-thirds lump-sum pension benefits in August 2022, and that is the time he should have been removed from the payroll. That the Respondent herein has therefore, contravened the provisions of Article 189 (2) of the Constitution by failing to place the Petitioner on the payroll while his pension benefit was outstanding. In support of this proposition, reliance was placed on some decisions of this Court in the cases of **Levy Mwale v Zambia National Broadcasting Corporation<sup>3</sup>** and **Owen Mayapi and 4 Others v The Attorney General<sup>4</sup>** where the import of Article 189 (2) of the Constitution was well explained.

[24] It was contended that retention on the payroll is meant for continued payment of ones' salary until the pension is liquidated in full and not for

purposes of disbursing pension benefits in instalments. That therefore, the fact that the Respondent had made a payment of ZMW 500,000.00 to the Petitioner at the time that he was removed from the payroll does not entail that the pension benefit was liquidated in full.

- [25] The Petitioner prayed that the question raised before this Court be interpreted accordingly and he be granted all the reliefs sought in his petition with costs.

### **Respondent's Case**

- [26] In response to the petition, the Respondent filed an answer to the petition with an accompanying affidavit in opposition to the petition. Additionally, the Respondent filed a witness statement together with the Respondent's list of authorities and skeleton arguments.

- [27] In its answer, the Respondent stated that the Petitioner as an employee of the Respondent was regulated by a contract of employment and various policies incorporated in it between the Petitioner and the Respondent. That on the other hand, the Petitioner as a member of the LASF pension scheme was regulated by the LASF Act. That the Respondent as an employer is different from its role as a pension scheme. It therefore, could not retain the Petitioner on the

payroll of the Respondent after it settled the Petitioner's terminal benefits in full as its former employee.

[28] The Respondent further stated that while the Constitution provides that a pension benefit shall be paid promptly and regularly, it does not provide for the procedure that is to be employed when paying out a pension benefit. As such, pension benefits are paid in accordance with the rules governing a particular pension scheme.

[29] Additionally, it was averred that the LASF Act does not provide for payment of full pension benefits upon an employee retiring. That the mechanism provided under the Act for paying a pension benefit is such that an employee is allowed to commute up to two-thirds of his or her pension while the remainder (one-third) is paid to the retiree on an annual basis during the lifetime of the retiree. Further, it was averred that the pension benefit under the LASF Act is a defined benefit, which cannot be paid in full but ceases on the death of the member or the disqualification of the widow or children on the death of the male member in receipt of a pension.

[30] That the Petitioner was therefore, not entitled to be kept on the Respondent's payroll as he was paid and is in receipt of his pension benefits (annuity) (one third) in accordance with the LASF Act. The first

payment of annuities in the sum of ZMW 57,028.24, was made on 10<sup>th</sup> March, 2021.

[31] That there is a difference between the LASF as an employer and LASF as a multi-employer pension scheme. That, the Respondent discharged its obligations to the Petitioner as an employer when it paid his terminal benefits and the obligation to pay retirement benefits was to be borne by the LASF pension scheme. Further, that as an employer, it discharged its obligations by deducting the relevant contributions at 10% of the Petitioner's pensionable emoluments and adding 23% employer portion and remitting the same timely to the LASF pension scheme.

[32] The Respondent denied having contravened the provisions of Article 189(2) of the Constitution when it removed the Petitioner from its payroll that therefore, the Petitioner, is not entitled to any of the reliefs sought.

**Respondent's evidence at trial**

[33] The Respondent's sole witness was Mr. George Chileshe (RW), in his capacity as the Respondent's Managing Director. He filed a witness statement which discloses facts as in the Respondent's answer. For



the sake of brevity, we will not restate the contents of the witness statement.

[34] At trial RW relied on the witness statement as evidence in chief.

[35] During cross-examination, RW confirmed that the Petitioner retired from the Respondent on 31<sup>st</sup> July, 2020. He also confirmed that the Respondent herein was both an employer and a manager of the pension scheme under the LASF Act. Further, that the Petitioner was both an employee of the Respondent and a member at the pension scheme administered by the Respondent. He described the LASF pension scheme as multi-employer pension scheme as opposed to an institutional pension scheme.

[36] In further cross-examination, RW confirmed that the Petitioner was entitled to benefits as an employee under the conditions of service as provided for in the Administration Manual for Management and Non-Unionized staff as well as benefits under section 25 of the LASF Act. That the benefits under the LASF Act are a defined benefit already prescribed by a defined formula. RW testified that the only benefit under the LASF Act was an annuity. That a member could elect to commute part of their retirement benefits and that the Petitioner opted for an annuity with two-thirds commutation. He stated that payment of

the two-thirds lump-sum was only to be made when funds were available.

[37] RW confirmed that the Petitioner was removed from the payroll on 15<sup>th</sup> June 2021, however, he could not recall when the lump-sum payment was disbursed to the Petitioner.

[38] In re-examination, RW testified that the retirement benefit, which was payable under the LASF Act, is an annuity. That, however, there was a provision for a member to commute part of that annuity as a lump-sum. RW further clarified that an annuity is the amount payable annually until the death of a member.

### **Respondent's submissions**

[39] The Respondent filed its skeleton arguments and raised three issues as follows:

- i. **Whether section 25 of the Local Authorities Superannuation Fund Act Chapter 284 of the Laws of Zambia is subject to article 189(1) and (2) of the Constitution (Amendment) Act No. 2 of 2016 in relation to the manner in which the pension benefit is paid under the Act;**
- ii. **Whether the decision by the Respondent to remove the Petitioner from the payroll without paying the said petitioner's lump-sum pension benefits arising out of the LASF Pension scheme is unconstitutional and contrary to the provisions of article 189(1) and (2) of the Constitution of Zambia (Amendment) Act No 2 of 2016;**
- iii. **Whether the Petitioner is entitled to be paid the purported withheld salary arrears in the total sum of K1,220,297.25 (gross) from the period**

**he was removed on the payroll (15<sup>th</sup> June 2021) until 26<sup>th</sup> August 2022 when his last payment from his outstanding LASF Pension benefit was made.**

[40] In addressing the first issue, it was argued, that Article 189 of the Constitution was to be read together with Article 187(3) of the Constitution on the law to be applied in respect to a pension benefit.

[41] That even though Article 187(3) of the Constitution provides that a pension benefit should be paid promptly, it does not set out the manner in which it is to be paid. That the Constitution has relegated the procedure to the relevant various pension legislation.

[42] It was therefore, argued that, while the LASF Act is subordinate to the Constitution, provisions relating to the payment of pension benefits in the Constitution should be read together with the LASF Act which sets out the procedure on how the pension benefit shall be paid. That section 25 of the LASF Act is subject to Article 189(1) and (2) of the Constitution and that the two pieces of legislation cannot be read in isolation but should be read together in order to ascertain how the Petitioner was to be paid his pension benefits.

[43] As regards the second and third issues raised, it was the Respondent's submission that the Petitioner as a member of the LASF Pension Scheme, the payment of his pension benefits was determined by the

provisions of the LASF Act. That under section 25 of the LASF Act, members of the LASF Pension Scheme are at liberty to commute either one third or two-thirds of their pension benefits to be paid as a lump-sum while the rest was to be paid as an annuity for the life time of the member. That the Petitioner opted to exercise his right under section 25 of the LASF Act to commute two-thirds of his pension benefits which was to be paid as a lump-sum while one-third was to be paid as annuities.

- [44] In justifying that the Respondent did not contravene the provisions of both the Constitution and the LASF Act, the Court was referred to various correspondences shared between the Petitioner and the Respondent prior to the Petitioner retiring from his employment. Particular reference was made to a letter dated 8<sup>th</sup> July, 2019 where the Petitioner wrote to the Respondent informing it of his intention to retire upon attaining the age of 55; a letter dated 8<sup>th</sup> August, 2020 where the Petitioner informed the Respondent that he had opted to exercise his right under section 25 of the LASF Act to commute two-thirds of his pension benefits which was to be paid as a lump-sum while one-third was to be paid as annuities; a letter dated 31<sup>st</sup> July, 2020 in which the Respondent informed the Petitioner that he would

be maintained on the payroll until his benefits were paid in full and a letter dated 15<sup>th</sup> July, 2021 where the Respondent informed the Petitioner that it would remove him from its payroll because he had been paid all his terminal benefits.

[45] It was argued thus that to cushion the Petitioner from experiencing inconvenience after his retirement and in accordance with the provisions of Article 189(2) of the Constitution, the Respondent maintained the Petitioner on the payroll from 31<sup>st</sup> July, 2020 to 15<sup>th</sup> June, 2021. Further, that the Respondent has consistently and promptly been paying the Petitioner his pension benefit in the form of annuities which constitute a pension benefit.

[46] That in addition, the Respondent had paid the Petitioner his lump-sum pension benefits in the sum of ZMW 2,139,267.06 in two instalments of ZMW 1,000,000.00 on 29<sup>th</sup> July, 2022 and ZMW 1,139,267.06 on 28<sup>th</sup> August, 2022.

[47] As such, it was submitted that although the Petitioner was not paid his lump-sum pension benefit on his last day of service, the Respondent did not contravene the provisions of both the Constitution and the LASF Act as it paid the Petitioner his annuities which constitute a pension benefit, regularly and promptly and also kept the Petitioner on



the payroll until he was paid his retirement benefits. Further, that the Petitioner was not entitled to be kept on the Respondent's payroll because the payment of the Petitioner's annuity, satisfied Article 189(1) and (2) of the Constitution which provides that a pension benefit should be paid regularly and promptly.

- [48] The Respondent submitted that the Petitioner was not entitled to be retained on the payroll and that the claims by the Petitioner be dismissed with costs for lack of merit.

**Petitioner's submissions in reply**

- [49] The Petitioner filed his submissions in reply on 17<sup>th</sup> November, 2023.

- [50] It was the Petitioner's arguments in reply that the Respondent had misconstrued the provisions of Article 189 of the Constitution by contending that the Constitution does not set out the manner in which the pension benefits ought to be paid out and that the Constitution has relegated the same to the relevant pension legislation. According to the Petitioner, the import of Article 189(2) of the Constitution is that in an event that a pension benefit is not paid on one's last working day, he/she ought to remain on the payroll without other conditions.

[51] As regards, the issue of whether the Respondent had contravened the provisions of the Constitution, it was the Petitioner's submission in reply that the Respondent having admitted in its submissions that it removed the Petitioner from the payroll despite not being paid his benefits in full, constitutes a clear violation of Article 189(2) of the Constitution and that the Respondent's argument that the Petitioner was removed from the payroll as he was receiving annuities was not supported by any law. It was argued that Article 189(2) of the Constitution is clear to the effect that a pension benefit ought to be paid on one's last working day, failure to which the retiree must be maintained on payroll.

[52] Further, reacting to the Respondent's argument that section 25 of the LASF Act does not provide for two aspects of terminal benefits, it was the Petitioner's submission that the Respondent's argument had no legal basis and that under section 25 of the LASF Act, a member is entitled to an annuity part of which they may commute for a lump-sum at retirement.

[53] The Petitioner submitted that lump-sum benefits ought to have been paid to him on 31<sup>st</sup> July, 2020 upon his retirement. That commutation is a cash option provided for in the pension industry which entitles a

member to be paid an immediate or prompt retirement lump-sum. On the other hand, the uncommuted net annuity is paid subsequent to the retirement date at periodic intervals and this is post retirement income.

[54] The Petitioner urged us to find in his favour and that we should grant the relief sought in the petition.

### **Analysis and Determination**

[55] We have considered the petition with the supporting affidavit, the Respondent's answer and affidavit in opposition. We have also considered the witness statements and arguments/submissions on record.

### **Facts not in dispute**

[56] From the evidence on record, the following facts are not in dispute:

- i. That the Petitioner is a former employee of the Respondent having worked for the Respondent from 2<sup>nd</sup> November, 1998 to 31<sup>st</sup> July 2020 when he retired upon attaining the age of 55 years;
- ii. That during his time of employment with the Respondent, the Petitioner was a member of the LASF Pension Scheme. The scheme pays out retiring employees using a defined formula as provided for under section 25 of the LASF Act;

- iii. Upon his retirement, the Petitioner elected to commute two-thirds of his pension benefits to be paid as a lump-sum while the remainder was to be paid as annuities in line with section 25 of the LASF Act;
- iv. The benefits that the Petitioner was entitled to upon his retirement were two-fold; benefits under the Administration Manual for Management and Non-Unionized Staff (Conditions of service terminal benefits) in the sum of ZMW 5, 498, 664.80. Additionally, the Petitioner was to receive ZMW 2, 639,267.06 as his Lump-sum pension benefit from the LASF Pension Scheme to which he was a contributing member, the remainder to be paid as annuities.
- v. On the following dates, the Respondent paid the Petitioner against the LASF Pension Scheme two-thirds commuted lump-sum as follows:
  - a. ZMW 500,000.00, on 26<sup>th</sup> November, 2020;
  - b. ZMW 1,000,000.00 on 4<sup>th</sup> August, 2020 and;
  - c. ZMW 1.139,267.06 on 26<sup>th</sup> August, 2020.
- vi. On 15<sup>th</sup> June, 2021 the Respondent removed the Petitioner from the payroll.
- vii. At the time of his removal from the payroll, the Petitioner had not been paid the remainder of the two-thirds pension benefits which he

commuted to be paid as a lump-sum in the sum of ZMW 2,139,267.06.

- viii. The Respondent has consistently paid the Petitioner his annuities in accordance with section 25 of the LASF Act (as per page 16 of the Record of Proceedings).

### **Issues for determination**

[57] From the pleadings and the arguments and/or submissions filed before Court and facts not in dispute, it can be discerned that the issues that fall for this Court's determination are as follows:

- i. **Whether or not section 25 of the LASF Act is subject to Article 189(1) and (2) of the Constitution in relation to the manner in which the pension benefit is paid under that Act;**
- ii. **Whether or not the Petitioner should have been placed on the payroll as provided for under Article 189(2) of the Constitution while his pension benefits which he commuted to be paid out as a lump-sum as provided under section 25 of the LASF Act were still outstanding;**

[58] We will deal with these two issues we have set out for determination seriatim.

**Whether or not Section 25 of the LASF Act is subject to Article 189(1) and (2) of the Constitution in relation to the manner in which pension benefit is paid under that Act.**



[59] In addressing this issue, it is imperative that we begin by reproducing the law relating to pension benefits as stipulated by the Constitution. Our starting point is Article 266 of the Constitution which defines a pension benefit as follows:

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

[60] Article 187(3) of the Constitution further provides for the law to be applied with respect to pension benefits and enacts as follows:

**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 the employee.**

[61] Another salient constitutional provision that relates to pension benefits is Article 189(1) and (2) of the Constitution which 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.**

[62] We have on numerous occasions pronounced ourselves on the import of the above constitutional provisions regarding the definition of a pension benefit. In the case of **Lubunda Ngala and Another v The Anti-Corruption Commission**<sup>2</sup> in relation to Articles 189 and 266 of the Constitution, we held that pension benefits relate to those who have reached retirement age or are retired early for some reason. More recently, in the cases of **Anderson Mwale v Zambian Open University**<sup>7</sup> and **Dickson Ndhlovu and Others v Road Development Agency**<sup>1</sup> we held that a pension benefit is one envisaged under Articles 187, 189 and 266 and one that is granted under or by a relevant law. (Emphasis added)

[63] Further in the case of **Dr. Oscar Mwiinde v The Attorney General and NAPSA**<sup>6</sup> we guided that Article 187 of the Constitution merely guarantees a person's pension benefit but various controls pertaining to accessing such pensions are provided for under various pieces of legislation providing for pensions. This position was reiterated in the case of **Luke Evuta Mumba (Professor) and Another v The Council of the University of Zambia**<sup>5</sup> where we stated that the provisions of Article 187(3) of the Constitution, relating to pension benefits must be read together with relevant pension laws.

[64] It is clear that provisions of the Constitution in relation to pension benefits should not be interpreted in isolation but should be construed together with the relevant pension legislation.

[65] Bearing that in mind, a reading of section 25 as read with section 2 of the LASF Act shows that this is the legislation that provides for pension benefits that the Petitioner is claiming herein in relation with Article 189 (2) of the Constitution. Section 25 of the LASF Act provides as follows:

**25. (1) A member shall be paid a retirement benefit in the form of an annuity at the rate of one seven hundred and twentieth of the retiring pensionable emoluments of the member for each completed month of the member's continuous service**

**(2) A member may commute one-third or two-thirds of the member's retirement benefit for lump-sum at the date of the member's retirement—**

**(a) if the member is retired under section twenty seven, at the rate of twenty-eight ngwee for each one ngwee of annuity commuted; or**

**(b) if the member retires or is retired under section twenty-six, twenty-eight or twenty-nine, at the rate laid down for the member's age at the date of the member's retirement in the appropriate Schedules.**

**(3) Notwithstanding subsection (1) and (2), the Minister may, in consultation with the Fund and based on an actuarial valuation undertaken to determine the financial sustainability of the Fund,**

**by statutory instrument prescribe the rate at which a retirement benefit is payable.**

[66] We have carefully perused Section 25 of the LASF Act and we are of the view that it provides the nature of retirement benefits that may be paid to a member under the LASF Act and also when the said retirement benefits may fall due. The provisions of Article 189(1) and (2) of the Constitution on pension benefits cannot therefore, be read in isolation but ought to be read together with sections 2 and 25 of the LASF Act, which is the applicable pension law in this case. The Constitution being the supreme law of the land means that it ranks high above all laws, hence the provisions of section 25 of the LASF Act being subordinate to the Constitution is subject to Article 189(1) and (2) of the Constitution in relation to the manner in which pension benefit is paid under that Act. This means that, if there are contradictions between the Constitution and the LASF Act, the Constitution reigns supreme. We have not seen any contradiction between the LASF Act in its form or application with the Constitution in regards to Article 189 (1) and (2) of the Constitution. We therefore, find no merit in the Petitioner's claims as there is no contradiction between section 25 of the LASF Act and the Constitution.

**Whether or not the Petitioner should have been placed on the payroll as provided for under Article 189(2) of the Constitution while his pension benefits which he commuted to be paid out as a lump-sum as provided under section 25 of the LASF Act were still outstanding.**

[67] In addressing this issue, our starting point is Article 189(1) and (2) of the Constitution which we have already alluded to above. In numerous decisions of this Court we have guided that an employee must be paid his pension benefits on his last working day, and that in the event that the pension benefit is not paid on the employees last working day, the employer must retain the employee on payroll until full payment of his pension benefit.

[68] In the case at hand, we find that there are two pertinent sub -questions to be answered and these are firstly; ***whether or not the two-thirds lump-sum benefit that the Petitioner is claiming herein is in fact a pension benefit*** and secondly ***whether there is a separation between the Respondent as an employer and LASF a Pension Scheme to which the Petitioner was a contributing member***. The two sub-questions we feel will be able to assist us to adequately address the issue of whether or not the Petitioner should have been



retained on the Respondent's payroll pending the payment of his two-thirds lump-sum benefits due to him.

[69] In addressing our minds as to whether or not the benefits claimed by the Petitioner under the LASF Act are pension benefits, we had earlier in our Judgment addressed the various constitutional provisions relating to pension benefits and we did mention that a pension benefit as envisaged under Articles 187, 189 and 266 of the Constitution is triggered by retirement and must be granted under relevant legislation. This is what we held in the cases of **Dickson Ndhlovu**<sup>1</sup>, **Lubunda Ngala**<sup>2</sup> and **Anderson Mwale**<sup>7</sup>.

[70] Evidence on record shows that the benefits that the Petitioner is claiming were triggered by the Petitioner's retirement from the Respondent's employment on 31<sup>st</sup> July, 2020. Upon his retirement, he opted to commute two-thirds lump-sum in accordance with section 25 as read with section 2 of the LASF Act.

[71] We note from a reading of the above provisions that a benefit as envisaged under section 2 includes a retirement benefit, additional retirement benefit, annuity, lump-sum or other benefit payable to a member or his dependents out of the Fund. Further the said section 2 defines "retirement benefit" to mean the benefits mentioned in section

25. Section 25 further provides guidance on the nature of the retirement benefit that a contributing member upon retirement shall receive. That benefit is a retirement benefit in form of an annuity but a member may opt to commute one-third or two-thirds of his retirement benefit for lump-sum at the date of the member's retirement.

[72] It is our firm view that the two-third lump-sum retirement benefits that the Petitioner is claiming under the LASF Act, are a pension benefit having been triggered by retirement and being granted under a relevant pension law as envisaged under Articles 187, 189 and 266 of the Constitution.

[73] We shall now address the question whether there is a separation between the Respondent as an employer and LASF Pension Scheme before we can delve into whether or not the Petitioner should have been placed on the payroll as provided for under Article 189(2) of the Constitution while his pension benefits which he commuted to be paid out as lump-sum as provided under section 25 of the LASF Act were still outstanding.

[74] The Respondent has argued that it discharged its obligations as an employer by paying the Petitioner his terminal benefits arising from the contract of employment between the Respondent and the Petitioner

and in line with the Administration Manual (the conditions of service) after which it removed the Petitioner from the payroll. That the obligation to pay the Petitioner the other set of benefits arising from the LASF Act was to be borne by the pension scheme and not the Respondent as an employer.

[75] The evidence on record shows that the Petitioner was both an employee of the Respondent as well as a contributing member of the LASF Pension Scheme. Consequently, upon his retirement, the Petitioner was entitled to two sets of retirement benefits; the 1<sup>st</sup> set being benefits under the Administration Manual (conditions of service) in the amount of ZMW 5,261,145.78. Secondly, the Petitioner was entitled to benefits under section 25 of the LASF Act to which he commuted two thirds lump-sum in the sum of ZMW 2, 639,267.06 and the remainder to be paid as annuity.

[76] The evidence on record further shows that the Petitioner was retained on the Respondent's payroll from 30<sup>th</sup> July, 2020 until 15<sup>th</sup> June, 2021 when the Respondent removed the Petitioner from the payroll upon full payment of terminal benefits payable under the conditions of service in the sum of ZMW 5,489,664.60.

[77] In ascertaining whether there is in fact a separation between the Respondent as an employer and the pension scheme as alleged by the Respondent, we took time to examine the provisions of the LASF Act as read with the LASF (Amendment) Act No. 8 of 2015. We also addressed our minds to the Administration Manual for Management and Non-Unionized Staff (appearing at page 125 of the Record of Proceedings).

[78] A perusal of the Administration Manual particularly clause 16.1 to 16.3 (at page 145 of the record of proceedings), revealed that an employee of the Respondent such as the Petitioner was eligible to join various pension schemes such as the LASF Staff Pension Scheme, the National Pension scheme Authority (NAPSA) Scheme as well as the Workers' Compensation Fund Control Board Scheme (WCFCB). Particularly, under the LASF Staff Pension Scheme, an employee was mandated to contribute ten percent (10%) of his monthly basic salary toward the scheme while the Fund (the Respondent herein) was mandated to contribute twenty three percent (23%) of the employees' monthly basic salary making a total contribution of thirty three percent (33%) every month.

[79] Further, a perusal of the LASF Act i.e. both the Principal Act and the Amendment Act No. 8 of 2015, reveals that the legislation makes no mention of the LASF Staff Pension Scheme. However, the legislation has in its interpretation section under section 2, defined the following terms;

**"Fund" to mean the Local Authorities Superannuation Fund;**

**"Member" to mean any employee of a local authority who is contributing to the Fund and any person who is in receipt of an annuity;**

**"Contributions" includes contributions paid into the existing fund;**

**"Benefit" to mean a retirement benefit, additional retirement benefit, annuity, lump-sum or other benefit payable to a member or his dependents out of the Fund.**

[80] From a combined reading of both the Administration Manual and the Provisions of the LASF Act, it is our understanding that the LASF Staff Pension Scheme mentioned in the Administration Manual, to which the Petitioner was a contributing member is in fact the Local Authorities Superannuation Fund, the Respondent herein. We say so because the LASF Act only makes mention of the fund to mean the Local Authorities Superannuation Fund and describes it as a Fund to which contributions of members are paid into. A further reading of the above provisions reveals that as rightly pointed out by the Respondent, the said Local



Authorities Superannuation Fund is a multi-employer Fund as opposed to an institutional pension scheme, as it provides cover to employees of all local authorities who are contributing members to the fund. A contributing member of the fund is upon retirement entitled to the retirement benefits as described under section 25 of the LASF Act.

- [81] In light of the foregoing, we find that the Respondent herein, in respect to the Petitioner, was both an employer as well as a manager of the Superannuation Fund. As per the evidence before Court, the relationship between the Petitioner and the Respondent as an employer was anchored on the contract of employment between the parties and various policies, whereas the relationship between the Petitioner as a contributing member of the Fund and the Respondent as a Fund Manager was governed by the provisions of the LASF Act. Consequently, the Petitioner, upon his retirement, was entitled to two sets of benefits; the terminal benefits under the Administration Manual (particularly under clause 15.1.5) in respect to his employment with the Respondent, as well as lump-sum benefits under the LASF Act by virtue of being a contributing member to the LASF. Therefore, to the extent that the relationship between the Respondent and the Petitioner was governed by contract whereas the membership of the Petitioner

to the fund was governed by statute, the LASF Act in this case, it is our considered view that therein lies the separation between the Respondent as an employer and the Fund Manager.

[82] The evidence on record shows that as an employer, the Respondent in complying with the obligations under Article 189(1) and (2) of the Constitution did in fact retain the Petitioner on the payroll from 31<sup>st</sup> July, 2020 up until 15<sup>th</sup> June, 2021 when it fully settled the Petitioner's terminal benefits as arising from his contract of employment.

[83] It is thus our considered view that the Respondent as an employer of the Petitioner satisfied the conditions of Article 189(1) and (2) of the Constitution by retaining the Petitioner on the payroll pending the payment of his terminal benefits arising under his contract of employment until 15<sup>th</sup> June, 2021 when the Petitioner's terminal benefits were paid. The Petitioner was therefore, not entitled to be retained on the payroll beyond the 15<sup>th</sup> June, 2021 as his terminal benefits arising out of his contract of employment were fully settled.

[84] The Petitioner claims that he was entitled to be retained on the payroll pending the payment of his two-thirds lump-sum benefits under section 25 of the LASF Act. As earlier on indicated in this Judgment, the

provisions of Article 189(1) and (2) of the Constitution should not be read in isolation but must be read together with the provisions of section 25 of the LASF Act as amended by Act No. 8 of 2015 which provides for the said pension benefit.

[85] These provisions make it clear that a contributing member of the fund is entitled upon retirement, to a retirement benefit in form of an '*annuity*' at the rate of one seven hundred and twentieth of the retiring pensionable emoluments of the member for each completed month of the member's continuous service, part of which may be commuted for lump-sum at the date of the member's retirement.

[86] The evidence on record shows that the Petitioner on 5<sup>th</sup> August, 2020 commuted two-thirds of his benefits to be paid as a lump-sum and the remainder to be paid as annuity. Thus, as rightly argued by the Petitioner, he was under the LASF Act entitled to both an '*annuity*' payable either monthly, quarterly or yearly and the '*two-thirds commuted lump-sum*' to be paid at the date of retirement.

[87] We therefore, find the argument by the Respondent that the two-thirds lump-sum benefit due to the Petitioner was only payable based on the

availability of funds to be without merit as the two-thirds lump-sum benefit fell due for payment at the date of retirement.

[88] That notwithstanding, we have guided in this Judgment that the Respondent, apart from being an employer, is also a multi-employer Pension Fund Manager for employees of all local authorities who are contributing members to the Fund. It is therefore, our considered view that the issue of payment of two thirds lump-sum payable at retirement to contributing members is outside the employee/employer relationship and is purely governed by the LASF Act and its rules and regulations. It is our further view that the spirit of Article 189 (1) and (2) of the Constitution was not to force employers to keep their former employees on payroll whose payment of pension benefits or other defined pension schemes are outside their control and mandate.

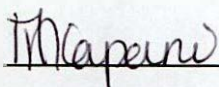
[89] Bearing in mind what we have said, the Petitioner may opt to take action against the Respondent as a Fund Manager if he feels it breached the provisions of the LASF Act and its attendant Rules and Regulations in relation to the delayed payment of the commuted two thirds lump-sum. This is indeed outside the jurisdiction of this Court whose mandate is well set out under Article 128 of the Constitution to *inter alia* interpret the Constitution and not legislation like the LASF Act.

[90] We thus find no merit in the Petitioner's case and we dismiss it. We order each party to bear own costs.



M. MUSALUKE

CONSTITUTIONAL COURT JUDGE



M. M. KAWIMBE

CONSTITUTIONAL COURT JUDGE



K. MULIFE

CONSTITUTIONAL COURT JUDGE