

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

2019/CCZ/003

IN THE MATTER OF: **ARTICLE 128 OF THE CONSTITUTION
OF ZAMBIA ACT NO.2 OF 2016**

IN THE MATTER OF: **ARTICLE 189 OF THE CONSTITUTION
OF ZAMBIA ACT NO.2 OF 2016**

AND IN THE MATTER OF: **PUBLIC SERVICE MANAGEMENT
DIVISION CIRCULAR NO.B21 OF 2018**

AND IN THE MATTER OF: **PUBLIC SERVICE MANAGEMENT
DIVISION CIRCULAR NO.B.1 OF 2019**

BETWEEN:

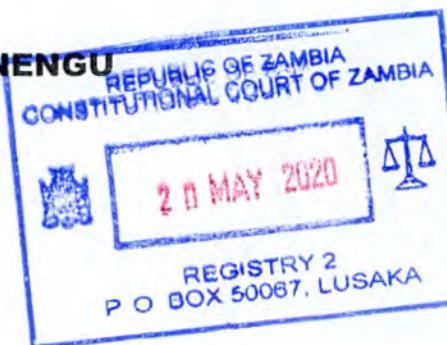
OWEN MAYAPI **1ST PETITIONER**

MULASIKWANDA MANENGU **2ND PETITIONER**

HEXRON GONDWE **3RD PETITIONER**

EDWARD FALANGA **4TH PETITIONER**

MUNKENA MAJORY **5TH PETITIONER**



AND

ATTORNEY GENERAL **RESPONDENT**

Coram: **Chibomba, PC, Sitali, Mulenga, Mulonda and Musaluke, JJC**
on 21st August, 2019 and on

For the Petitioners: **Mr. B. Sitali of Messrs Butler and Company
Legal Practitioners**

For the Respondent: **Mrs D.M. Shamabobo, Acting Principal State Advocate Attorney General's Chambers**

JUDGMENT

Mulenga, JC delivered the Judgment of the Court

Cases referred to:

- 1. Godfrey Malembeka (suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and another Selected Judgment No. 34 of 2017 (CC)**
- 2. Lubunda Ngala and Another v Anti-Corruption Commission Selected Judgment No. 4 of 2018**
- 3. Faustine Mwenya Kabwe and Another v Mr Justice E.L. Sakala, Mr Peter Chitengi and Attorney General SCZ/8/93/2009**

Legislation referred to:

- 1. The Constitution of Zambia as amended by Act No. 2 of 2016**
- 2. The Public Service Pensions Act No. 35 of 1996**
- 3. The Public Service Commission Regulations, Statutory Instrument No. 70 of 1971**

This matter came before us by way of Petition filed on 8th February, 2019. The Petition is made pursuant to Articles 128 and 189 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) and accompanied by an Affidavit verifying facts deposed to by the 1st Petitioner. The Petition challenges the

constitutionality of two Public Service Management Division Circulars providing for payment of basic salary to retirees maintained on the payroll and the subsequent decision to stop the payment of housing and utility allowances to the Petitioners. In particular, that the Circulars offend or are contrary to the provisions of Article 189 of the Constitution.

The facts in this matter are essentially not in dispute. Briefly stated, the Petitioners were commissioned and non-commissioned officers serving in the Zambia Air Force. The conditions of service governing their employment as per document titled “Zambia Air Force Administrative Instructions APZ 1107” exhibited as ‘OM1’ provided that they could opt to retire from employment upon completing ten (10) years of service.

The Petitioners, in 2017, severally applied for voluntary retirement from employment by giving notice

and, through the letters exhibited collectively as 'OM3', the Zambia Air Force accepted their applications pursuant to the relevant regulations under the Defence Act Cap 106 of the Laws of Zambia and indicated that they would be paid their pension benefits calculated in accordance with the Public Service Pensions Act No. 35 of 1996.

After their retirement, they were retained on the payroll and continued to receive their monthly salary inclusive of utility and housing allowances calculated at 5% and 40% of their basic salary, respectively.

On 22nd November, 2018 the Respondent issued the Public Service Management Division Circular No. B21 of 2018, exhibited as 'OM7'. The Circular instructed that retirees who were retained on the payroll pending payment of their pension benefits were only entitled to be paid a basic salary based on the Public Service Commission Regulations, Statutory Instrument No. 79 of 1971. We wish

to quickly mention here that there is no Statutory Instrument No. 79 of 1971 under the Public Service Commission Regulations but Statutory Instrument No. 70 of 1971 and the latest amendment being Statutory Instrument No. 91 of 1987. We shall therefore refer to the correct citation being S. I. No. 70 of 1971 in the Judgment.

The second Circular No. B.1 was issued on 24th January, 2019 instructing among others, that only employees who retired upon attaining the retirement age or were retired in national interest, posthumously, retrenched or retired due to invalidity should be retained on the payroll pending the payment of pension benefits in full.

As a consequence of Circular No. B21 of 2018, the Zambia Air Force stopped paying the Petitioners their housing and utility allowances and the Petitioners are currently only being paid their basic salary. The Petitioners hence seek the following reliefs:

- 1. A declaration that (the Public Service Management Division) Circular No. B21 of 2018 and Circular No. B.1 of 2019 are unconstitutional;**
- 2. A declaration that the Respondent's decision to stop payment of housing and utility allowances to the Petitioners is unconstitutional;**
- 3. An order that the Petitioners be paid all their housing and utility allowances by the Respondent including the withheld arrears until such time that they are paid their pension benefits in full;**
- 4. Interest on (3)**
- 5. Costs**
- 6. Any other relief the Court might consider appropriate.**

At the hearing of the Petition on 21st August, 2019 both parties relied on their filed skeleton arguments. The Petitioners contended that the Respondent's decision to stop paying housing and utility allowances as instructed under Circulars No. B21 of 2018 and No. B.1 of 2019 were in violation of Article 189 (2) of the Constitution. The Petitioners reasoned that the housing and utility allowances were part and parcel of their monthly salary.

Addressing the Respondent's reliance on the definition of "salary" in the Public Service Commission Regulations, S.I. No. 70 of 1971, as being basic salary, the Petitioners

submitted that the said definition cannot be resorted to in interpreting the provisions of the Constitution. That by restricting Article 189 (2) to basic salary, the Respondent was in effect reading into the Constitution words which are not expressly included.

The Petitioners maintained that had the Legislature intended that the person retained on the payroll should only be paid a basic salary, the Legislature would have so stated. In so arguing, the Petitioners relied on the case of **Godfrey Malembeka (suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and Another**¹ as authority that any limitation in a constitutional provision must be found within the corners of the Constitution. Hence, that the Public Service Commission Regulations, S.I. No. 70 of 1971 cannot be relied on to change the meaning of Article 189 (2) of the Constitution.

Focusing on our decision in **Lubunda Ngala and Another v Anti-Corruption Commission**², the Petitioners posited that the Respondent wrongly interpreted this Court's decision as disallowing allowances. That in the **Lubunda Ngala**² case, this Court did not consider the issue of housing or utility allowances and further, that the said decision was distinguishable from the case at hand in that the applicants in **Lubunda Ngala and Another v Anti Corruption Commission**² were claiming retention on the payroll on account of unpaid leave days, uniform and settling-in allowances, which the Court rightly held as not constituting pension benefits to warrant their retention on the payroll.

It was argued that in *casu*, the Petitioners are claiming that they should continue being paid their housing and utility allowances during the period they are retained on the payroll. Thus, that the decision in the **Lubunda Ngala**²

case cannot be taken as legal justification for the Respondent's decision to withhold payment of housing and utility allowances to the Petitioners.

The Petitioners submitted that since Article 189 (2) of the Constitution confers a right to be retained on the payroll, the provision should be construed in a non-restrictive manner which allows the beneficiaries to fully enjoy the right or benefit. The Petitioners cited the case of **Faustine Mwenya Kabwe and Another v Mr Justice Sakala, Mr Justice Peter Chitengi and Attorney General**³ where the Supreme Court stated that:

"constitutional provisions conferring individual rights and freedoms should not be narrowly construed but stretched in favour of the individual so as to ensure that the rights and freedoms so conferred are not diluted. The individual must enjoy the full measure and benefits of the rights so conferred and in this respect, the derogations to the rights will usually be narrowly construed."

The Petitioners invited us to use the purposive rule of interpretation so as to give legislative effect to Article 189 (2) of the Constitution. That an interpretation which leads

to withholding of 45% of the Petitioners' monthly salaries would be absurd and cannot be said to be consistent with the general legislative purpose of Article 189 (2) of the Constitution.

The Petitioners further urged us to consider the Report of the Technical Committee on drafting of the Zambian Constitution in order to ascertain the intention of the Legislature in enacting Article 189 (2). They proffered that since the rationale of enacting Article 189 (2) is to cushion retirees from hardships as they wait for payment of their pension benefits, any decision whose effect is to reduce by almost half the salary payable to retirees as they wait for their pension benefits would be inconsistent with the intention of the Legislature.

That by withholding almost half of the Petitioners' monthly salary, the Respondent's action exposes the Petitioners to the very hardships that the Legislature

intended to cushion the Petitioners against. The Petitioners pointed out that it is absurd that while the Petitioners' housing allowances have been withheld, similarly circumstanced retirees occupying Zambia Air Force institutional houses have continued to occupy such houses without paying any rent.

The Petitioners concluded that Circulars No. B21 of 2018 and B.1 of 2019 violated Article 189 (2) of the Constitution and prayed that they be declared unconstitutional.

In response, the Respondent, in the skeleton arguments in opposition to the Petition, proffered that what falls for determination in these proceedings is the definition of the word 'salary'.

Seeking to define the word, reference was made to the Oxford Online Dictionary which defines salary as:

A fixed regular payment, typically paid on a monthly basis but often expressed as an annual sum, made by an employer to an employee, especially a professional or white-collar worker.

It was submitted that based on this definition, salary ordinarily means basic pay because it is basic pay that is normally expressed as an annual sum of what an employer pays an employee. That this then meant that the term in its ordinary meaning does not include allowances which are given for a specific purpose such as housing and utility allowances.

It was posited that to find that the literal application of the word salary as used under Article 189 (2) of the Constitution includes housing, utility and other allowances that a civil servant is paid while in active service would be absurd.

We were urged to adopt a purposive approach in construing Article 189 (2) of the Constitution so as to

ascertain the meaning and purpose of the provision having regard to the context and historic origin behind it.

Referring to Article 254 of the Draft Report of the Technical Committee on drafting of the Zambian Constitution, 2012, it was submitted that the rationale for the enactment was to cushion the hardships retirees are subjected to as they await their benefits. It would be erroneous, the Respondent contended, to argue that retirees should be entitled to the same salaries and allowances as officers in active service.

Further, that it was not the intention of the Legislature that the word 'salary' as used under Article 189 should include allowances such as housing or utility allowance as that would be a great burden on the scarce public resources.

It was the Respondent's position that the Public Service Commission Regulations, S. I. No. 70 of 1971

provide a helpful definition of salary which this Court should resort to and that the said definition only refers to basic pay. That there was therefore nothing unconstitutional about Circular No. B21 of 2018.

As regards paragraph 6 of the Circular No. B21 of 2018 requiring the recovery of any allowance previously paid, the Respondent's position as stated in its Answer and affidavit in opposition is that there is no demand or intention for recovery of the same. This is the position they are held to.

The Respondent however conceded that Circular No. B.1 of 2019 is unconstitutional in as far as it tries to exclude some types of retirement from the application of Article 189 of the Constitution.

We have considered the Petition before us and the arguments advanced by the parties. Before proceeding to address the arguments advanced by the parties we wish to

settle the three issues concerning Circular B.1 of 2019, the argument on scarce government resources and the meaning assigned to the **Lubunda Ngala**² case by the Respondent.

As regards Circular B.1 of 2019, we note that the Respondent has conceded that the Public Service Management Division Circular B.1 of 2019 is unconstitutional to the extent that it excludes some types of retirement from the application of Article 189. The concession is based on the position that Article 189 (2) does not prescribe the type of retirement which entitles one to pension benefits. We briefly wish to reiterate our observations in the **Lubunda Ngala and Another v Anti Corruption Commission**² case that pension benefits are triggered by retirement due to age or other circumstances. We did not venture into defining the other circumstances. It is apparent that the circumstances have to be akin to

retirement. The rest of the contents of Circular No. B.1 of 2019 were not in contention.

The first issue has partially succeeded to the extent that the exclusion of some types of retirement from the application of Article 189 is unconstitutional. We however, note the fact that the Public Service Management Division Circular No. B.1 of 2019 contains other provisions, such as the treatment of deceased employees, payments to estates and separation by means other than retirement, that have not been impugned and which do not affect the Petitioners. It is trite that declarations are to be granted judiciously and in this case where only one of a number of provisions in the Circular has been proved to be unconstitutional, justice demands that the entire Circular cannot be declared unconstitutional along with the majority of the provisions that have not been proved to be unconstitutional. We accordingly decline to grant the declaration in the manner

sought. We thus declare that Circular No. B.1 of 2019 is unconstitutional only to the extent that it excludes some types of retirement from the application of Article 189.

The second issue was in a corollary argument by the Respondent inviting us to consider the adverse effect that the position advanced by the Petitioners would have on scarce government resources. We wish to state 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.

The last issue relates to our decision in the **Lubunda Ngala**² case which was cited in Circular No. B21 of 2018 in the following manner:

In addition to this, it should be noted that it was also clearly stated in the Constitutional Court Judgment of Lubunda Ngala and Jason Chulu v Anti Corruption Commission selected judgment No. 4 of 2018 that the enactment of Article 189 and 266 did not at all envisage the inclusion of any other allowances such as facilitating allowances, housing allowance, settling – in allowance or such other allowances, that are paid through the payroll and to which officers were eligible to receive before their retirement.

This was a misinterpretation of our decision in the **Lubunda Ngala**² case which had nothing to do with the inclusion or non-inclusion of allowances being paid to an employee through the payroll prior to retirement.

The **Lubunda Ngala**² case related to whether outstanding benefits, such as uniform and settling in allowances upon resignation, constituted a ‘similar allowance’ under the definition of pension benefits in Article 266 thereby entitling a former employee to be maintained on the payroll under Article 189. After considering various constitutional

provisions, we held that the accrued leave days, uniform and settling-in allowances that were claimed by the applicants in that case, did not qualify to be pension benefits that are covered by Articles 189 and 266 of the Constitution. We added that “**while a pension benefit can ‘loosely’ be considered to be a terminal benefit, it is not every terminal benefit that has qualities or characteristics of a pension benefit**”. We thus agree with the Petitioners in this matter that the Respondent misapprehended our decision in the **Lubunda Ngala²** case.

We now proceed to consider the Petitioners’ claim which impugns the Public Service Management Division Circular No. B21 of 2018 being the gravamen of the Petitioners’ case. The Petitioners argue that the Circular is unconstitutional in so far as it instructed that retirees retained on the payroll are only to receive basic salaries excluding allowances which they received while in

employment. It is the Petitioners' reasoning that they are entitled to a full salary including housing and utility allowances.

This position, according to them, is premised on the rationale behind Article 189 (2) of the Constitution which was to alleviate the hardship occasioned by the delay in payment of pension benefits to retirees. That the said Article cannot therefore be taken to imply that the retirees are only to receive their basic salary, thereby excluding 45% of their entitlements.

The Petitioners also argued with respect to housing allowance that a restrictive interpretation of salary would infer that similarly circumstanced retirees would be treated differently in that while accommodated retired personnel continue to occupy institutional houses at no cost on account of having not been paid pension benefits, the

unaccommodated retired personnel will not be receiving their housing allowance.

The Respondent on the other hand maintained that Circular No. B21 of 2018 is not unconstitutional and that it is premised on the Public Service Commission Regulations, S. I. No. 70 of 1971 which confine the term ‘salary’ to basic salary and therefore excludes other allowances given for specific reasons. Further, that since housing and utility allowances are not considered in computing pension benefits, they cannot be deemed to be part and parcel of a salary as envisaged by Article 189 (2) of the Constitution.

We have perused the Public Service Management Division Circular No. B21 of 2018. It bases the definition of ‘salary’ on the Public Service Commission Regulations, S.I. No. 70 of 1971. It thus instructed that retired personnel retained on the payroll were only to receive their basic salaries.

In arguing their respective positions based on Article 189 (2) of the Constitution, the parties paid particular attention to the word ‘salary’ and what it infers.

This Petition is therefore inviting us to interrogate Article 189 (2) of the Constitution as it relates to the salary to be paid to the Petitioners pending payment of pension benefits. Article 189 (2) of the Constitution provides for social protection for retired personnel who on account of bureaucratic delays have been unable to access their pension benefits. The said Article 189 (2) 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.

Thus, what is actually in issue is the meaning ascribed to the word ‘salary’. In this case, both parties are agreed that what should be given to a person maintained on the payroll pending the pension benefit is a salary. However, that what constitutes a salary is not defined or specified in

the Constitution. Hence, both the Petitioners and the Respondent have argued that this Court should use the purposive approach to ascertain the meaning and to interpret what constitutes salary in Article 189 (2), but with different outcomes, namely basic salary with allowances and basic salary without allowances, respectively. The parties equally referred to and relied on the Draft Report of the Technical Committee on drafting the Zambian Constitution, 2012 as supporting their conclusions on what is to comprise the salary.

The question therefore is what comprises a salary under Article 189(2) of the Constitution? We have stated in a plethora of cases including the **Lubunda Ngala**² case that the starting point in interpreting any statutory provision is the literal rule of interpretation which requires that words in the statute must be given their ordinary meaning unless it results in absurdity. In cases where absurdity results or

where it is not possible to decipher the intention of the Legislature from the words in the statute, the purposive rule of interpretation has to be resorted to. And if need be, one has to also look at the rationale and context of the provisions in issue. Where there are two or more provisions touching on the subject, these have to be considered holistically in giving effect to the provision in contention.

In this current case, we have considered the Draft Report of the Technical Committee on drafting the Zambian Constitution, 2012 and the Draft Final Report of the Technical Committee on drafting the Zambian Constitution, 2013. The Draft Report of the Technical Committee on drafting the Zambian Constitution dated 30th April, 2012 introduced the then Article 254 which provided for pension and retrenchment benefits to be paid promptly. The proposed article provided, among others, that a person retained on the payroll would also receive increment in

salary given to public officers in the salary scale at which they retired and that the pension benefit would be based on the last salary received while on the payroll. The rationale for the article was stated as follows:

The rationale for the article is that, benefits need to be made promptly for a pension, gratuity and retrenchment package to serve its purpose. The Committee observes that public servants suffer hardships due to delays in payment of terminal benefits and need to be cushioned from these hardships by continuing to receive salaries until the Government pays them terminal benefits, and that for the avoidance of doubt this payment shall not be deducted from the terminal benefits. The Committee, therefore, resolves to make provision in the Constitution for prompt payment of pension and retrenchment benefits.

In the Draft Final Report of the Technical Committee on drafting the Zambian Constitution dated October, 2013 the Technical Committee after considering the resolutions of district, provincial, sector and national conventions resolved to retain the article as stated in the first draft. However, the Technical Committee proceeded to re-draft and re-number it as article 226. There were no changes made to that article 226 by the Legislature which was

subsequently enacted as the current Article 189. We wish to quickly state that although the rationale makes specific reference to public servants, Article 189 is of general application to all employees in both the public and private sectors.

The issue in contention in this matter is what amounts to a salary for purposes of being retained on the payroll in respect of the Petitioners since the rationale of that article was that they should be paid a salary. The Petitioners do not dispute the Respondent's submission that the reference to the last salary received in relation to the calculation of their pension benefits relates to basic salary. The Petitioners' argument, however, is that the meaning of salary to be paid when maintaining a person on the payroll pending the payment of pension benefits on the other hand includes allowances. That arguing otherwise, would be discriminatory in that other similarly circumstanced former

employees who are accommodated by the institution would be enjoying the benefit of accommodation without paying rent.

Applying the first canon of interpretation that calls upon us to give words used in the law their ordinary meaning as we stated in the **Lubunda Ngala²** case, we have had to look up the meaning of the words payroll, salary and emoluments. The starting point is the Constitution which does not define salary but defines emoluments in Article 266 as:

-include salaries, allowances, benefits and rights that form an individual's remuneration for the services rendered, including pension benefits or other benefits on retirement.

We note that the Public Service Pension Act No. 35 of 1996 also does not define salary but only defines pensionable emoluments in section 2 as follows:

2. 'Pensionable emoluments' means salary or wages and any special personal addition to salary or wages granted without any condition that it shall not count for the purposes of calculating pension.

The Public Service Commission Regulations as amended by S. I. No. 91 of 1984 define salary and basic salary as follows:

Salary -means basic salary.

Basic salary -means the salary payable to an officer exclusive of any inducement allowance, personal allowance or other allowance or any direct payments made under assistance schemes.

This definition of salary is as was provided in the initial regulations under Statutory Instrument No. 319 of 1965 and basic salary was defined under Statutory Instrument No. 200 of 1968 under the same regulations. It is noteworthy that both words, salary and basic salary, are only mentioned in Part IV on Discipline in the Regulations. Under this part, regulation 32 (8) on suspension as amended by S. I. No. 91 of 1987, provides that salary under the said regulation includes personal allowances and

direct payments made under assistance schemes in addition to basic salary.

It is evident from the foregoing that reliance on the definition of salary in the S. I. to assert that what should be paid to a retired officer retained on the payroll under Article 189 (2) is a basic salary is not entirely accurate.

Black's Law Dictionary defines payroll and salary as follows:

- | | |
|----------------|---|
| Payroll | -A list of employees to be paid and the amount due to each of them.
-The total compensation payable to a company's employees for one pay period. |
| Salary | -An agreed compensation for services. |

These definitions show that salaries and allowances are generally indicative of different types of emoluments. These provisions further lend support to the position that what constitutes an individual's salary for pension purposes may differ and may include allowances depending

on the person's conditions of service. Therefore, what constitutes salary under Article 189 is a question of fact that has to be proved or as provided for in the respective conditions of service. Hence, the phrase 'retained on the payroll' has to be interpreted in light of what constitutes salary in a given case and may differ for particular employees.

In this matter, we have given careful consideration to the phrases 'retained on the payroll' and 'based on the last salary received' in Article 189 (2) of the Constitution in giving the purposive interpretation. We wish to restate Article 189 (2) which provides:

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.

This article states that a person who has retired and has not been paid his pension benefits on the last day of work will be retained on the payroll based on the person's last salary. The phrase 'retained on the 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.

Further, this provision does not state that the retiree will be paid a basic salary but rather that the person will be retained on the payroll based on the last salary. To state that the person will be retained on the payroll based on the last salary is hence not the same thing as to state that the person will be retained on the payroll and be paid a basic salary. An interpretation that gives the provision that meaning alters the meaning of the provision and does

not take into account the person's conditions of service and the rationale for retaining a person on the payroll. If it were the intention of the Legislature that a retired person should be paid a basic salary and nothing more, they would have expressly stated so in Article 189 (2).

Therefore, our considered view is that by retaining a person on the payroll after retirement and while awaiting payment of the pension benefit, the person should not be worse off in terms of the salary received than that which the person received while in employment.

The above provision was made in the Constitution to specifically cushion employees in general from hardship caused by the delay in payment of their pension benefits. The Respondent cannot therefore side step the responsibility to pay the pension benefit promptly by reducing what is paid to a person retained on the payroll to a basic salary.

Further, in the present case, the Petitioners' exhibited conditions of service; the Zambia Air Force Administrative Instructions APZ 1107, which provide that those officers who are provided accommodation by the employer are entitled to remain in that accommodation pending payment of their terminal benefits. The officer, according to those conditions of service, is entitled to remain in that house up to 90 days after payment of the terminal benefits. We thus agree that if the Petitioners who are not accommodated by the employer are not paid their housing allowance while awaiting payment of their pension benefits, they will be treated differently from those retirees who are accommodated in institutional houses and are entitled to remain in that accommodation.

Furthermore, since salary is not defined in the Constitution, the Court cannot give an interpretation which limits what is to be paid to an employee as a basic salary

when the constitutional provision does not qualify the salary to be paid to a basic salary. For that reason, a purposive interpretation that gives greater benefit to the retired person awaiting payment of their pension benefit should be adopted. This is more so that the unaccommodated similarly circumstanced retired officers would be treated differently from those accommodated.

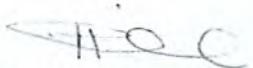
In this case, the Respondent initially retained the Petitioners on the payroll and paid them the basic salary and housing allowance as evidenced by the exhibited payslips. The Respondent further did not dispute that the Petitioners were also being paid the utility allowance over the table, as stated by the Petitioners. The payment of these two allowances was only stopped after the issuance of Circular No. B21 of 2018 which was based on the misapprehension of our decision in the **Lubunda Ngala²** case.

For the foregoing reasons, the Petitioners' case in relation to Circular No. B21 of 2018 succeeds. The Public Service Management Division Circular B21 of 2018, is therefore in violation of Article 189 (2) of the Constitution, in so far as it instructed that retired personnel retained on the payroll were only to receive their basic salary. We hereby grant the declaration that Circular No. B21 of 2018, to the extent that it limits the payment to be made to the Petitioners to a basic salary as opposed to retaining them on the payroll including a housing allowance which was paid through the payroll, is unconstitutional.

Consequently, we further grant the declaration that the Respondent's decision to stop payment of the housing and utility allowances to the Petitioners is unconstitutional and order that the Respondent should pay the housing and utility allowances including the withheld arrears until such time as they are paid their pension benefits.

Since the claim is against the Attorney General, we award simple interest on the withheld arrears at 6% per annum from the date of the Petition to the date of payment.

Costs are for the Petitioners.


.....
H. CHIBOMBA

PRESIDENT

CONSTITUTIONAL COURT


.....
A.M. SITALI
CONSTITUTIONAL COURT JUDGE


.....
M.S. MULENGA
CONSTITUTIONAL COURT JUDGE


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P. MULONDA
CONSTITUTIONAL COURT JUDGE


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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE