

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT NDOLA
(CONSTITUTIONAL JURISDICTION)

2020/CCZ/0012

BETWEEN:

LEVY MWALE

AND

ZAMBIA NATIONAL BROADCASTING CORPORATION RESPONDENT



CORAM: Chibomba, PC, Mulenga and Mulonda, JJC.

On 6th October, 2020 and on 10th December 2020

For the Petitioner: Mr. J. Ilunga of Messrs Ilunga and Company.

For the Respondent: Mr. M. Z. Zaza, In House Counsel, Zambia National Broadcasting Corporation.

J U D G M E N T

Chibomba, PC, delivered the Judgment of the Court.

Cases cited:

1. Lubunda Ngala and Jason Chulu v Anti-Corruption Commission, Selected Judgement No.4 of 2018
2. Owen Mayapi and 4 Others v Attorney General (2019) CCZ/ 003
3. Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and Others (2005) Z.R 135
4. Faustine Mwenya Kabwe v Justice Sakala and Others SCZ/8/93/2009
5. Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and Another, Selected Judgement No. 34 of 2017
6. South Dakota v North Carolina (1940) 192 USA 268: 48 ED 448.
7. Sturges v Crowninshield 17U.S (4 Wheat) 122 (1819)

Legislation referred to:

1. Constitutional Court Rules, Statutory Instrument No.37 of 2016
2. Constitution of Zambia (Amendment) Act No.2 of 2016
3. National Pension Scheme Authority Act No.7 of 2015

Other Works referred to:

1. Justice D. M. Dharmadhikari "Principle of Constitutional Interpretations; Some Reflections", 2004, 4 SCC (Jour) 1.

A. INTRODUCTION

[1] By petition filed pursuant to Order IV Rule 1 of the Constitutional Court Rules (the CCR) and Article 189 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, (the Constitution as Amended), the Petitioner, Mr. Levy Mwale, seeks the following reliefs from the Respondent, the Zambia National Broadcasting Corporation (ZNBC):-

- (i) **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;**
- (ii) **An order for payment of the sum of K177,646.00 being monies owed to the Petitioner by the Respondent in 14 months salary arrears from January, 2019 to February, 2020;**
- (iii) **Interest; and**
- (iv) **Legal costs.**

The Petition was filed together with an affidavit verifying facts.

B. RESPONDENT'S ANSWER TO THE PETITION

[2] In opposing the prayers in the petition, the Respondent filed an Answer and the Respondent's affidavit verifying facts.

C. THE PETITIONER'S EVIDENCE

[3] At the hearing of this matter, the learned Counsel for the Petitioner, Mr. Ilunga, relied on the petition filed and on the affidavit verifying facts, affidavit in reply and on the arguments contained in the Petitioner's Skeleton Argument as well as the oral evidence of the Petitioner.

[4] In his testimony, the Petitioner who testified as PW1 adopted his affidavit verifying facts and his affidavit in reply as his evidence in chief. The sum total of PW1's evidence in chief was that on 20th March, 2000 he was employed by ZNBC as Human Resource Officer. However, he was on 31st December, 2018 granted early retirement and that his last salary was paid on 31st December, 2018. He testified that his retirement benefits were only fully paid to him on 13th March, 2020. That however, he was removed from the Respondent's payroll on 31st December, 2018 and that despite engaging the Respondent over his non-retention on the payroll before his pension benefits were paid in full, the Respondent declined to do so and that a period of 14 months lapsed and hence the prayers in his petition.

[5] In cross-examination, PW1 told the Court that he freely and voluntarily applied to go on early retirement and that although he was aware of the Respondent's backlog of pending terminal benefits, he had

insisted on going on early retirement as payment of terminal benefits was not his concern. When further asked to confirm whether the grant of early retirement was against the wish of the Respondent, PW1 stated that he was not in the position to know. He reiterated that the Respondent granted him early retirement.

[6] In re-examination, PW1 confirmed that he had insisted to be allowed to go on early retirement.

D. THE RESPONDENT'S EVIDENCE

[7] In the Answer filed, the Respondent disputed liability and the allegations in the petition.

[8] The Respondent's Director of Human Resource and Administration, Mr. Masaiti Katebe, testified as RW1 and adopted the Respondent's affidavit verifying facts as his evidence in chief. He told the Court *inter alia*, that the Petitioner was employed by the Respondent as Human Resource Officer from 20th March, 2000 on permanent and pensionable basis and that on 25th August, 2018 the Petitioner, on his own accord, gave the Respondent notice of his intention to go on early retirement on 31st December, 2018 which request was declined by the Respondent on ground of lack of funds to pay his terminal benefits and pending backlog of unpaid terminal benefits to retirees and other

separated employees. It was RW1's further evidence that according to the conditions of service that the Petitioner enjoyed, early retirement was neither mandatory nor of right but was granted at the discretion of the Respondent's management. However, that following the Petitioner's appeal and insistence, the Respondent, on 26th September, 2018 granted the Petitioner's request to go on early retirement. And that by letter dated 25th October, 2018 the Petitioner was advised of the modalities on how his terminal benefits would be paid considering the huge list of earlier retired or separated employees of the Respondent. RW1's evidence was that since the Petitioner instigated the termination of his employment through early retirement, his separation should be construed as a resignation and he was thus not entitled to retention on payroll whilst awaiting the full payment of his dues.

[9] RW1's further evidence was that the Petitioner did not suffer any hardship or prejudice by not being paid a salary during the period his dues were being paid and as such, the Respondent did not violate Article 189 of the Constitution as alleged by the Petitioner. He testified that the Petitioner was paid his total terminal benefits in 7 instalments by 31st March, 2020.

[10] In cross-examination, RW1 conceded that the Petitioner's conditions of service allowed him to go on early retirement at

management's discretion and that the Petitioner had attained the 10 years threshold before he applied for early retirement. It was RW1's further evidence that the Respondent exercised its discretion and granted the Petitioner's request to go on early retirement and that the Petitioner was informed of his removal from the payroll. RW1 conceded that the Petitioner was not paid his terminal benefit in full until March, 2020. RW1 told the Court that since the Petitioner voluntarily opted to go on early retirement before the normal pensionable age of 55 years or 60 years to pursue other personal endeavours, he was not entitled to retention on payroll during the period his benefits had not been paid in full.

E. SUBMISSIONS BY THE PETITIONER AND RESPONDENT

[11] At the close of the case and as stated above, the learned Counsel for both parties relied on their respective skeleton arguments which Counsel for the Respondent augmented with oral submissions.

[12] In respect of the Petitioner's first prayer in the Petition, it was contended in the Petitioner's skeleton argument that by removing the Petitioner from the payroll during the period his pension benefits remained unpaid in full, the Respondent breached or acted contrary to Article 189 (2) of the Constitution. Article 189 (1) and (2) provide as follows:

“189 (1) A pension benefit shall be paid promptly and regularly.

189 (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.”

[13] Mr. Ilunga pointed out that according to the above quoted provision, the Petitioner was entitled to be paid his pension benefits in full on his last working day, being, 31st of December, 2018. However, that the Petitioner was only paid in full on 13th March, 2020. As such, the Petitioner was entitled by law to remain on the Respondent’s payroll until full payment of his terminal benefits was done. In support of the above contention, Counsel cited the case of **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**¹ in which we, *inter alia*, observed that:

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

[14] Counsel also cited the case of **Owen Mayapi and 4 Others v Attorney General**² in which we stated that:

“The phrase “retained on payroll” means that such retirees will continue to be paid what they were getting through the payroll at the time of their retirement. This, we opine, is premised on the need to maintain the status quo of a retiree who, for no fault of his/her own, has not accessed his/her pension benefits”.

[15] As regards the Petitioner's second prayer in the Petition for an order for payment of the sum of K177,646.00 being 14 months' salary arrears from January, 2019 to February, 2020, Mr. Ilunga submitted that the claim is anchored on Articles 187 (1) and (2) and 189 (1) and (2) of the Constitution. Article 187 (1) and (2) states that:

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

(2) A pension benefit shall not be withheld or altered to that employee's disadvantage”.

[16] As regards how the Constitution should be interpreted, Mr. Ilunga referred us to the cases of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others³**, **Faustine Mwenya Kabwe v Justice Sakala and Another⁴**, **Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association v Attorney General and Another⁵** and **Lubunda Ngala and Another v Anti-Corruption Commission¹**. Counsel then referred us to what we quoted from the case of **South Dakota v North Carolina⁶**, where it was observed that:

“In interpreting Constitutional provisions, the Constitution must be read as a whole and that no single provision must be isolated from other provisions bearing on the subject. No provision of the Constitution should be segregated from the others and that all provisions bearing a particular subject must be considered and taken into account in interpreting a provision of the Constitution so as to give effect to the greater purpose of the instrument”.

[17] Counsel wound up his submissions, by asserting that Article 189(2) of the Constitution as amended confers a right to be retained on the payroll and hence, the provision should be construed in a non restrictive manner which ought to allow the Petitioner to fully enjoy the benefits conferred therein. Counsel, thus, prayed that the Petitioner be granted the reliefs sought in the petition with costs.

[18] On the other hand, the Respondent, in their Skeleton Arguments took the position that since a Constitution enjoys the status and privilege of being supreme, its interpretation should be different from that of other Statutes. Counsel, thus, referred us to the case of **Sturges v Crowninshield**⁷ where Justice Marshall, at P. 550, stated that:

“It is a document intended to endure for ages and therefore, it has to be interpreted not merely on the basis of the intention and understanding of the framers of the Constitution but on the existence of the working of the Constitution to deal effectively with current constitutional issues needing a solution in the existing social and political context.”

[19] In opposing the Petitioner’s submissions in support of the first prayer in the Petition, Mr. Zaza submitted that since the Petitioner on his own accord instigated the termination of his employment contract through early retirement against the wishes and advice of the Respondent especially as it pertained to its liquidity situation, the Petitioner is not entitled to the reliefs sought. According to Counsel, his

understanding of our decision in the **Lubunda Ngala**¹ case is that those that choose or trigger the termination of their employment contracts are not entitled to retention on the payroll for the purpose of drawing a monthly salary. According to Counsel, the reason is that allowing those who volunteer to go on early retirement to be retained on payroll would result in employees opting for such an avenue so as to profit a salary from both former and new employer. And that, this would amount to unjust enrichment, which is not within the spirit of Article 189 of the Constitution as amended. Counsel asserted that the intent and purpose of Article 189 was to cushion the hardship of those whose employment is terminated through retirement on reaching pensionable age or those abruptly terminated at the instance of the employer and not to benefit employees who terminate their employment contracts either by resignation or early retirement in search of other greener pastures elsewhere.

[20] In response to the second prayer in the Petition, Mr. Zaza submitted that since the Petitioner was put on the payroll so that he could be receiving his terminal benefits, he did not suffer any hardship save for the months of January and February 2019 when the Petitioner did not receive either his salary or terminal benefits as the Petitioner was in March, 2019 put back on the payroll.

[21] As regards the definition of the phrase “retained on the payroll”, Mr. Zaza agreed with the definition given by this Court in the case of **Owen Mayapi**² quoted above. He, nevertheless, went on to argue that the Petitioner was not entitled to be retained on the payroll as the terminal benefits due to him were not those intended by Article 189 of the Constitution as amended.

[22] In augmenting the Respondent’s written submission, Mr. Zaza submitted that constitutional construction or interpretation should be based on the fact that the Constitution is a document that should endure for ages. In support of the above submission, Counsel referred us to the Article by **Justice D. M. Dharmadhikari of the Constitutional Court of India**, in his article titled “**Principle of Constitutional Interpretations; Some Reflections, 2004**,” where he observed that:-

[A] Constitution is thus, a permanent document to endure for ages. The words and expressions in the Constitution have to be construed by not only understanding the mind of the framers but on the basis of each generation’s experience in relation to current issues and topics. A Constitution as the Indian Constitution, cannot comprehend, at the time of its framing, all issues and problems that might arise in its working in the times ahead. The Constitution, therefore, contains only basic democratic principles. It contains habits and aspirations of people of that generation, but it is drafted in a way to realise those objectives for future generations.

[23] Mr. Zaza submitted that this Court is enjoined with constant interpretation of the constitutional provisions and should thus do that to

different cases and should not merely rely on precedent as it should treat each case on its own. Counsel's prayer was therefore that the Petition be dismissed with costs.

[24] In reply, Mr. Ilunga submitted that Article 189 (2) is very specific and that this Court, in **Owen Mayapi and 4 Others v Attorney General**² has already deliberated and pronounced itself as to how this particular Article should be effected. Hence, it needs no further debate.

F. ANALYSIS

[25] We have considered the contents of the pleadings in this matter together with the evidence adduced by the parties and the arguments advanced in the respective Skeleton Arguments and the authorities cited. We have also considered the oral submissions by the learned Counsel for the respective parties. It is our firm view that the two main questions raised for consideration by this Court are as follows:

- 1) **Whether the Petitioner having requested for early retirement on his own volition qualifies for a pension benefit within the contemplation of Article 189 (2) of the Constitution as amended; and**
- 2) **Whether the Petitioner was entitled to be retained on the Respondent's payroll following the separation until payment of pension benefits.**

[26] Before we tackle the above questions, we wish to start by laying out the salient facts of this case which we shall take into account in determining the issues raised in this matter. These are that the Petitioner was employed by the Respondent as Human Resource Officer on permanent and pensionable basis on 20th March, 2000 and that the conditions of service under which the Petitioner served allowed for an employee who had served 10 years or more to apply for early retirement. Whether or not such an employee could proceed on early retirement was in the discretion of the employer, the Respondent, as stipulated in clause 35.1 (c) of the conditions of service in question. Clause 35.1 is couched in the following terms:

“An employee may apply for early retirement and the corporation may at its discretion allow the employee to go on early retirement provided that he/she has been in employment of the corporation for a period of ten (10) years”. (Underlining is ours for emphasis)

[27] When the Petitioner first applied to go on early retirement, the Respondent declined his request citing liquidity challenges to pay his terminal benefits and those of other employees due before his. The Petitioner, however, appealed against the refusal and the Respondent's management approved his request and indicated that his last working day was 31st December, 2018. The Respondent removed the Petitioner from its payroll in December, 2018 but reinstated him two months later

for the purpose of paying him his retirement benefits in instalments. The Petitioner was paid his outstanding pension benefits in full on 31st March, 2020. What is in dispute, however, is whether the Petitioner was entitled to be retained on the payroll so that he could have, in terms of Article 189 (2) of the Constitution as amended, continued to receive his monthly salary during the period his terminal benefits remained unpaid in full.

[28] The starting point in determining this matter as we see it is to first address the peripheral issue raised by both parties as regards the cannon of interpretation this Court should apply in interpreting Article 189 of the Constitution as amended.

[29] In support of each party's position as regard this issue, the learned Counsel on either side cited and referred to our decisions and to authorities from other Jurisdictions. Our simple response however, is to take the same position that we have taken in our previous decisions where we made it clear that unless the interpretation of a statutory provision results in absurdity, words used in a statute must be given their ordinary meaning and that the literal rule of interpretation should thus be applied. The question therefore is, has the Respondent satisfied the Court that in the circumstances of this case, if Article 189 is given its ordinary meaning, this will result in an absurdity? We think not as the

wording of Article 189 (2) is clear. This, to put it blatantly, is that, pay the employee his pension benefit on his last working day. If not, retain him on payroll until you pay his pension benefit. In **Lubunda Ngala**¹ and **Mayapi**² cases we pronounced ourselves on the rationale behind the enactment of Article 189 which is that the provision is meant to cushion pensioners and retrenchees from the hardships they were experiencing as a result of delayed payment of their pension money or gratuity. We reiterate this position in the current case.

[30] Coming to our two main questions posed above, the Respondent, in its Answer and submissions argues that the Petitioner opted to go on early retirement against the wishes and advice of the Respondent especially as it pertained to its liquidity situation, and as such the Petitioner was not entitled to be retained on the payroll.

[31] In this regard, it was the Respondent's argument, citing our decision in the **Lubunda Ngala and Jason Chulu v Anti Corruption Commission**¹ case as authority, that we should not treat the Petitioner's separation from the Respondent as qualifying for a pension benefit within the contemplation of Article 189 (2) of the Constitution as amended.

[32] Our view on the matter is that the very fact that the Respondent accepted the Petitioner's request to go on early retirement though with

some misgivings does not relegate the retirement to a resignation from employment which would not attract a pension benefit within the provisions of Article 189 (2) of the Constitution as amended. We say so because it was within the Respondent's discretionary power pursuant to clause 35.1 of their conditions of service not to accept the request by the Petitioner for early retirement no matter how earnest his appeal may have been. The early retirement of the Petitioner was provided for within the Respondent's conditions of service subject to conditions precedent being met. These having been met, and the request accepted, this, in our view, qualified the separation with a pension benefit.

[33] The second issue is whether or not the Petitioner was entitled to be retained on payroll and what this retention entailed. The Petitioner is on record as having engaged the Respondent over his retention on the payroll until payment of his pension benefits as provided for under the Constitution as amended. Following this communication, the Respondent in a letter dated 7th January, 2019 declined to retain the Petitioner on payroll stating that Article 189 (2) of the Constitution as amended did not apply to his situation. Further, the Respondent states that the Petitioner was only off the payroll for two months as he was thereafter reinstated for the purpose of remitting his terminal benefits.

[34] The second issue brings out two other issues on payroll retention that require our consideration. These are; whether the Petitioner was entitled to be retained on payroll and secondly, whether the Petitioner's reinstatement on payroll is what is contemplated under Article 189 (2) of the Constitution as amended.

[35] On the question of retention on payroll, this Court had occasion to pronounce itself on the issue in the case of **Owen Mayapi and 4 others v Attorney General**² where we stated that **"The phrase retained on payroll means that such retirees will continue to be paid what they were getting through the payroll at the time of their retirement"**.

[36] In this particular matter, the Petitioner's separation by early retirement qualifies him for a pension benefit as alluded to above. Therefore Article 189(2) within the context of retention applies. We say so because the Petitioner was not paid his pension benefits in full on his last working day.

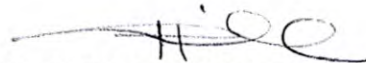
[37] The second issue that requires our consideration is whether retention on payroll covers payments made towards liquidating the pension benefit. The **Mayapi**² case cited above is clear. Retention on payroll is meant for continued payment of one's salary until the pension benefit is liquidated in full and not for the purposes of disbursing pension benefits by instalments as was done in this case.

G. ORDERS OF THE COURT

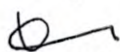
[38] For the reasons given above, we grant the Petitioner's first prayer namely a declaration that the Respondent's conduct of removing him from the payroll before his pension benefits were paid in full was contrary to Article 189 (2) of the Constitution as amended.

[39] As regards the second prayer in the petition, we order that the Respondent pay the Petitioner his salaries for the period his pension benefits remained unpaid in full. The said salaries shall be paid together with interest at 6% from the date of filing of the Petition up to Judgement date and thereafter at the average lending rate as determined by the Bank of Zambia up to date of final payment.

[40] We also award costs to the Petitioner to be agreed and in default thereof to be taxed.



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H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT



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M. S. Mulenga
CONSTITUTIONAL COURT JUDGE



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P. Mulonda
CONSTITUTIONAL COURT JUDGE