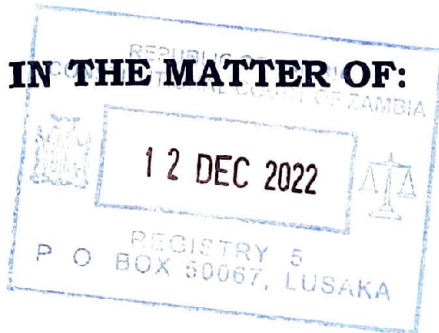


IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2022/CCZ/0012



IN THE MATTER OF:

**THE CONSTITUTION OF
ZAMBIA, CHAPTER 1 OF THE
LAWS OF ZAMBIA AS AMENDED
BY THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT
NO. 2 OF 2016**

IN THE MATTER OF:

**ARTICLES 187 AND 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 (AMENDMENT) ACT
NO. 2 OF 2016**

IN THE MATTER OF:

**ALLEGED CONTRAVENTION OF
ARTICLE 187 OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO.2 OF
2016**

IN THE MATTER OF:

**THE LOCAL AUTHORITIES
SUPERANNUATION FUND
(AMENDMENT) ACT NO. 8 OF
2015**

IN THE MATTER OF:

**THE HIGHER EDUCATION ACT
NO. 4 OF 2013**

IN THE MATTER OF:

**THE UNIVERSITY OF ZAMBIA
FIRST IN FIRST OUT POLICY**

BETWEEN:

LUKE EVUTA MUMBA (PROFESSOR)

1ST PETITIONER

TAMALA TONGA KAMBIKAMBI (DR)

2ND PETITIONER

AND

THE COUNCIL OF THE UNIVERSITY OF ZAMBIA

RESPONDENT

**CORAM: *Mulonda, Musaluke and Chisunka, JJC on 14th
September, 2022 and 12th December, 2022***

APPEARANCES:

For the Petitioners: Mr. P. Songolo – Philsong and Partners Legal Practitioners.

For the Respondent: Mr. R. Hatoongo – Legal Counsel, UNZA.
Ms. T. Nkhoma – Legal Officer, UNZA.

J U D G M E N T

Chisunka, JC, delivered the Judgment of the Court

Cases referred to:

1. **Anderson Mwale and Others v Zambia Open University, 2021/CCZ/001**
2. **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission, CCZ Selected Judgment No. 4 of 2018**
3. **Levy Mwale v Zambia National Broadcasting Corporation, 2020/CCZ/0012**
4. **Owen Mayapi and 4 Others v Attorney General, 2019/CCZ/003**
5. **Lieutenant Chrispin S. Muchindu v Attorney General, 2021/CCZ/0034**
6. **Gilford Malenji v Zambia Airports Corporation, 2021/CCZ/005**

Legislation referred to:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Higher Education Act No. 4 of 2013**
3. **The Local Authorities Superannuation Fund Act Chapter 284 of the Laws of Zambia as amended by the Local Authorities Superannuation Fund (Amendment) Act No. 8 of 2015**

Introduction and Background

1. Professor Luke Evuta Mumba and Dr. Tamala Tonga Kambikambi (the “Petitioners”) filed a Petition on 15th June, 2022, against the Council of the University of Zambia (the “Respondent”) alleging contravention of Articles 187, 189(1) and (2) of the *Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016* (hereafter the ‘Constitution’). The Petitioners seek the following relief against the Respondent:

- 1.1. **A declaration that the decision by the Respondent to remove the Petitioners off the payroll without paying the said Petitioners’ terminal benefits is unconstitutional and contrary to the provisions of Article 189(1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016;**
- 1.2. **A declaration that the first-in-first-out policy and clause 2(a) of the internal memorandum on pre-requisite for statutory retirement and retention of employees on the payroll dated 12th February, 2019 are contrary to the supreme law of the land and in particular Articles 187 and 189(1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and therefore, null and void;**

- 1.3. **An Order that the Petitioners be retained on the payroll and paid their withheld salary arrears until such a time that they are paid their pension benefits in full;**
- 1.4. **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;**
- 1.5. **Costs; and**
- 1.6. **Such other order that this Honourable Court shall deem just.**

The Petitioners' Case

2. The background material facts are contained in the Petition and the affidavit verifying facts. The affidavit verifying facts was sworn by the Petitioners. Collectively, the Petition and the affidavit disclosed that:
 - 2.1. The 1st Petitioner was employed as a Lecturer by the Respondent in 1988 until he applied for early retirement on 29th January, 2014. He served the Respondent for a period of nineteen years. His retirement benefits upon early retirement were pegged at K 2,166,382.01.
 - 2.2. On 3rd June, 2021, the Respondent paid the 1st Petitioner his retirement benefits owed under the 1988 employment contract for his nineteen years' service.

2.3. On 7th May, 2016, the Respondent appointed the 1st Petitioner as Vice Chancellor for a period of five-years. On 30th June, 2021, the five-year employment contract came to an end by effluxion of time. The Respondent computed the 1st Petitioner's terminal benefits or gratuity under the five-year contract in the sum of K 2,089,407.67. To date, this amount remains unpaid.

2.4. On 17th May, 2021, the Respondent re-appointed the 1st Petitioner as Vice Chancellor for another period of five-years. On 6th May, 2022, however, the Respondent terminated the 1st Petitioner's contract without paying him his retirement benefits and terminal benefits or gratuity on the dates they fell due namely, 29th January, 2014, 30th June, 2021, and 6th May, 2021 respectively.

2.5. The 2nd Petitioner was employed by the Respondent as a Lecturer in 1998. On 31st January, 2019, she applied for and proceeded on early retirement. Her retirement benefits were computed in the amount of K4,342,039.70.

2.6. Before the 2nd Petitioner's retirement benefits were paid, the Respondent appointed her as Deputy Vice Chancellor on 27th February, 2020, for a period of four years.

2.7. On 6th May, 2022, however, the Respondent terminated the 2nd Petitioner's employment contract without paying her retirement benefits and terminal benefits or gratuity on the dates they fell due namely, 31st August, 2020 and 6th May, 2022.

2.8. Following the Petitioners' termination from employment as Vice Chancellor and Deputy Vice Chancellor, respectively, the Respondent removed them from the payroll, despite the fact that their retirement or pension benefits and terminal benefits or gratuity remained unpaid.

The Petitioners Arguments

3. The Petition was accompanied by written skeleton arguments and an abstract of authorities. The Petitioners argued that:

3.1. They had a right to be paid a pension benefit upon their separation based on Article 187(1) and (3) of the Constitution, which provides that:

187. (1) An employee, including a public officer and Constitutional office holder, has a right to a pension benefit.

(2)

(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.**

- 3.2. In the case of *Anderson Mwale and Others v Zambia Open University*¹ this Court pronounced that the pension benefit envisaged by the framers of the Constitution is granted under or by a relevant pension law or any other law.
- 3.3. In this case, the law under which the Petitioners seek to be granted their pension benefit is section 38 (3) (b) (iii) of the *Higher Education Act No.4 of 2013* (the “**HEA**”) for the 1st Petitioner and section 5 of the *Local Authorities Superannuation Fund (Amendment) Act No. 8 of 2015* (the “**LASFA**”) for the 2nd Petitioner.
- 3.4. The retirement benefits and gratuity due to the Petitioners amounted to a pension benefit in terms of Article 266 of the Constitution. Upon termination of their employment contracts, however, the Respondent did not pay the Petitioners their pension benefits or the gratuity owed but

removed them from the payroll contrary to Article 189(2) of the Constitution which provides that:

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.

3.5. The Petitioners ought to have been paid their pension benefits promptly as pronounced in the case of **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission²**. The Respondent's non-payment of pension benefits entitled the Petitioners to be retained on the payroll.

3.6. By virtue of Article 1 of the Constitution, the Respondent's first-in-first-out policy ("FIFO policy") and its internal memorandum on pre-requisite for statutory retirement and retention of employees on the payroll dated 12th February, 2019 is unconstitutional because it disqualifies discharged employees from being retained on the payroll while awaiting payment of pension benefits.

4. At the hearing of the Petition, Counsel for the Petitioners augmented the written skeleton arguments with oral submissions. Counsel relied on the cases of **Levy Mwale v**

Zambia National Broadcasting Corporation³ and **Owen Mayapi and 4 others v Attorney General⁴** and submitted that:

- 4.1. The 1st Petitioner's retirement benefits for the nineteen years he served the Respondent were paid. Thus, the 1st Petitioner's grievance was the Respondent's failure to pay gratuity under the five-year contractual term running from 2016 up to 2021 and the pro-rated gratuity for the subsequent contract.
- 4.2. Section 38(3) (b) (iii) of the **HEA** directs the Respondent to pay terminal benefits to academic and administrative staff or employees. Thus, this provision underpins the 1st Petitioner's right to be paid a gratuity and since he was not paid on the date that he was dismissed, he ought to have been retained on the payroll.
- 4.3. The 2nd Petitioner's retirement benefits are granted under section 5 of the **LASFA** which provides that a member of the Fund shall be paid a retirement benefit. The 2nd Petitioner was a member of the Fund and she was entitled to be paid. The Respondent did not, however, pay the 2nd Petitioner's retirement benefits for the twenty-two years she served the Respondent.

- 4.4. A pension benefit must be paid promptly, on an employee's last working day. Thus, an employee whose gratuity is protected by statute must be retained on the payroll.
- 4.5. The gratuity owed to the Petitioners under their fixed term contracts is protected by the **HEA** whereas the pension benefits under their permanent and pensionable contracts is protected by the **LASFA**.
- 4.6. Thus, the Respondent contravened the Constitution by not paying the Petitioners their pension benefits in full on their last working day and not retaining them on the payroll during the period their pension benefits remained unpaid.
- 4.7. The Respondent must pay the Petitioners their pension benefits and retain them on the payroll for the period their pension benefits were not paid based on their last salary which they received in their capacity as Vice Chancellor and Deputy Vice Chancellor, respectively.

The Respondent's Case

5. The Respondent filed an Answer to the Petition on 27th June, 2022, in which it was asserted that it did not contravene

Article 189(1) and (2) of the Constitution and that the Petitioners did not show the laws that support their claim for retention on the payroll. The Respondent's affidavit verifying answer was deposed to by its Registrar, Theresa C. Chalwe. The affidavit disclosed that:

5.1. The Petitioners were employed as Lecturers in 1988 and 1998 and retired in 2014 and 2019, respectively. Upon retirement, the Respondent informed them that their retirement benefits would be paid in accordance with the FIFO policy. The Petitioners did not challenge the decision to be paid using the FIFO policy.

5.2. In May, 2016, the 1st Petitioner was engaged by the Respondent on a five-year fixed term contract as Vice Chancellor. The 1st Petitioner was further engaged for another five-year contract in July, 2021. In February, 2020, the 2nd Petitioner was engaged by the Respondent as Deputy Vice Chancellor on a four-year fixed term employment contract.

5.3. On 6th May, 2022, the Petitioners' fixed term employment contracts were terminated pursuant to their respective terms and they were paid three months pay in lieu of notice. On or

about 3rd June, 2022, the 1st Petitioner was paid his pension benefits in line with the FIFO policy.

5.4. The Petitioners were removed from the payroll following this Court's decision in numerous cases on the retention of employees who serve on fixed term contracts. In addition, Cabinet Office issued circular no. B25 of 2022 directing that employees who served on contractual terms of appointment, such as the Petitioners, should not be retained on the payroll pending payment of gratuity.

5.5. The 2nd Petitioner, however, is listed on the queue for payment of her retirement benefits and gratuity and she will be paid in accordance with the FIFO policy.

The Respondent's Arguments

6. The Respondent filed written skeleton arguments on 28th July, 2022. The Respondent cited the cases of ***Lubunda Ngala and Jason Chulu v Anti-Corruption Commission***² and ***Anderson Mwale and Others v Zambia Open University***¹ and argued that:

6.1. The rationale for retention on the payroll is to cushion retirees from the financial hardships they may face during the period that their pension benefits remain unpaid. In the case of the 1st Petitioner, his pension benefits were already paid and therefore, retention on the payroll did not apply to him.

6.2. The 2nd Petitioner retired in 2020 as a Lecturer but immediately took up a position as the Deputy Vice Chancellor of the Respondent. This appointment ensured that she continued drawing a salary. She was not retained on the payroll after her early retirement due to her immediate engagement as Deputy Vice Chancellor.

6.3. The status of the 2nd Petitioner changed from a pensionable employee to one who was entitled to gratuity at the end of her contract. The result is that the 2nd Petitioner does not fall within the scope of Article 189(2) of the Constitution because she suffered no hardships due to her immediate appointment as Deputy Vice Chancellor after her retirement.

6.4. The Petitioners' final employment contract with the Respondent was on a fixed term basis and not on permanent and pensionable terms. Thus, what is due to the

Petitioners based on their last engagement is gratuity and not a pension benefit.

6.5. Section 38(3) (b) (iii) of the **HEA** does not amount to a pension law and the Petitioners did not show that the gratuity owed to them under their final employment contracts with the Respondent was a pension benefit and that it was provided for under an existing law.

7. At the hearing of the Petition, Counsel for the Respondent augmented the skeleton arguments with the following oral submissions:

7.1 The Petitioners should be treated differently. This is because the 1st Petitioner was already paid his pension and the question that remains is whether he should remain on the payroll simply because he is owed gratuity for the fixed term contracts he served. In respect of the 2nd Petitioner, the question to be addressed is whether an employee who voluntarily and willfully changes their employment status from permanent and pensionable to a fixed term contract should be retained on the payroll.

7.2 This Court has dealt with the issue of gratuity as to whether it is a pension benefit or not. On the strength of the case of ***Anderson Mwale and Others v Zambia Open University***¹, gratuity is not a pension benefit unless it is provided for under a pension law or any other law. The provision that the Petitioners have relied on for payment of their gratuity as a pension benefit, namely, section 38(3) (b) (iii) of the **HEA**, does not relate to a public university and has therefore, been misplaced.

7.3 The Latin maxim *ejusdem generis*, means that a word must be known by the company it keeps. Thus, reference to a pension law speaking to a gratuity as a pension benefit, means that any other law that would be efficacious in terms of retaining an employee who is on a fixed term contract pending payment of the gratuity, must be related to or have some semblance of pension regulations.

7.4 The words 'promptly' and 'regularly' used in Article 189(2) of the Constitution, when construed using the literal rule of interpretation, are conjunctive and not disjunctive. Further, a gratuity is a one-off payment at the end of an employee's fixed term contract or where the contract is terminated before its

end, it's pro-rated and paid as a lump sum at once. A gratuity, therefore, cannot be paid regularly and that falls outside of the definition of a pension benefit.

7.5 The Petitioners retired on their own volition and opted to enter into fixed term contracts. Their retirement ended their subscription to the Fund under the **LASFA** and for that reason, they are precluded from relying on it.

7.6 The FIFO policy is a system and practice that the Respondent has used for several years to pay out terminal benefits and gratuity. This policy arose from negotiations between the Respondent's management and the recognised trade unions and it does not abrogate the Constitution.

8. When prodded by the Court, Counsel for the Respondent confirmed that the 2nd Petitioner is entitled to her pension benefit even after her voluntary change in employment status from a permanent and pensionable contract to a fixed term contract. Counsel further confirmed that the Respondent owed the 2nd Petitioner monies under her permanent and pensionable contract and gratuity under her fixed term contract. Despite this, the Respondent could not retain her on

the payroll because that would result in her drawing two salaries.

The Petitioners' Reply

9. The Petitioners filed an affidavit in reply on 6th July, 2022, and written skeleton arguments in reply on 9th August, 2022. In the affidavit in reply, the Petitioners deposed that:

9.1 The Respondent is under a constitutional obligation to pay the Petitioners their pension benefits and that financial difficulties cannot be used as a licence to abrogate constitutional provisions. A constitutional obligation cannot be defeated by administrative tools, policy or a cabinet circular or be waived by way of estoppel as suggested by the Respondent.

9.2 The Petitioners' decision to be added to the list of retirees scheduled for payment of terminal benefits in accordance with the FIFO policy does not take away their constitutional right to be paid pension benefits promptly or be retained on the payroll until full and final payment.

10. In the written skeleton arguments in reply, the Petitioners reiterated that they were entitled to be paid a pension benefit and, where that benefit was not paid, to be retained on the payroll. In augmenting the written skeleton arguments,

Counsel for the Petitioners submitted that the Petitioners employment contracts at pages 47-48 and 66 of the record of proceedings, clearly show that the **HEA** applies to the Petitioners and the Respondent. Consequently, the Respondent cannot not claim that section 38(3) (b)(iii) of the **HEA** is inapplicable.

Facts Not in Dispute

11. From the documentary evidence before this Court and taking into account the parties' submissions before us, we find that the following facts are not in dispute:

- 11.1 The 1st Petitioner, served the Respondent under three (03) employment contracts. Firstly, the 1988 contract on permanent and pensionable terms. Secondly, the 2016 fixed term five-year contract. Thirdly, the 2021 fixed term five-year contract.
- 11.2 The 1988 employment contract came to an end on 29th January, 2014, by way of early retirement. The Respondent paid the 1st Petitioner the pension benefits due under the 1988 contract on 3rd June, 2022.
- 11.3 The 2016 and 2021 fixed term five-year contracts attracted gratuity upon their cessation. The 2016 fixed term five-year

contract ended by effluxion of time. The 2021 fixed term five-year contract was brought to an end by the Respondent on 6th May, 2022. The gratuity accrued under the two fixed term five-year contracts was not paid.

11.4 The 2nd Petitioner served the Respondent under two (02) employment contracts namely, the 1998 contract on permanent and pensionable terms and the 2020 fixed term four-year contract.

11.5. The 1998 employment contract came to an end on 31st January, 2019, by virtue of early retirement. The 2020 fixed term four-year contract ended on 6th May, 2022, at the instance of the Respondent.

11.6. The retirement benefits, terminal benefits and gratuity due to the 2nd Petitioner under both her employment contracts have not been paid by the Respondent.

Issues for Determination

12. Having outlined the facts that are not in contention and taking into account the submissions by both parties, we wish to state that the main issue for determination is whether or not, on the evidence before us, the Respondent contravened Articles 187 and 189 of the Constitution by removing the

Petitioners from the payroll. Flowing from the main issue, is whether or not the terminal benefits in the form of gratuity which the Petitioners are entitled to under their respective fixed term contracts are pension benefits as envisaged by the Constitution.

Evaluation and Determination of Issues

13. In determining the issues in this case, it is imperative that we consider Articles 187, 189 and 266 of the Constitution as well as the relevant case law and legal principles in relation to a pension benefit. This Court has had the occasion to interpret these provisions. Article 187(1) of the Constitution confers on an employee, a right to a pension benefit. Article 266 of the Constitution defines a pension benefit as follows:

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

14. When faced with a question relating to the kind of terminal benefits that fall within the definition of pension benefit under Article 266 of the Constitution, this Court stated the following in the case of ***Lubunda Ngala and Jason Chulu v. Anti-Corruption Commission***²:

...our firm view is 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....

15. The pension benefit contemplated under Article 187(3) of the Constitution is one that is granted by or under an Act of Parliament. To this end, in the case of **Anderson Mwale and Others v Zambia Open University**¹ we pronounced that:

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.....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.

16. Once a person is due a pension benefit under Article 187 of the Constitution and that pension benefit is not paid on that person's last working day, Article 189 (2) of the Constitution provides that, that person must be retained on the payroll based on the last salary received by that person. Accordingly, in the case of **Owen Mayapi and 4 Others v Attorney General**⁴ this Court opined 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.

17. What we discern from the foregoing authorities is that:
 - 17.1 Even though the definition of a pension benefit is broad and includes gratuity, it is not all benefits that accrue at separation that amount to a pension benefit under the Constitution;
 - 17.2 For a pension to qualify as a pension benefit under the Constitution, it must first be provided for under an Act of Parliament; and
 - 17.3 If it is not provided for by an Act of Parliament, then that benefit cannot be categorised as a pension benefit and thus, retention on the payroll cannot be sustained.
18. In order for us to address the issues outlined in the present case, we deem it helpful that we consider the Petitioners' claims for pension benefits under their permanent and pensionable contracts and their fixed term contracts separately.

A. The Petitioners' Permanent and Pensionable Employment Contracts

19. As already stated, the Petitioners' initial employment contracts with the Respondent were under permanent and pensionable terms. In respect of the 1st Petitioner, it is common cause that his 1988 contract as a Lecturer on permanent and pensionable terms came to an end on 9th January, 2014, via early retirement. It is undisputed that the 1st Petitioner's pension benefits arising from the 1988 contract were paid on 3rd June, 2022. It follows, therefore, that at the time the Petition was filed on 15th June, 2022, no pension benefit was due and thus, no constitutional question could arise in respect of the 1st Petitioner's 1988 contract. We have arrived at this conclusion on the basis of our decision in the case of ***Lieutenant Chrispin S. Muchindu v Attorney General***.⁵

20. In regard to the 2nd Petitioner's 1998 contract on permanent and pensionable terms as a Lecturer, it is not in dispute that it ended through early retirement on 31st August, 2020, with effect from 31st January, 2019. The 2nd Petitioner contended that she had a right to the pension benefit accrued under this employment contract and that the Respondent's failure to pay

her pension benefits on her last working day and to retain her on the payroll contravened Articles 187 and 189 of the Constitution. She relied on the **LASFA** as the Act of Parliament that granted her a pension benefit under her 1998 permanent and pensionable contract.

21. The Respondent on the other hand, argued that the 2nd Petitioner was not paid on her last working day on account of the FIFO policy and that she could not be retained on the payroll because she took up employment as Deputy Vice Chancellor upon her early retirement. Thus, retaining her on the payroll would have resulted in her drawing two salaries simultaneously.
22. The Respondent, however, admitted that the 2nd Petitioner contributed to the Fund provided under the **LASFA** during the duration of her permanent and pensionable contract and that she only stopped contributing and being a member of the Fund when she retired as a Lecturer. Furthermore, the Respondent conceded that it owes the 2nd Petitioner a pension benefit in the sum of K4,342,039.70.
23. It is our considered view that the fact that the Respondent approved the 2nd Petitioners application to go on early

retirement as shown on page 56 of the record of proceedings, attracts a pension benefit within the provisions of Articles 187 and 189 of the Constitution. This view aligns with our decision in the case of ***Levy Mwale v Zambia National Broadcasting Corporation***.³

24. Further, we have carefully reviewed the *Local Authorities Superannuation Fund Act Chapter 284 of the Laws of Zambia* as amended by the *Local Authorities Superannuation Fund (Amendment) Act No. 8 of 2015*, and we are satisfied that the said Act is a pension law. This is evidenced by its long title which provides, *inter alia*, that it's an Act to provide for the payment of pensions from the Fund.
25. Our position is that once the 2nd Petitioner retired, her right to pension benefit was triggered and it ought to have been paid in accordance with Articles 187 and 189 of the Constitution irrespective of whether or not she took up employment after retirement with the Respondent or elsewhere. The Respondent's argument that the 2nd Petitioner would have received two salaries if she was retained on the payroll, therefore, has no basis under the Constitution.

26. In light of the foregoing, we find that the 2nd Petitioner's early retirement and her membership to the Fund qualified her for a pension benefit. Since she was not paid her pension benefit in full on her last working day under the 1998 permanent and pensionable contract, it follows that Article 189(2) of the Constitution applies to her and she must be retained on the payroll based on her last salary as a Lecturer.
27. The outcome in respect of the 2nd Petitioner, therefore, is that the Respondent's conduct in removing her from the payroll, after she retired early as a Lecturer and before her pension benefits under the 1998 permanent and pensionable contract were paid in full, is contrary to Article 189 (2) of the Constitution.

B. The Petitioner's Fixed Term Employment Contracts

28. After their retirement as Lecturers, the Petitioners were employed by the Respondent on fixed term employment contracts. The 1st Petitioner was employed as Vice Chancellor in 2016 for a five-year term and his employment was renewed in 2021 for a further five-year term. The 2nd Petitioner's fixed

term contract as Deputy Vice Chancellor was for a four-year period that commenced on 1st March, 2020.

29. The Petitioners submitted that the Respondent owed them terminal benefits in the form ^{of} gratuity under their fixed term employment contracts. They argued that this gratuity amounted to a pension benefit under Articles 187, 189 and 266 of the Constitution and that the relevant law that grants them the said gratuity is section 38(3)(b)(iii) of the **HEA**.
30. The Respondent contended that the Petitioners reliance on section 38(3) (b) (iii) of the **HEA**, was misplaced because that section did not relate to a public university such as the Respondent. In rebuttal, the Petitioners argued that the Petitioners' employment contracts expressly provided that the **HEA** applied to the Petitioners and the Respondent.
31. The issue in respect of the Petitioners' fixed term employment contracts is whether or not the gratuity thereunder qualifies as a pension benefit in terms of Articles 187 and 189 of the Constitution.
32. At this point we wish to mention that in the case of ***Gilford Malenji v Zambia Airports Corporation***⁶ we expressed our views on the kind of gratuity that could be classed as a

pension benefit under Articles 187 and 189 of the Constitution. We simply put it that:

Therefore, for one to claim gratuity as a pension benefit, it has to be a pension benefit granted to him under a relevant provision of the law.

33. We have examined section 38(3) (b) (iii) of the **HEA** which is the provision that the Petitioners allege grants them a pension benefit in the form of gratuity under their fixed term contracts. The said section 38(3)(b)(iii) falls under Part VI of the **HEA** and has a heading titled:

Transformation, Amalgamation and Closure of Higher Education Institutions.

34. Section 38(1) and (2) of the **HEA** provides for the establishment and declaration of constituent colleges of a public higher education institution at the discretion of the Minister responsible for education, by statutory order. This section, therefore, caters for amalgamations or mergers between public universities and other educational institutions to form constituent colleges.
35. A literal interpretation of section 38(3) of the **HEA** reveals that it applies to instances where the Minister responsible for education establishes a constituent college by amalgamating

or merging an educational institution with a public higher education institution.

36. Upon amalgamation, section 38(3) (b) (iii) of the **HEA**, empowers the Minister to make provision for the payment of terminal benefits for those employees of the educational institution whose services are not transferred to the public higher education institution.
37. Thus, it is clear that the terminal benefits envisaged in section 38(3)(b)(iii) of the **HEA** relates to the employees of an educational institution that has amalgamated or merged with a public higher education institution pursuant to a statutory order issued by the Minister responsible for education. We note that by virtue of section 2 of the **HEA**, the Respondent is a public higher education institution and not an educational institution.
38. Section 38(3)(b)(iii) of the **HEA** therefore, only applies to employees of an education institution that has merged with a public higher education institution such as the Respondent. It is therefore, not applicable to the Petitioners' service in so far as terminal benefits or pension benefits are

concerned because they were employees of a public higher education institution and not an education institution.

39. As a result, section 38(3) (b) (iii) of the **HEA** does not grant a pension benefit to the Petitioners in their capacity as the Respondent's Vice Chancellor and Deputy Vice Chancellor, respectively. In any case, there is no evidence that the Respondent amalgamated or merged with a public higher education institution or of a statutory order to that effect. We therefore, agree with the Respondent that the Petitioners misplaced the operation of section 38(3) (b) (iii) of the **HEA**.

40. There is therefore, no pension law or other law provided by the Petitioners in this case that grants them a pension benefit in the form of gratuity. The result is that the Petitioners have not proved their allegation that the Respondent contravened Articles 187 and 189 of the Constitution in respect of their claim for gratuity under their respective fixed term contracts.

C. The Constitutionality, or lack thereof, of the Respondent's FIFO Policy and Internal Memorandum

41. The Petitioners contend that the Respondent's FIFO policy and the internal memorandum on pre-requisites for statutory retirement and retention of employees dated 12th

February, 2019, are contrary to Articles 187 and 189 of the Constitution. The Respondent argued that the FIFO policy does not contravene the Constitution.

42. The Respondent's internal memorandum aforesaid is produced at pages 74 and 75 of the record of proceedings. It is, however, illegible making it impossible to discern its contents, particularly the impugned clause 2(a). The Petitioners have not furnished us with a readable copy of the internal memorandum. They have effectively not proved their claim and we therefore, decline to grant the declaration that the Respondent's internal memorandum is null and void.
43. In respect of the FIFO policy, the bottom line is that every employee that is owed a pension benefit under Article 187 of the Constitution must be retained on the payroll pursuant to Article 189(2) of the Constitution. A retired employee may, therefore, be subjected to the FIFO policy and simultaneously be retained on the payroll while awaiting full payment of his or her payment of pension benefits.
44. In this case, the Respondent's FIFO policy is unconstitutional only to the extent of its operation in relation to the 2nd Petitioner not being retained on the payroll after her early

retirement and upon being placed on the queue of retired personnel due to be paid their pension benefits.

ORDERS

45. For these reasons, we make the following Orders:

45.1 All of the 1st Petitioner's claims in the Petition lack merit and we accordingly dismiss them.

45.2 The 2nd Petitioners claim for gratuity as a pension benefit under her four-year fixed term contract lacks merit and it is accordingly dismissed.

45.3. We grant the 2nd Petitioner's claim for a declaration that the decision by the Respondent to remove her from the payroll without paying her pension benefits under her 1998 permanent and pensionable contract is contrary to Article 189 of the Constitution.

45.4. The 2nd Petitioner's claim for a declaration that the Respondent's FIFO policy is contrary to the provisions of Articles 187 and 189 of the Constitution is partially successful in so far as it relates to her non retention on the payroll after her early retirement.

45.5 We order the Respondent to pay the 2nd Petitioner her salaries for the period her pension benefits remained unpaid in full,

based on the last salary that she received as a Lecturer under the 1998 permanent and pensionable contract. For avoidance of doubt, the 2nd Petitioner should be paid salary arrears from the time she ought to have been retained on the payroll on 31st January, 2019 and should continue to be retained on the payroll until her pension benefit is paid in full.

45.6 The salaries due to the 2nd Petitioner shall be paid together with interest at 6% from the date of filing of the Petition up to Judgment date and thereafter at the average lending rate as determined by the Bank of Zambia up to date of final payment.

45.7 Each party to bear their own costs.



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P. MULONDA
CONSTITUTIONAL COURT JUDGE



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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE