

**IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)**

2022/CCZ/005

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS 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

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 189(1) AND (2) OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: THE FIRST SCHEDULE TO THE PUBLIC ROADS ACT NO. 12 OF 2002

IN THE MATTER OF: PUBLIC SERVICE PENSIONS ACT NO. 35 OF 1996

BETWEEN:

**DICKSON NDHLOVU
KAPEMBWA MULENGA
ELIAS MWILA
TITUS CHANSA
MASUZYO NDHLOVU**



**1ST PETITIONER
2ND PETITIONER
3RD PETITIONER
4TH PETITIONER
5TH PETITIONER**

AND

ROAD DEVELOPMENT AGENCY

RESPONDENT

**CORAM: Munalula, DPC, Mulenga and Chisunka, JJC on 27th July, 2022 and
21st September, 2022**

For the Petitioners: Mr. P. Songolo and Mrs. A. Mwampaja of Philsong & Partners

For the Respondent: Mr. F. Malambo of Shephande and Company

J U D G M E N T

Mulenga, JC delivered the Judgment of the Court.

Cases cited:

1. Anderson Mwale and Two Others v Zambia Open University 2021/CCZ/001
2. Owen Mayapi and Others v The Attorney General 2019/CCZ/003
3. Godfrey Miyanda v The High Court (1984) Z.R. 62. (S.C.)
4. BP Zambia Plc v Interland and Motor Limited (2001) Z.R. 37
5. Rush and Thompkins Limited v Greater London Council and Another [1989] A.C. 993
6. Kalunga Chansa v Evelyn Hone College CAZ Appeal No. 134 of 2019
7. Levy Mwale v ZNBC 2020/CCZ/0012
8. Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick 2021/CCZ/002
9. Lubunda Ngala and Another v Anti-Corruption Commission CCZ Selected Judgment No. 4 of 2018
10. Gilford Malenje v Zambia Airports Corporation Limited 2021/CCZ/005

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia
2. The Public Roads Act No.12 of 2002
3. The Public Service Pensions Act No. 35 of 1996

Introduction

[1] The Petitioners filed this Petition against their former employer, Road Development Agency, the Respondent, on 8th April, 2022 seeking for this Court to pronounce itself on Article 189(2) of the Constitution in relation to their contracts of employment. Article 189 entitles retired employees to be retained on their employers' payroll if their pension benefits are not paid on

the last working day. This article has been a subject of interpretation in a number of our decisions.

Petitioners' Case

[2] In their Petition, the Petitioners allege that they were employed by the Respondent on various dates as Director-Planning and Design; Director Finance; Director Human Capital and Administration; Director Procurement; and Director Communication and Corporate Affairs, respectively.

[3] All the Petitioners were engaged on fixed contracts of three years, on various dates in 2019, 2020 and 2021, which provided for gratuity payments at the rate of thirty-five percent (35%) of their last salary.

[4] In November, 2021, the Petitioners' contracts were terminated with immediate effect. For the 1st, 2nd, 4th and 5th Petitioners, their contracts were terminated on 24th November, 2021, while the 3rd Petitioner's contract was terminated on 15th November, 2021.

[5] Upon termination of their contracts, the Respondent failed or neglected to settle the terminal dues and removed the Petitioners from the payroll as of January, 2022. Reliance was placed on Article 189 of the Constitution and their contracts supported by sections 4(2)(b) and 3(9) of Part 2 of the Second and First Schedules, respectively, to the Public Roads Act No. 12 of 2002 and sections 36 to 39 of the Public Service Pensions Act No. 35 of

1996. The Petitioners position is that based on these, they were entitled to be retained on the payroll until full payment of their pension benefits in form of gratuity since these were not paid on the dates the contracts were terminated.

[6] The Petitioners thus seek the following reliefs:

1. **A declaration that the decision by the Road Development Agency to remove the Petitioners from the Respondent's payroll without paying the said Petitioners' terminal benefits in form of gratuity is unconstitutional and contrary to the provisions of Article 189 (1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016;**
2. **An order directing the Respondent to retain the Petitioners on the Respondent's payroll until their pension benefits are paid in full;**
3. **An order directing the Respondents to pay to the Petitioners all the withheld salaries from January 2022 until payment of their pension benefits and or gratuity in full;**
4. **Interest on all sums granted from date of cause of action to the date of full and final payment at the current commercial bank lending rate;**
5. **Costs; and**
6. **Such other order that this Court shall deem just.**

[7] In skeleton arguments filed in support of the Petition, the Petitioners argued that the failure by the Respondent to pay the Petitioners their respective gratuities on the date that their contracts were terminated entitled them to be retained on the payroll. The directive issued removing them from the payroll in January 2022 was unconstitutional as it offended Article 189 (1) and (2) of the Constitution.

[8] Laying claim to their right to pension benefits in the form of gratuity, the Petitioners cited a number of our decisions. Amongst the authorities cited was **Anderson Mwale and Two Others v Zambia Open University**¹ which the

Petitioners used as basis to argue that constitutional provisions guaranteeing pension rights were applicable to them seeing as their gratuity is provided for in the Public Roads Act No.12 of 2002 and the Public Service Pensions Act No. 35 of 1996.

[9] It was also the Petitioners' argument that our decision in **Owen Mayapi and 4 Others v Attorney General**² dictated that the Respondent ought to have continued paying the Petitioners what they were getting through the payroll at the time of their termination of contracts. Having failed to do so, the Respondent diluted the pension protection guaranteed in Article 189 of the Constitution.

[10] During the hearing of the Petition on 28th July, 2022, learned counsel for the Petitioners, Mr. Songolo reiterated the salient points of the Petitioners' case and invited us to interpret the first schedule to the Public Roads Act of 2002 and the Public Service Pensions Act No. 35 of 1996. He submitted that the two pieces of legislation provided for the gratuities due to the Petitioners. In his view, the Respondent's failure to pay the Petitioners their gratuities on their last working day entitled the Petitioners to be retained on the payroll in line with Article 189 (2) of the Constitution of Zambia.

[11] Mr. Songolo called on us to uphold the Petition with costs to the Petitioners.

Respondent's Case

[12] The Respondent denied the Petitioners' claim by stating in its Answer and Affidavit in support that it had not neglected to settle the Petitioners' terminal dues but was merely delayed due to computing the exact amounts due to each of the Petitioners. In what appeared to be an alternative position, the Respondent averred that maintaining the Petitioners on the payroll would have resulted in unjust enrichment as the contracts provided that they would get terminal benefits for the whole contract duration. This, the Respondent argued, would put the Petitioners in a position they would have been in had it not been for the termination of contracts. The Respondent thus reasoned that removing the Petitioners from the payroll did not occasion any loss.

[13] The Respondent also added that the Petitioners had an active cause Comp/IRCLK/120/2022 before the Industrial and Labour Relations Division (IRD) and therefore the action before this Court amounted to forum shopping. In so stating, the Respondent exhibited process before the IRD marked "NB1".

[14] In the skeleton arguments in support of the Answer, the Respondent argued that the gratuity sought by the Petitioners did not fit in the pension benefits envisaged by the Constitution as the terminal benefits have already been computed and agreed on by the parties. Further, that the subject constitutional provisions were only applicable to cases of retirement and not dismissals or termination of contracts.

[15] The Respondent averred that Article 189 of the Constitution does not apply to the Petitioners as their contracts of service provided for remedies or recourse following termination.

[16] Augmenting this position during the hearing of the Petition, learned counsel for the Respondent, Mr. Malambo submitted that the gratuities claimed by the Petitioners were not pension benefits as they were not arising from retirement but a termination of contract of service. That in so far as the Petitioners' contracts of service provided for gratuity even in respect of months that the Petitioners had not worked for, retaining them on the payroll would amount to double payment.

[17] Mr. Malambo urged us to dismiss the Petition with costs.

Petitioners' Reply

[18] The Petitioners maintained in reply that the Respondent was constitutionally mandated to retain them on the payroll. It was reiterated

their retention on the payroll was a right which did not amount to unjust enrichment as asserted by the Respondent.

[19] On the allegation of forum shopping, the Petitioners stated that the IRD had no jurisdiction to hear constitutional matters as its jurisdiction is limited as per **Godfrey Miyanda v The High Court**³. Calling in aid the decision of **BP Zambia Plc v Interland and Motor Limited**⁴, the Petitioners noted that the Petition at hand was not relitigating the same subject matter as cause Comp/IRCLK/120/2022 and thus there was no risk of this court's judgment colliding with that of the IRD.

[20] The Petitioners also took exception to the Respondent's attachment of an exhibit produced in the IRD matter constituting of privileged correspondence that indicated the progress made in *ex curia* efforts. On the strength of **Rush and Thompkins Limited v Greater London Council and Another**⁵, the Petitioners prayed that the same be expunged from the record.

[21] In the alternative, the Petitioners relied on the decision of **Kalunga Chansa v Evelyn Hone College**⁶ to assert that exploring *ex-curia* settlements did not preclude them from commencing actions before the courts of law.

[22] Mr. Songolo made brief oral submissions in reply emphasising that this Court was the right forum for the Petition at hand as the IRD had no

jurisdiction on constitutional issues. He thus implored us to uphold the Petition in its entirety notwithstanding the cause before the IRD.

Determination

[23] We have considered the positions advanced by the respective parties. This Court has had occasion to pronounce itself on Article 189 of the Constitution as evidenced by the cases cited by both parties. We are therefore of the view that the interpretation of Article 189 is now sufficiently settled.

[24] In **Levy Mwale v ZNBC**⁷ we categorically stated that failure by an employer to pay an employee the pension benefits on the last working day entitles such a one to be retained on the payroll until settlement of the pension benefits. In **Anderson Mwale and Two Others v Zambian Open University**¹, we elucidated this entitlement by highlighting that for an employee to lay claim to their right to be retained on the payroll, they have to show that the benefits in issue are pension benefits which are provided for by statute. This is because Article 187(3) of the Constitution expressly refers to a pension law.

[25] Both parties have alluded to these authorities. The Petitioners are of the view that they should be awarded the reliefs sought based on the fact that their gratuities are pension benefits provided for in the Public Roads Act

and Public Service Pensions Act and that consequently, that they were entitled to be maintained on the payroll until full payment of the gratuities pursuant to Article 189 of the Constitution. The Respondent is of the contrary view. This view is based on three main points: the first is that the Petitioners have not proved that the gratuity they lay claim to is set out in statute; secondly, retaining the Petitioners on the payroll would amount to unjust enrichment as their contracts of service provide that regardless of termination before time, they would get their gratuity for the full duration of the contract period; and thirdly, that the Petition amounts to forum shopping as the Petitioners have an active cause before the Industrial Relations Division flowing from the same factual matrix before this Court.

[26] We first wish to address the allegation of forum shopping. The Petitioners have admitted that they commenced an action before the IRD but that they reserved the question of retention on the payroll for this Court as they were advised that this is the only Court that can deal with constitutional issues. They reason that since the remedies sought in the action before the IRD are not the same as the remedies under this Petition, the action does not amount to forum shopping.

[27] Forum shopping connotes a party's tendency to commence a series of actions before different courts in a bid to get a favourable outcome. It is a practice the courts frown upon and consider an abuse of court process due

to its effect of resulting in multiplicity of actions. Multiplicity of actions has the potential to result in various courts rendering conflicting or contradictory decisions which could put the justice system in disrepute. It is also desirable that all matters in controversy between parties to an action are decided in one action in order to ensure economical use of our overstretched justice system.

[28] In *casu*, the Petitioners could have included the reliefs set out in the Petition before us in their complaint before the Industrial Relations Division IRD. This is more so that in **Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick⁸**, we have guided that the IRD has jurisdiction to pronounce itself on every right and obligation flowing out of an employer-employee relationship notwithstanding that the relief sought is set out in the Constitution. We expressly stated that the IRD's jurisdiction included making a determination whether employees should be retained on the payroll pending final settlement of their pension dues.

[29] Therefore, the explanation advanced by the Petitioners is at best a misdirection which we cannot accept in light of our decision in the **Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick⁸** case.

[30] We would have dismissed this matter for the aforesaid reason but we note that the matter before the IRD is at an advanced stage that might

not allow the issue to be effectively adjudicated upon. This is based on the Respondent's counsel's submission that the parties had since executed a consent order.

[31] The main issue for determination is whether the Petitioners' gratuities or terminal benefits are pension benefits that fall under Article 189 of the Constitution.

[32] The Petitioners argued that their gratuities are pension benefits as they are provided for under sections 4(2)(b) and 3(9) of the Second and First schedules, respectively, to the Public Roads Act and sections 36 to 39 of the Public Service Pensions Act. Therefore, that they were entitled to be maintained on the payroll until final payment of their gratuities. The Respondent's position is that the gratuities due to the Petitioners did not fit in the pension benefits envisaged by Article 189 which are applicable to retirement and not dismissals or terminations of contracts which provide for available recourse.

[33] Article 189 of the Constitution provides as follows:

- 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.

[34] Article 266 defines pension benefit as follows:

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

[35] In the case of **Lubunda Ngala and Another v Anti- Corruption Commission⁹** in which we considered Articles 189 and 266 of the Constitution, among others, we stated that it is not every terminal benefit that qualifies as a pension. Therefore, that where the nature of the terminal benefit is in issue one has to show that the benefit is a pension benefit as envisaged by Article 187 and 189 of the Constitution.

[36] The Petitioners have relied on the Public Roads Act and the Public Service Pensions Act as supporting their position that their gratuities are pension benefits. Section 4(1) and (2) of the Second Schedule to the Public Roads Act provides as follows:

4. (1) On or after the appointed date, the Agency shall on the terms and conditions as it may with the approval of the Minister, determine appoint as officers of the Agency public officers from the Public Service as may be necessary for the performance of the functions of the Agency.

(2) Where an officer from the Public Service is appointed to the service of the Agency-

(a) the terms and conditions of service with the Agency shall not be less favourable than those the officer enjoyed in the Public Service; and

(b) the officer shall be deemed to have retired under section thirty-nine of the Public Service Pensions Act.

[37] These provisions have not been shown to be applicable to the Petitioners because the Second Schedule is clearly headed as *"Savings and Transitional Provisions in relation to the Roads Department"*. In the absence

of proof that the Petitioners were officers in the Roads Department that transitioned to the Road Development Agency, reliance on this provision is misplaced. Equally, we did not find any section 3(9) in Part 2 of the First Schedule to the Public Roads Act which deals with the administration of the agency.

[38] Sections 36 to 38 of the Public Service Pensions Act No. 35 of 1996 provide for benefits on resignation, discharge and dismissal while section 39 provides for benefits on retirement following an abolition of a post. This Act applies to public service workers who are on pensionable terms and who contribute to the Fund. The Petitioners have equally not shown that they fell under this Act or that they were contributors to the fund. Hence, their reliance on these two Acts was misconceived. It follows that the Public Roads Act and the Public Service Pension Act do not show that the Petitioners' gratuities were pension benefits as envisaged by Articles 187 and 189 of the Constitution.

[39] Consequently, their case is on all fours with the case of **Anderson Mwale and Others v Zambia Open University**¹ which we dismissed and where we stated that the pension benefit envisaged in Articles 187, 189 and 266 is one granted under or by a relevant pension law or any other law. Further, in **Gilford Malenje v Zambia Airports Corporation Limited**¹⁰ we reiterated that

it is incumbent on a party to provide evidence that the gratuity in issue is a pension benefit as envisaged by the constitutional provisions.

[40] The Petitioners having failed to show that their gratuities are pension benefits granted under the pension law or any other law, their claim fails and the reliefs sought cannot be granted. The Petition is accordingly dismissed.

[41] In view of the particular facts of this matter, we order that each party bears their own costs.



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M.M. MUNALULA, JSD
DEPUTY PRESIDENT, CONSTITUTIONAL COURT



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M.S. MULENGA
CONSTITUTIONAL COURT JUDGE



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M.K. CHISUNKA
CONSTITUTIONAL COURT JUDGE