

IN THE CONSTITUTIONAL COURT

2021/CCZ/0006

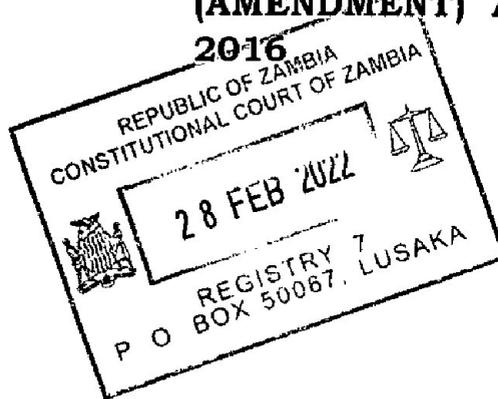
HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

**IN THE MATTER OF: ORDER IV RULE 1 OF THE
CONSTITUTIONAL COURT
RULES**

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

BETWEEN:



GIFT MOYO

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

***CORAM: Sitali, Mulenga, Mulonda, Munalula and Chisunka
JJC, On 21st July, 2021 and 28th February, 2022.***

APPEARANCES:

***For the Petitioner: Mr. C. Simukonda - Messrs
Kang'ombe and Associates***

***For the Respondent: Colonel F. Chidakwa and Captain F.
Mandumbwa - Attorney General's
Chambers***

J U D G M E N T

Chisunka, JC, delivered the Judgment of the Court.

Legislation referred to:

1. ***The Constitutional Court Rules, Statutory Instrument No. 37 of 2016***
2. ***The Constitution of Zambia (Amendment) Act No. 2 of 2016***
3. ***The Zambia National Service Act Chapter 121 of the Laws of Zambia***
4. ***The Public Service Pensions Act No 35. of 1996***
5. ***The Defence Act Chapter 106 of the Laws of Zambia***
6. ***The Defence Pensions Regulations, Statutory Instrument No. 184 of 1966***
7. ***The Zambia National Service (Pensions) (Application) Regulations, Statutory Instrument No. 99 of 197***
8. ***The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia***

Cases referred to:

1. ***Owen Mayapi and 4 Others v Attorney General 2019/CCZ/003***
2. ***Lubunda Ngala and Jason Chulu v Anti-Corruption Commission Selected Judgment No. 4 of 2018***
3. ***Levy Mwale v Zambia National Broadcasting Corporation 2020/CC/0012***
4. ***Mcqueen Zenzo Zaza v ZESCO Limited 2018/CCZ/006***
5. ***Gervas Chansa v Attorney General 2019/CCZ/004***

Introduction

1. The delay in delivering this Judgment is regretted. At the time of hearing this matter, we sat with Hon. Lady Justice Munalula, but at the time of delivering this judgment she was indisposed. This is therefore a majority Judgment.

2. **Gift Moyo** (the ‘Petitioner’) filed a Petition on 9th March, 2021, against the **Attorney General** (the ‘Respondent’) alleging contravention of Article 189(2) of the *Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016* (hereafter the ‘Constitution’). The Petition was brought before us under Order IV Rule 1 of the *Constitutional Court Rules, Statutory Instrument No. 37 of 2016*. On this basis, the Petitioner submits that this Court has jurisdiction to hear, determine and grant the remedies that he is seeking, namely:
 - 2.1 **A declaration that the conduct of the Respondent to remove the Petitioner from the payroll before the payment of pension benefits due to him was contrary to Article 189(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016;**

 - 2.2 **An order for payment of a sum of K 165,950.00 being monies owed to the Petitioner by the Respondent in 25 months’ salary arrears from April, 2018 to 30th April, 2020;**

 - 2.3 **Interest on sums payable;**

 - 2.4 **Legal Costs;**

2.5 **Such other order as this Honourable Court shall deem just.**

The Petitioner's Case

3. The background material facts are contained in the Petition, the affidavit verifying facts and further affidavits filed on 9th March, 11th April and 4th June, 2021, respectively. The affidavit verifying facts, sworn by the Petitioner, discloses that:

3.1 The Petitioner was employed by the Zambia National Service ("ZNS") as a Non-Commissioned Officer on 4th May, 2000 and stopped working for ZNS on 20th March, 2018. His last salary was K 6,638.

3.2 Upon stopping work, ZNS removed him from the payroll before he was paid his retirement benefits. His retirement benefits were only paid in full on 30th April, 2020, some twenty five months after they fell due.

3.3 During the period he was off the payroll, after he stopped work, he was not paid his salary and accumulated salary arrears in the sum of K165, 950.00 which remain unpaid to date.

The Arguments and Submissions

4. The Petition was accompanied by Heads of Arguments and List of Authorities. The Petitioner contended that his removal from the payroll prior to the payment of his pension benefits was 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.

5. On the strength of this, he submitted that his removal from the payroll was unconstitutional and went against this Court's decision and pronouncements in a number of cases in particular, *Owen Mayapi and 4 Others v Attorney General*¹, *Lubunda Ngala and Jason Chulu v Anti-Corruption Commission*², *Levy Mwale v Zambia National Broadcasting Corporation*³ and *Mcqueen Zenzo Zaza v ZESCO Limited*⁴. In particular, he highlighted the *Owen Mayapi*¹ case in which we stated that:

... the provisions of Article 189 of the Constitution must be effected without resorting to secondary issues. Further, the argument touching on the strain that paying retired employees their salaries and allowances would put on the scarce government resources is not tenable in that the remedy does not

lie in restricting what is paid to such retired personnel. The remedy lies in each state agency or employer ensuring that retired personnel are paid their pension benefits promptly as provided in Article 189(1) of the Constitution.

6. At the hearing, Counsel informed the Court that the question presented to the Court was whether or not the Petitioner was entitled to be retained on the payroll. He submitted that to answer that question, recourse should be had to the *Public Service Pension Act No. 35 of 1996*, which in section 2 defines pensionable service to mean the aggregate of continuous service, if any, in respect of which contributions have been paid under Part V.
7. Counsel submitted that because the Petitioner worked for the Respondent for a continuous period of eighteen years, he was entitled to be paid a pension and to be retained on the payroll until payment of those benefits after he stopped working for the Respondent.
8. Counsel drew our attention to the *Defence (Regular Force) (Pensions) Regulations, Statutory Instrument No. 184 of 1966* (hereafter '*Defence Pensions Regulations*') and contended that it applied to the Petitioner by virtue of regulation 2 of the *Zambia National Service (Pensions) (Application)*

Regulations Statutory Instrument No. 99 of 1976, which provided that the *Defence Pensions Regulations* shall apply to all servicemen in the Zambia National Service.

9. It was, also submitted that pursuant to regulation 4 of the *Defence Pensions Regulations*, the Petitioner was entitled to be paid a pension because of the fact that he served ZNS continuously for eighteen years. Based on the foregoing, the Petitioner was paid a pension benefit and that he was entitled to be paid salaries for the period he was not retained on the payroll, which is from the date of his separation up to the date the Respondent finally paid his pension benefits.

The Respondent's Case

10. The Respondent filed an Answer to the Petition on 6th April 2021, in which it was contended that the Petitioner was discharged from ZNS on disciplinary grounds on 20th March, 2018. The Petitioner was, therefore, removed from the payroll upon separation due to the disciplinary nature of his discharge from ZNS. That since the Petitioner never retired from ZNS by age or other circumstances, he did not receive any retirement benefits as alleged, but was paid a pension refund, and such a payment did not come within the meaning

of “pension benefits”. The Respondent contended that the Petitioner was not entitled to any of the remedies sought.

11. The Respondent’s answer was supported by an affidavit, which was amended with leave of the Court, filed on 21st May 2021. The affidavit in opposition was sworn by Lieutenant Colonel Charles Bwalya Mwela, who deposed that:

- 11.1 The Petitioner was enlisted into ZNS on 4th May, 2000, as a Non-Commissioned Officer, and he was discharged from ZNS on 20th March, 2018, following a disciplinary process for offences the Petitioner committed under the *Zambia National Service Act*.

- 11.2 Upon his discharge, the Petitioner was entitled to receive some payment from the Public Service Pension Fund which he received for the eighteen years he served ZNS.

- 11.3 The Respondent removed the Petitioner from the payroll between the period he was discharged and the payment of his benefits from the Public Service Pension Fund.

- 11.4 The Respondent did not retain the Petitioner on the payroll after his discharge because he did not separate

from ZNS by way of retirement. The Petitioner separated from ZNS on disciplinary grounds and was therefore excluded from being retained on the payroll. The Respondent did not therefore owe the Petitioner any salary arrears.

The Arguments and Submissions

12. In making his oral submissions, the Respondent's Counsel informed the Court that he concurred with the Petitioner on the issue to be determined before the Court as stated by the Petitioner. His only objection was to the method proposed by the Petitioner to answer the question presented to the Court. In this respect, he referred the Court to the case of ***Levy Mwale v Zambia National Broadcasting Corporation***³, for the proposition that an employee's mode of separation must be investigated before that employee can be said to qualify for retention on the payroll. The Respondent contended that the Petitioner separated from ZNS by way of a discharge that was anchored on disciplinary grounds.

13. Relying on the case of ***Owen Mayapi and 4 Others v Attorney General***¹, the Respondent submitted that a pension benefit is triggered by retirement due to age or other

circumstances. The Respondent contended that the Petitioner did not separate from the employ of the Respondent by way of retirement by age or any other circumstance, and thus, the Petitioner was not entitled to be retained on the payroll.

14. The Respondent argued that the conditions for retirement in the public service are laid down in section 33 (i) and (ii) of the *Public Service Pensions Fund Act No. 35 of 1996*, (hereinafter 'Act No.35 of 1996') and these include, *inter alia*, the condition that an officer shall retire on:

14.1 the fifty-fifth anniversary of his date of birth; or

14.2 on giving due notice, retire on or after attaining the age of fifty-five years; or

14.3 completing twenty years' service, whichever is the earlier

15. The Respondent further argued that the Petitioner did not fit in any of the categories enumerated in section 33 (i) and (ii) of *Act No. 35 of 1996*. It was contended that the Petitioner was less than forty-five years of age at the time of his separation and having only served ZNS for eighteen years, the Petitioner had served less than the twenty years' service required in

section 33 (i) and (ii) of *Act No. 35 of 1996* and cannot legally be called a retiree or treated as such.

16. The Respondent also relied on the case of ***Lubunda Ngala and Jason Chulu v Anti-Corruption Commission***², and submitted that not every payment made after separation from employment qualifies to be defined as a pension benefit for purposes of retention on the payroll. It was submitted that the Petitioner being a contributing member of the Public Service Pension Fund, was entitled to some form of payment, even though that payment did not qualify him to be a retiree and thus, what was paid to him amounted to a **pension refund.**

17. Counsel for the Respondent argued that the Public Service Management Division Circular Number B21 of 2018, which this Court had occasion to interpret in the ***Owen Mayapi***¹ case, provides for how employees who separate by means other than retirement ought to be treated. Counsel further submitted that the rationale behind Article 189(2) of the Constitution, was to reduce hardship on retirees, and not on employees who separate through a disciplinary process.

18. Counsel further argued that the *Defence Pensions Regulations* and the *Zambia National Service (Pensions) (Application) Regulations*, relied on by the Petitioner, were old law and were no longer authority because they were replaced by *Act No. 35 of 1996*, which, it was submitted, is now the sole authority in relation to computation and payment of pension benefits to public workers. It was submitted on behalf of the Respondent that qualification to get a pension in the service was not determined by the years of service completed, but by the mode of separation from the service.

The Petitioner's Reply

19. In reply, Counsel for the Petitioner submitted that the *Defence Pensions Regulations* and the *Zambia National Service (Pensions) (Application) Regulations*, were still good law and had not been repealed nor replaced and thus they could be relied on. It was argued that the Petitioner was discharged from employment and a discharge was not a punishment under the *Zambia National Service Act Chapter 121 of the Laws of Zambia* (hereinafter referred to as "CAP 121". It was also submitted that section 32 of *CAP 121* lists punishments

that may be imposed on an offender and a discharge was not a punishment under the said section.

20. The Petitioner had also filed a written reply to the Respondent's Answer and an affidavit in reply on 13th April, 2021. We will not replicate the contents of the Petitioner's reply as it largely repeats the contents of the Petition and affidavit in support.

Facts Not in Dispute

21. 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:

21.1 The Petitioner was employed by the Respondent into ZNS on 4th May, 2000, as a Non-Commissioned Officer.

21.2 The Petitioner separated from ZNS on 20th March, 2018 through a discharge after a disciplinary process.

21.3 The Respondent did not retain the Petitioner on the payroll after the Petitioner separated from the employ of ZNS.

21.4 The Petitioner received a payment from the Public Service Pension Fund for the eighteen years he served ZNS.

Issues for Determination

22. Having outlined the issues 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 Article 189(2) of the Constitution by removing the Petitioner from the payroll before he was paid by the Public Service Pension Fund. To resolve this, we deem it imperative to first determine whether or not the payment paid to the Petitioner was a pension benefit for purposes of Article 189(2) of the Constitution and thus entitled him to be retained on the payroll.

Evaluation and Determination of Issue

23. To address the issue, we deem it helpful to briefly review the arguments that were canvassed before us. We note that the issue has two limbs to it, namely retention on the payroll and mode of separation as can be discerned from the submissions by the parties. The Petitioner's arguments are predicated on

retention, while the Respondent's arguments are anchored on mode of separation.

24. The Petitioner submitted that he was entitled to be paid a pension benefit and consequently, to be retained on the payroll until payment of his pension benefits on grounds that he served the Respondent for a continuous period of eighteen years. The Petitioner largely relied on the *Defence Pensions Regulations* for this submission.
25. The Respondent, on the other hand, argued that the *Defence Pensions Regulations* did not apply in this case, as the Regulations were superceded by *Act No. 35 of 1996*. The Respondent further argued that, in any case, the Petitioner's mode of separation from employment precluded the Petitioner from being retained on the payroll.
26. There is therefore, a dispute as regards the relevant applicable pension law between the *Defence Pensions Regulations* and *Act No. 35 of 1996*, in this case.
27. Our view is that by virtue of section 20(4) of the Interpretation and General Provisions Act, CAP 2, any statutory instrument that is inconsistent with an Act of Parliament is void to the

extent of the inconsistency. This therefore, entails that the provisions of *Act No. 35 of 1996* prevail over those of the *Defence Pensions Regulations*.

28. Furthermore, we are guided by the maxim *leges posteriores priores contrarias abrogant*, which in essence is a canon of construction that means that later Acts of Parliament abrogate prior contrary laws, as the later Act shows the intention of the legislature. This position is strengthened by the long title to *Act No. 35 of 1996* which states that it is:

“An Act to consolidate the law relating to pensions and other benefits for persons employed in the Public Service...”

29. In view of this, we are inclined to apply the provisions of *Act No. 35 of 1996* as opposed to *Defence Pensions Regulations* in this case. For the avoidance of doubt, the *Defence Pensions Regulations* are not applicable to the Petitioner for the foregoing reasons. We now examine the two limbs below.

A. The Petitioner’s Mode of Separation

30. The Petitioner submitted that he merely “stopped work” and that he was neither discharged nor dismissed by the Respondent. The Respondent contended that the Petitioner was discharged from the employ of the Respondent after a

disciplinary process that found the Petitioner guilty of committing offences under *CAP 121*.

31. We have had the opportunity to review the documents submitted in this case. Pages 7 to 24 of the Respondent's supplementary record of proceedings filed on 11th June 2021, clearly show the record of the disciplinary hearing against the Petitioner. It is plain from the said record of proceedings that the Petitioner was charged with the following offences by his Commanding Officer:

31.1 Discreditable conduct contrary to section 29(1)(d) of the Zambia National Service Act CAP 121;

31.2 Insubordination contrary to section 29(1)(b)(i) of the Zambia National Service Act CAP 121;

31.3 Assault contrary to section 29(1)(o) of the Zambia National Service Act CAP 121; and

31.4 Threatening violence contrary to section 29(1)(o) of the Zambia National Service Act CAP 121.

32. The evidence on record demonstrates that on 20th March, 2018, the Petitioner appeared before the Commanding Officer to be heard on the four charges levelled against him. When called upon to answer to the charges against him, the

Petitioner requested the Commanding Officer to simply discharge him from employment. The Commanding Officer, however, declined his request of a discharge without due process and allowed the disciplinary matter against the Petitioner to proceed. Despite his request for a discharge, the Petitioner actively participated in his disciplinary hearing including cross-examining the witness brought against him.

33. At the conclusion of the disciplinary hearing, the Commanding Officer found the Petitioner guilty of three of the four charges against him namely, discreditable conduct, assault and threatening. Based on this guilty verdict against the Petitioner, the Commanding Officer discharged the Petitioner from employment on account of discipline.

34. Thus there is overwhelming evidence that the Petitioner was charged with four offences under *CAP 121*, he appeared before the Commanding Officer for a disciplinary hearing, and upon being found guilty of three of the four charges against him, the Petitioner was discharged from the Respondent on disciplinary grounds.

35. In view of the above evidence on record, we find merit in the Respondent's submission that the Petitioner's separation from the Respondent was caused by disciplinary action against the Petitioner.

B. Retention on the Payroll

36. The Petitioner submitted that he was entitled to a pension benefit and consequently, that he was entitled to be retained on the payroll for the period between his separation from the Respondent and the final payment of his pension benefits. The Petitioner based his argument on regulation 4 of the *Defence Pensions Regulations*, which defines pensionable service in the following terms (quoting relevant parts):

Pensionable service means continuous service in the Regular Force on or after a person' eighteenth birthday and shall include –

- (a) time spent on duty;**
- (b) time spent on leave; and**
- (c) time spent on attachment or secondment to any other military, naval or air force or to the service of a Scheduled Government.**

37. It was further submitted that due to the fact that the Petitioner served the Respondent for a continuous period of

eighteen years, the Petitioner was entitled to be paid a pension on the basis of regulation 4 of the *Defence Pensions Regulations*. The Respondent on the other hand, relied on the provisions of *Act No. 35 of 1996*, as the authority on payment of pension benefits.

38. The Petitioner made contributions to the Public Service Pensions Fund as shown on his payslip and on the award of payment of discharge benefits at pages 10-12 of the record of proceedings filed on 29 April, 2021.

39. In terms of what was paid to the Petitioner on separation, page 11 of the record of proceedings and page 25 of the supplementary record of proceedings indicate that the Petitioner was paid pursuant to section 41(b) of *Act No. 35 of 1996*, which section provides that:

Subject to the provisions of Part X, an officer who retires under section thirty-three on grounds other than those described in sections thirty-nine and forty shall, with effect from the date of the officer's retirement, be entitled-

(b) if the officer's pensionable service amounts to ten years or more, to a pension calculated as follows:

$\frac{KA \times B}{C}$

Where KA = the officer's pensionable emoluments;

B = the number of completed months of the officer's pensionable service;

C = the age at which the officer retires expressed in complete months;

SC = the sum of the officer's contributions;

I = interest at current Central Bank deposit rate;

Y = the number of completed years in respect of which the officer has contributed.

40. It is, however, clear that section 38 of *Act No. 35 of 1996*, provides that where a person is dismissed from employment that person is only entitled to a refund of the pension contributions made by that person at that point. Section 38 of *Act No. 35 of 1996* reads:

"An officer who is dismissed shall be refunded the sum of the contributions the officer made."

41. This being the case, the Petitioner has not shown that what he was paid was a pension benefit and not a pension refund.

Whether the Respondent contravened Article 189(2) of the Constitution.

42. The onus to prove that what was paid to the Petitioner after his separation from employment is a pension benefit for purposes of Article 189(2) of the Constitution lies on the

Petitioner. This position is settled and is consistent with what we said in the case of ***Gervas Chansa v Attorney General***⁵, that it is for the Petitioner to prove his case on a balance of probabilities in a civil suit. It was therefore, incumbent upon the Petitioner to adduce evidence to prove that the payment he received on separation was a pension benefit for the purposes of Article 189(2) of the Constitution.

43. The Petitioner contends that he was paid a pension benefit because the payment was made pursuant to section 41(b) of *Act No. 35 of 1996* which provides for benefits for officers retiring on grounds that are not prescribed. The Respondent argues that the Petitioner was paid a pension refund and the refund does not qualify to be defined as a pension benefit due to the Petitioner's mode of separation.
44. Our approach in resolving this issue, is that we must first determine what constitutes a pension benefit under the provisions of the Constitution. The Constitution defines a pension benefit in Article 266 to include a pension, compensation, gratuity or similar allowance in respect of a person's service.

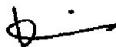
45. We have had occasion to pronounce what can properly be termed a pension benefit in the cases of **Lubunda Ngala²** and **Owen Mayapi¹**, where we stated that a pension benefit is triggered by retirement due to age or other circumstances, and those other circumstances must be akin to retirement. Thus, for a benefit paid on separation to be correctly termed a pension benefit, it must arise from retirement due to age or circumstances similar to retirement.
46. We also stated the rationale behind the enactment of Article 189(2) of the Constitution was that it was meant to cushion pensioners, retirees and retrenchees from the hardships they were experiencing as a result of delayed payment of their pension benefits or gratuity.
47. It is clear from the evidence before us that the Petitioner was discharged from employment following a disciplinary process on grounds of discipline and therefore, was effectively not retired. The question therefore, is whether a person that is discharged from employment, or otherwise separated, on disciplinary grounds can successfully make a claim under Article 189(2) of the Constitution.

48. We wish to state at this point that a discharge effected on disciplinary grounds is not, by any stretch of imagination, akin to retirement.
49. As the Petitioner was discharged from employment on disciplinary grounds he was not entitled to be retained on the payroll pursuant to the provisions of Article 189(2) of the Constitution.
50. Consequently, the Respondent did not contravene Article 189(2) of the Constitution by removing the Petitioner from the payroll. We therefore decline to grant the Petitioner the declaration that his removal from the payroll was unconstitutional.
52. Taking all of the above into account, we are of the settled view that this Petition lacks merit, and is accordingly dismissed. The rest of the claims sought by the Petitioner are also dismissed as they are anchored on the success of the claim for the said declaration.

53. Each party to bear their own costs.



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A. M. SITALI
CONSTITUTIONAL COURT JUDGE



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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE



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P. MULONDA
CONSTITUTIONAL COURT JUDGE



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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE