

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

2021/CCZ/001

IN THE MATTER OF: ARTICLES 128, 187 AND 189 OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016

AND

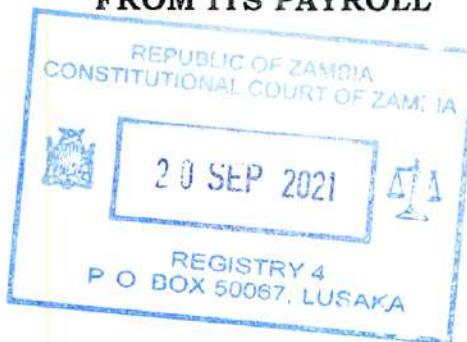
IN THE MATTER OF: A DECISION OF THE ZAMBIAN OPEN UNIVERSITY TO REMOVE THE PETITIONERS FROM ITS PAYROLL

BETWEEN:

ANDERSON MWALE

BUCHISA MWALONGO

KOLA ODUBOTE



1ST PETITIONER

2ND PETITIONER

3RD PETITIONER

AND

ZAMBIAN OPEN UNIVERSITY

RESPONDENT

Coram: Chibomba, PC, Sitali, Mulenga, Munalula and Musaluke, JJC, on 16th March, 2021 and 20th September, 2021

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

For the Respondent: Ms. E. C. Chiyenge of Mbalashi C. and Associates

JUDGEMENT

Sitali JC, delivered the Judgment of the Court.

Cases referred to:

1. Lubunda Ngala and Jason Chulu v Anti-Corruption Commission, Selected Judgment No. 4 of 2018.
2. Godfrey Malembeka (suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and Another (2017) 2 Z.R. 286
3. Attorney General v Chibaya and Others Supreme Court Appeal No. 70 of 2011
4. Faustine Mwenya Kabwe and Another v Mr. Justice Sakala, Mr. Peter Chitengi and Attorney-General SCZ/8/93/2009
5. Attorney General, The Movement for Multiparty Democracy v Akashambatwa Mbikusita Lewanika and Others SCZ Judgment No.2 of 2014
6. Director of Public Prosecutions v Ngandu and Others (1975) Z.R. 253

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia.
2. The Public Service Pensions Act, Chapter 260 of the Laws of Zambia.
3. The National Pension Scheme Act, Chapter 256 of the Laws of Zambia.
4. The Judges (Conditions of Service) Act, Chapter 257 of the Laws of Zambia.
5. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.

BACKGROUND AND INTRODUCTION

[1] The Petitioners filed a petition against the Respondent on 12th January, 2021 seeking a declaration that the Respondent's decision to remove the Petitioners from the payroll before paying them their gratuities as stated in the Respondent's letter of 28th April, 2020 is unconstitutional; an order that the Petitioners be retained on the payroll and be paid all the withheld salary arrears and allowances

until such time that they shall be paid their pension benefits which are in the form of gratuity; damages; interest and costs.

PETITIONERS' CASE

[2] The petition was accompanied by an affidavit verifying facts sworn by the 1st Petitioner, Anderson Mwale. The facts of the case as set out in the petition and affidavit are that the 1st Petitioner entered into a three-year contract of employment as accountant with the Respondent from 1st April, 2013 to 30th March, 2016, which upon expiry was renewed for a further period of three years from 1st April, 2016 but which was only served up to 31st December, 2017. The 1st Petitioner was subsequently employed by the Respondent as its Bursar from 31st January, 2018 to 31st December, 2019 when his contract of employment came to an end and having reached retirement age.

[3] The 2nd Petitioner entered into a three year contract of employment with the Respondent from 1st January, 2011 to 31st December, 2013 which upon expiry was renewed for a further period of three years from 1st January, 2014 to 31st December, 2016. The 2nd Petitioner was subsequently employed by the Respondent as a

Lecturer Grade II from 1st January, 2017 until he retired on 31st December, 2019 when his contract of employment came to an end and having reached retirement age.

[4] The 3rd Petitioner entered into a three-year contract of employment with the Respondent from 1st April, 2013 to 1st March, 2016 which upon expiry was renewed for a further period of three years when the 3rd Petitioner was employed by the Respondent as a senior lecturer from 1st April, 2016 to 1st March, 2019 when his contract of employment came to an end and having reached retirement age.

[5] It was a condition of the Petitioners' contracts of employment that at the end of their respective contracts they would be paid gratuity calculated at 29% of their terminal salary plus all allowances to which they were entitled during the period of their employment. When the Petitioners' respective earlier contracts of employment came to an end, the Respondent paid them their respective gratuities. However, when the Petitioners' last renewed contracts came to an end on 31st December, 2019, in the case of the 1st and 2nd Petitioners and on 1st March, 2019, in the case of the 3rd

Petitioner, the Respondent did not pay them their respective gratuity and therefore retained them on the payroll.

[6] By letter dated 28th April, 2020 the Respondent informed the Petitioners that they had been removed from the payroll ostensibly because, according to this Court's decision in **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**⁽¹⁾, the gratuity which had not yet been paid to them could not be considered a pension benefit so as to justify their continued retention on the payroll.

[7] Despite making representations that they were entitled to be retained on the payroll until they were paid their gratuity, the Respondent refused to restore the Petitioners to the payroll. The Petitioners contended that as result of the Respondent's refusal to pay them their respective gratuity, they had been subjected to hardship in their livelihood. The Petitioners further contended that the Respondent's action violated Articles 187 and 189 of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth referred to as the Constitution).

RESPONDENT'S CASE

[8] On 27th January, 2021 the Respondent filed an Answer to the petition together with an affidavit in opposition sworn by Fredrick Ng'andu the Registrar of the Respondent University. In its Answer and affidavit, the Respondent admitted that it had employed the Petitioners on fixed term contracts for various periods respectively and averred that the correct particulars pertaining to the contracts and periods were as follows:

- (a) That the 1st Petitioner was employed in the position of Accountant for a period of three years from 1st April, 2013. On expiry, the contract was renewed for a further period of three years from 1st April, 2016. That the contract period was varied when the 1st Petitioner was appointed to the higher position of Bursar in which he served on a two-year contract with effect from 1st January, 2017. Before the expiry of his last contract, the 1st Petitioner tendered his resignation by notice dated 22nd June, 2018, but the Respondent turned down the resignation, maintaining that he had only a few months before the expiry of the contract.

- (b) That the 2nd Petitioner was employed as a Lecturer Grade II in the School of Law on a three-year contract from 1st

January, 2011, which on expiry was renewed for a further period of three years from 1st January, 2017, at the end of which the Respondent declined the 2nd Petitioner's request to renew the contract.

- (c) That the 3rd Petitioner was employed as a Senior Lecturer in the School of Agriculture on a three-year contract with effect from 4th January, 2016. That prior to its expiry, the 3rd Petitioner applied to renew the contract, and the Respondent offered him a two-year contract instead, which he turned down.

[9] The Respondent averred that the Petitioners did not retire from its employ but that their services terminated upon expiry of their respective fixed term contracts. The Respondent further averred that it was not privy to any of the Petitioners' alleged retirement as they were not employed on permanent or pensionable conditions of service. The Respondent contended that the conditions of service applicable to the Petitioners' service, other than those specifically stipulated in their respective letters of appointment or renewed contracts, were the Respondent's Revised Conditions of Service dated October, 2010. That clause 5.0 (iv) of those conditions states that all appointments shall be on fixed contracts and no employee

shall be engaged on permanent and pensionable basis. That accordingly, each of the Petitioners was employed on a fixed term contract, not conditioned on retirement or attainment of retirement age.

[10] The Respondent stated that the rates of gratuity due to each Petitioner was as stated in the letters of appointment or renewed contracts and that the correct dates of expiry of the 1st, 2nd and 3rd Petitioners' contracts were 31st December, 2018, 31st December, 2019 and 3rd January, 2019, respectively.

[11] The Respondent averred that the Petitioners' retention on the payroll was based on its mistaken belief that, in terms of Articles 187 and 189, as read with the definition of pension benefit in Article 266 of the Constitution, all gratuity and other terminal benefits payable to employees upon their contracts of service coming to an end were pension benefits entitling former employees to retention on the payroll until they are fully paid.

[12] The Respondent averred that during the period that the Petitioners were retained on the payroll, the 1st Petitioner, who was owed K290,204.16 in gratuity and K235,000.00 for other terminal

benefits making a total of K525,204.16, was paid a total sum of K546,720.00 resulting in an excess payment of K245,546.80 according to the Respondent.

[13] That the 2nd Petitioner who was owed K185,184.72 in gratuity and K58,514.05 for other terminal benefits making a total of K243,698.77, was paid a total sum of K53,214.00 resulting in a credit balance due to him of K190,484.77.

[14] That the 3rd Petitioner, who was owed K237,614.40 in gratuity and K10,000.00 for other terminal benefits making a total sum of K247,614.40, was paid a total sum of K310,290.00 resulting in an excess payment of K62,675.00.

[15] The Respondent averred that while it regretted its inability to pay the gratuity and other terminal benefits owed to the Petitioners immediately upon their contracts coming to an end, the 1st Petitioner and 3rd Petitioner have not suffered hardship as alleged in their petition as they were overpaid during their retention on the payroll. With respect to the balance of the gratuity and other terminal benefits due to the 2nd Petitioner, the Respondent averred

that it was committed to paying the same as soon as its financial situation would permit.

[16] The Respondent denied that it violated Articles 187 and 189 of the Constitution by removing the Petitioners from the payroll and asserted that it maintained statutory contributions to the National Pension Scheme in respect of the 2nd Petitioner and the 3rd Petitioner while they were still eligible for membership of the pension scheme and were expected to receive their pension benefits from the scheme upon retirement in accordance with the National Pension Scheme Act, Chapter 256 of the Laws of Zambia. That their dates of birth according to the NAPSA records are 12th May, 1960 and 10th December, 1962 respectively, while that of the 1st Petitioner according to his curriculum vitae is 1st January, 1957. He thus was above retirement age and not eligible for membership under the national pension scheme even before he was employed by the Respondent.

[17] It was contended that the Respondent did not have permanent and pensionable conditions of service; and that the Petitioners were employed on fixed term contracts with a provision for payment of

end-of-contract gratuity at the rate of 29% of salary inclusive of allowances on the expiry of contract. That gratuity is not due by virtue of an employee having reached retirement age or having retired under any law, but by virtue of a contract coming to an end, whether by expiry of a fixed term, resignation, termination of contract on medical grounds or death.

[18] The Respondent contended that the said gratuity is not a pension benefit within the contemplation of the provisions of the Constitution and therefore, that the Petitioners are not entitled to any of the reliefs they seek. The Respondent urged the Court to dismiss the petition with costs.

[19] On 2nd February 2021, with leave of the Court, the Respondent filed a further affidavit in opposition to which the Respondent's revised Conditions of Service dated 4th October, 2010 and referred to in paragraphs 6 (a) and 14 (c) of the affidavit in opposition were exhibited as the conditions under which the Petitioners served.

PETITIONERS' REPLY

[20] The Petitioners filed a reply in which they stated that after the Respondent refused to accept the 1st Petitioner's resignation, his last

fixed term contract of employment came to an end by effluxion of time on 31st December, 2018. That after the Respondent refused to accept the 2nd Petitioner's application to renew his contract of employment, the 2nd Petitioner's contract of employment expired on 31st December, 2019. That the 3rd Petitioner's last fixed term contract of employment expired on 3rd January, 2019.

[21] It was averred that at the expiry of their respective contracts, the 1st, 2nd and 3rd Petitioners who were aged 61 years old, 59 years old and 56 years old respectively stopped working for the Respondent, hence retiring from employment with the Respondent. The Petitioners argued that the Respondent had an obligation to ensure that their gratuities were paid when they fell due, as the Respondent knew that all its employees were employed on fixed term contracts and not on permanent and pensionable basis, which contracts provided for gratuity.

[22] The Petitioners averred that in its letter dated 28th April, 2020, the Respondent referred to Lubunda Ngala and Jason Chulu v Anti-Corruption Commission⁽¹⁾ and stated that this Court in that case had interpreted pension benefits contemplated by Articles 188

and 189 as not including those due by reason of expiration of a fixed term contract.

[23] They contended that since they were not paid their gratuity, their retention on the payroll was in accordance with Article 189 of the Constitution. That as regards the amounts reflected in paragraph 11 of the Respondent's affidavit in opposition, the gratuity and salaries due to the Petitioners for the period that they were removed from the payroll would be worked out following a proper reconciliation of each Petitioner's account. The 1st Petitioner asserted that the amount of K235,000.00 referred to in paragraph 11 (a) of the Respondent's affidavit in opposition was due to the 1st Petitioner in relation to a motor vehicle which should have been sold to him and thus had no bearing on the matter before Court.

[24] The Petitioners argued that to date the Respondent had not paid them their gratuity and therefore no money was paid to them under any mistaken belief. They insisted that as long as their gratuity remained unpaid, they were entitled to be retained on the payroll. Further, that they had not been overpaid because the amounts paid to the 1st Petitioner and the 3rd Petitioner when they

were retained on the payroll were rightly paid to them; that the amounts paid to them cannot be converted into gratuity and that they cannot be treated as though they had been paid their gratuity.

[25] The Petitioners averred that they are all above the retirement age and are not eligible for membership under the National Pension Scheme which renders them vulnerable to economic hardship unless their gratuity is paid. The Petitioners averred that they did not state that they were employed on permanent and pensionable service but that, as the Respondent admitted, they were employed on fixed term contracts which provided for the payment of gratuity at the end of the contract.

PETITIONER'S ARGUMENTS

[26] At the hearing of the petition, Mr Sitali, counsel for the Petitioners relied entirely on the petition and affidavit verifying facts, as well as the reply and the skeleton arguments filed on 5th February, 2021 in support of the petition. He did not make any oral submissions.

[27] In the Petitioners' skeleton arguments, Counsel submitted that in his view, the only question which falls for the Court's

determination is whether a person who is employed on a fixed term contract which provides for the payment of gratuity at the end of such a contract, and who is not paid their gratuity at the end of the fixed term contract and is no longer in employment with that employer, is entitled to be retained on the payroll in terms of Article 189 (2) of the Constitution.

[28] Counsel submitted that the Respondent in its Answer and affidavit in opposition admitted that the gratuity due to the Petitioners arose by virtue of their respective fixed term contracts having come to an end. He submitted that the Respondent's contention that the gratuity due to the Petitioners cannot be considered to be a pension benefit to warrant their continued retention on the payroll until their gratuity is paid as provided for under Article 189 (2) of the Constitution because the gratuity arose from their fixed term contracts having come to an end, cannot be sustained. That this position is not only inconsistent with the purpose of Article 189 but also ignores the definition of a pension benefit as contained in Article 266 of the Constitution which provides as follows:

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

[29] Counsel submitted that the legislature in the definition of pension benefit did not exclude gratuity earned by virtue of a fixed term contract coming to an end. That if anything, by stating that gratuity must be in respect of a person's service, the legislature made it clear that gratuity earned after the end of a fixed term contract is included in the definition of pension benefit. That this is because gratuity is, as in the present case, in respect of a person's service. He submitted that had the legislature intended to exclude gratuity arising from a fixed term contract from the definition of a pension benefit, it would have stated so in Article 266.

[30] In support, Counsel cited **Godfrey Malembeka (suing as Executive Director of Prisons Care and Counseling Association) v Attorney-General and Another**⁽²⁾ wherein we held that if there have to be any limitations in a constitutional provision, these have to be found within the corners of the Constitution. It was submitted that Article 266 should therefore be given a liberal interpretation

which will confer its benefit on persons whose gratuity arises from fixed term contracts, a category to which the Petitioners belong.

[31] Counsel submitted that a fixed term contract can be for any duration as there is no stipulation in any law to the contrary. He contended that the Respondent had gone to great lengths to show that the Petitioners were not employed on permanent and pensionable basis and had exhibited its conditions of service to show that all its employees are employed on fixed term contracts. Counsel submitted that the fact that the Respondent's conditions of service do not provide for employment on permanent and pensionable basis is immaterial to the issue at hand.

[32] Counsel further submitted that the Respondent's conditions of service, being inferior to the Constitution, cannot be resorted to, to interpret a constitutional provision or to deny the Petitioners a right or benefit conferred upon them by the Constitution. That to hold otherwise would be to annul Article 187 of the Constitution which declares that:

"An employee, including a public officer and constitutional office holder, has a right to a pension benefit."

[33] It was submitted that an employee's right to a pension benefit, which by virtue of Article 266 includes a gratuity, cannot be circumvented by conditions of service which are inferior to the Constitution. Counsel cited **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**⁽¹⁾ in which this Court said the words 'promptly' and 'regularly' which are used in Article 189 (1) are catchwords in determining what constitutes a pension benefit.

[34] Counsel submitted that the Court held that for a terminal benefit to qualify as a pension benefit it must be paid promptly and regularly and that a one-off payment does not qualify to be a pension benefit. Counsel contended that while he agreed that the type of terminal benefits which were claimed by the Applicants in the **Lubunda Ngala**⁽¹⁾ case, namely, accrued leave days, uniform and settling allowance did not qualify as pension benefits, he disagreed with the reasoning that for a terminal benefit to qualify as a pension benefit it must be paid promptly and regularly.

[35] He submitted that although Article 189 (1) states that a pension benefit shall be paid promptly and regularly, it is not Article 189 (1) which defines what a pension benefit is but rather Article

266. It was submitted that the definition in Article 266 should be given precedence over Article 189 (1), in determining whether a payment is a pension benefit. That Article 189 (1) is declaratory and places an obligation on the employer to ensure that pension benefits are paid regularly and promptly.

[36] Counsel submitted that Article 188 which requires that a pension benefit should be reviewed periodically to take into account actuarial assessment is also another declaratory provision. That it places an obligation on an employer to periodically adjust upwards the pension benefits if such pension has not yet been paid to a former employee or where part of the pension benefit, in cases where the pension benefit is payable monthly, is still being held by the employer.

[37] That in the present case, Article 188 places an obligation on the Respondent to review upwards the gratuity, due to the Petitioners, to take into account inflation and other factors, from the time that the gratuity became due and payable.

[38] Counsel went on to submit that the word 'and' as used in Article 189 (1) does not mean that payment should be capable of

both being paid promptly and regularly, but rather that the word "and" should be construed to mean 'or.' That unless the word 'and' as used in Article 189 (1) is construed as 'or' the interpretation of Article 189 and Article 266 which defines a pension benefit would lead to absurdity. That although gratuity is included in the definition of pension benefit, it is not paid regularly but only once and to hold that only payments which are paid both promptly and regularly qualify to be pension benefits would lead to absurdity and conflict between Articles 189 and 266.

[39] Counsel submitted that there are instances when the word 'and' should be construed as 'or' to avoid absurdity in a legislation and cited G.C Thornton's Legislative Drafting at pages 95-97 which states as follows:

"The terms 'and' and 'or' are beguilingly simple; one is looked on as the antithesis of the other. 'And' is classified as conjunctive in character while 'or' is classified as disjunctive. The former connotes "togetherness" and the latter tells you to "take your pick."

[40] Counsel also called in aid Maxwell on the Interpretation of Statutes which stated the following on construction of statutes:

"In ordinary usage, 'and' is conjunctive and 'or' is disjunctive. But to carry out the intention of the legislature it may be necessary to read 'and' in the place of the conjunction 'or' and vice versa.

[41] Counsel cited a number of case authorities to press the point that if construing 'and' as a conjunctive would lead to some absurdity, then the word 'and' should be construed to mean 'or.' He submitted that in the present case, the definition of pension benefit in Article 266 includes gratuity and that it is a well-known fact that gratuity is not paid regularly but is paid once at the end of a fixed term contract. That since gratuity is not paid regularly but has been included in the definition of pension benefit, the correct interpretation to be placed on the word 'and' as used in Article 189 (1) is 'or'.

[42] Counsel submitted that the absurd consequences of the conflict between Article 189 and 266 can therefore be avoided by reading the word 'and' in Article 189 (1) as 'or'. That it is inconceivable that the framers of the Constitution would include gratuity in the definition of pension benefit in Article 266 which they know is a one-off payment, only to remove it under Article 189 (1) for being incapable of being paid regularly. Counsel cited Attorney-

General v Chibaya and Others⁽³⁾ wherein the Supreme Court stated that:

"It is settled law that an employee on a fixed term contract is not entitled to pension benefits or redundancy pay as such employees can only be entitled to gratuity at the end of his contract."

[43] Counsel argued that the case of **Chibaya** is distinguishable from the present case for the following reasons: first, that the **Chibaya** case was decided before the constitutional amendment of 2016, which among other things, states that gratuity is a pension benefit. That the Supreme Court's statement in the **Chibaya** case ought to be understood with regard to the constitutional context in which it was made, which is before the Constitution was amended by, *inter alia*, the inclusion of Articles 189 and 266; secondly, that the **Chibaya** case dealt with former employees of the Department of National Parks and Wildlife Service (DNPWS) who were declared redundant on the transformation of that Department into the Zambia Wildlife Authority (ZAWA). The employees were engaged by ZAWA but subsequently retrenched in 2007.

[44] Following their retrenchment, the employees commenced an action, claiming, *inter alia* to be paid their terminal benefits. In dealing with the appeal on the disputed assessment by the Deputy Registrar, the Supreme Court elucidated the types of terminal benefits which were available to the Respondents as former public service employees and contrasted this with what would have been payable to an employee on contract.

[45] That in the present case, the words pension benefits were used to simply state that whilst public service employees were entitled to a pension payable by the Public Service Pensions Board, a person who was on contract and did not contribute to such a pension fund, was not entitled to be paid the same type of pension benefit as was payable to a public service employee who had been contributing to the public service fund (pension scheme from the public pensions board), but that such an employee was entitled to gratuity only, and that the term pension benefit as used in the **Chibaya** case does not mean the same thing or was not used in the same sense as in Article 266. That under Article 266, pension benefits include gratuity. Thirdly, that this Court has original and final jurisdiction to

interpret the Constitution as provided in Articles 121 and 128 of the Constitution.

[46] Counsel submitted that this Court is therefore not bound by the decision in the **Chibaya** case, to the extent that the said decision was not made in the context of the Constitution as amended in 2016. Counsel cited the case of **Faustine Mwenya Kabwe and Another v Mr. Justice Sakala, Mr. Peter Chitengi and Attorney-General**⁽⁴⁾ in which 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, any derogations to the rights will usually be narrowly construed.”

[47] Counsel went on to submit that although Articles 189 (2) and 266 do not deal with individual rights and freedoms, they confer a right on an individual who at the end of a fixed term contract which provided for payment of gratuity has not been paid their gratuity to be retained on a payroll. That the Articles should therefore be construed in a manner which does not dilute the benefit or right conferred.

[48] It was submitted that Articles 189 and 266 should be interpreted using the purposive rule of interpretation adopted by this Court in the **Lubunda Ngala** case so as to give legislative effect to the purpose of that provision. That the purposive rule of statutory interpretation has also been endorsed in a plethora of cases and notably in the case of **The Attorney-General, The Movement for Multiparty Democracy v Akashambatwa Mbikusita Lewanika and Others.**⁽⁵⁾

[49] It was submitted that an interpretation or holding that an employee whose fixed term contract provides for gratuity which is not paid at the end of the contract should not be retained on the payroll would clearly be absurd and cannot be said to be consistent with the general legislative purpose of Article 189 (2). That this would be particularly absurd where, as in the present case, the employee is no longer an employee of the employer and has even exceeded the normal retirement age.

[50] Counsel contended that conversely, it could not have been the intention of the framers of the Constitution to only offer protection to employees that are employed on a permanent and pensionable

basis, while forsaking those who are employed on fixed term contracts and have ceased to be employed by their respective employers, and have also exceeded the normal retirement age.

[51] Counsel referred to the Report of the Technical Committee on Drafting the Zambian Constitution and contended that the rationale for enacting Article 189 (2) was to cushion retirees from hardships as they wait for payment of their pension benefits and that this was to be achieved by ensuring that such retirees continued to receive their salaries until Government pays them their pension benefits.

[52] It was submitted that the rationale for the enactment of Article 189 (2) applies as much to persons who serve on fixed term contracts which provide for gratuity at the end of the contract. That if gratuity is not paid to them, and in circumstances where they are no longer employees of an employer and are of advanced ages as the Petitioners herein, they face the same exposure as retirees whose benefits have not been paid.

[53] Counsel submitted that it is therefore inconceivable that protection would be offered to one category of former employees by way of retention on the payroll and denied to another category of

employees who are similarly circumstanced just because they were employed under fixed term contracts. He argued that a Constitution could not countenance such discrimination.

[54] Counsel submitted that since gratuity is included in the definition of a pension benefit, a person employed on a fixed term contract which provides for gratuity, and who is not paid their gratuity at the end of the contract, and is no longer in the employ of the concerned employer, should be retained on the payroll until their gratuity is paid.

RESPONDENT'S ARGUMENTS

[55] Mrs. Chiyengi, Counsel for the Respondent, similarly entirely relied on the Respondent's Answer, affidavit in opposition and further affidavit in opposition and the skeleton arguments filed on 17th February, 2021. She did not make any oral submissions.

[56] In the Respondent's skeleton arguments, it was submitted that according to clause 5.0 (iv) of the Respondent's Revised Conditions of Service dated October, 2010 exhibited to the further affidavit in opposition filed on 2nd February, 2021, all employees including the Petitioners, were engaged on fixed term contracts with no provision

for permanent and pensionable employment. It was further submitted that the Respondent contributed to the National Pension Scheme under the National Pension Scheme Act, Chapter 256 of the Laws of Zambia, in respect of eligible employees.

[57] It was submitted that the Petitioners were engaged on fixed term contracts, the last of which expired on 31st December, 2018 in respect of the 1st Petitioner, on 31st December, 2019 in respect of the 2nd Petitioner, and on 3rd January, 2019 in respect of the 3rd Petitioner. That employees were entitled to end-of-contract gratuity, which fell due upon a contract coming to an end on expiry of a fixed term, resignation, medical grounds or upon death according to clauses 15.2 (iv) (a), 15.3 (iii), and 15.4 (iv) (c) of the Respondent's exhibited conditions of service.

[58] That the Petitioners were entitled to end-of-contract gratuity but that the Respondent did not pay them their gratuity upon the expiration of their last contracts, which is the gratuity in issue.

[59] It was submitted that the Respondent initially retained the Petitioners on its payroll, on the understanding that Article 189 read together with the interpretation of pension benefit in Article 266,

requires staff to be retained on the payroll until the end-of-contract gratuity is paid. That the Respondent later removed the Petitioners from the payroll, following a legal opinion they had received based on the understanding of this Court's decision in the case of Lubunda Ngala and Jason Chulu v Anti-Corruption Commission.⁽¹⁾

[60] That based on that opinion and their understanding of this Court's interpretation of the constitutional provisions in that case, the Respondent's view was that it was mistaken in its belief that end-of-contract-gratuity was included in the definition of pension benefit. That it now believes that the gratuity in issue was not a pension benefit within the contemplation of the constitutional provisions because it was not due by virtue of the Petitioners being retired by the Respondent.

[61] Further, that the Respondent would treat the payments the Petitioners received under their erroneous retention on the payroll, as payment towards their gratuity and other terminal benefits and would seek to recover any excess payments.

[62] Counsel submitted that the issues at the core of the dispute which require the Court's determination are:

- (a) whether the Petitioners were retired from the Respondent's employment; and
- (b) whether the gratuity in issue is a pension benefit in terms of Articles 187 and 189, so as to entitle the Petitioners to retention on the Respondent's payroll until they are paid.

[63] Counsel submitted that the Constitution has not created any pension or pension benefits and argued that it is clear from the wording of Articles 187 to 189 that it was not the intention of the framers of the Constitution to do so. Rather, that the Constitution has enshrined an employee's right to a pension benefit and prohibited the withholding of a pension benefit or its alteration to an employee's disadvantage; the law to be applied with respect to a pension benefit; the review of a pension benefit to take into account actuarial assessments; exemption of a pension benefit from tax; prompt and regular payment of a pension benefit and retention of a person on the payroll, if he or she is not paid their pension benefit on the last working day, until payment of the pension benefit based on the last salary received by the person while on the payroll.

[64] It was submitted that the very nature of the Constitution, being the primary law of the land, envisages that there are and shall contemporaneously be laws providing for an employee's pension

benefits. That the context of the subject constitutional provisions extends to the specific laws governing the pension benefits they relate to as evidenced by Article 187 (3) which explicitly provides for the law applicable to a pension benefit.

[65] It was contended that Article 266 uses the terms and phrases ‘pension’, ‘compensation’, ‘gratuity’, ‘or similar allowance’ in respect of a person’s service in defining a “pension benefit.” That while the term ‘pension’ is generally understood in ordinary and legal language to mean an amount of money paid regularly to an individual or their beneficiaries as a retirement benefit, the rest of the terms and phrases in the definition, including the phrase ‘gratuity’ have various meanings according to ordinary and law dictionaries.

[66] That the term gratuity in the context of employment service is defined in the **Oxford Advanced Learners Dictionary** as:

1. money that you give to somebody who has provided a service for you;
2. money that is given to employees when they leave their job (e.g., a retirement gratuity).

[67] Further that in **Black's Law Dictionary**, the term is defined under the term "bounty" as "a premium or benefit ... given ... to induce someone to ... perform a service.

[68] Counsel also set out the definitions of the words "compensation" and "allowance" given in the Oxford Advanced Learners Dictionary and in Black's Law Dictionary and contended that the various meanings of the terms raise the need to critically understand words or terms in context. The case of **Director of Public Prosecutions v Ngandu and Others**⁽⁶⁾ was cited in support wherein the Supreme Court said:

"... But as this court has said (see for instance **Sinkamba v Doyle**⁽¹⁾) ordinary meanings or dictionary meanings of words or phrases, while they may properly be used as working hypotheses or starting points, must always in the final analysis give way to the meaning which the context requires; and we use the word "context" in its widest sense as described by Viscount Simonds in **Attorney-General v H.R.H. Prince Augustus**⁽²⁾ at page 53:

"... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari material, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.'

[69] Counsel further submitted that the Petitioners were not serving on permanent and pensionable conditions of service but on fixed term contracts which entitled them to an end-of-contract gratuity. That the term ‘gratuity’ as used in the employment contracts in issue was not a retirement or pension benefit and therefore fits into the first ordinary meaning assigned by the **Oxford Advanced Learners Dictionary** outlined above, that is, “money given to somebody who has provided a service.” That on the other hand, the context in which the term ‘gratuity’ and other terms and phrases appear in Article 266 of the Constitution assigns them a special meaning determined by the subject matter, which is pension, and that the onus is on the Petitioners to prove that the gratuity in issue fits into this context.

[70] Further, that the terms and phrases begin with specific terms and end with words of a general description, that is, ‘or similar allowance.’ It was contended that the words ‘or similar’ restrict the kind of allowances intended to the category or class (*genus*) to which the earlier specific terms ‘pension,’ ‘compensation’ and ‘gratuity’ belong. That **Bennion on Statutory Interpretation**, 3rd Edition at

page 961 discusses some aspects of the application of the *ejusdem generis* principle in statutory interpretation which is helpful in construing the scope of the benefits intended by the definition in issue. That the author refers to instances where the *genus* describing terms are followed by wider residuary words, quoting case law:

'According to well-established rules in the construction of statutes, general terms following particular ones apply only to such persons or things as are ejusdem generis as those comprehended in the language of the legislature.' To like effect, Lord Campbell said that '**where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.**'

[71] Counsel submitted that in the present case, the definition of "pension benefit" in Article 266 is made more complex as the specific terms and the general words which follow them are not only capable of more than one meaning, but are also technical terms. That therefore, they must be assigned their technical meaning according to the laws dealing with the subject matter, that is, occupational pension laws or other related legislation in which they are found.

[72] Counsel contended that to start with, given the context of the constitutional provisions, the words ‘pension’, ‘compensation’, ‘gratuity’ and ‘similar allowance’ must be generically categorised as “a payment that is a pension or a retirement benefit.” That the effect of this position is for example, that '**compensation in respect of a person's service**' when used in reference to a reward of salary or wage, or in reference to an award in respect of injury suffered by an employee in the course of service who is still in employment cannot properly be included in the definition. That, similarly, ‘gratuity,’ or other ‘allowance’, such as a long service bonus, if paid by qualifying length of service or by virtue of termination of a contract whether by expiry of a fixed term, resignation, or by reason of death cannot be included in the definition because it is not paid as a pension or retirement benefit.

[73] Counsel submitted that it follows from the foregoing arguments that, ultimately, whether or not a gratuity is a pension or retirement benefit can only be construed in the context of the relevant occupational pension law or employment law. That there are a host of occupational pension laws and other statutes

conferring or governing pension benefits and retirement benefits. Notably, that the National Pension Scheme Act, provides for membership to the pension fund under the Act, of all employees below the prescribed age generally, with few exceptions (significantly of public servants who at the time of commencement of the Act were members of the Public Service Pension Fund under the Public Service Pensions Act, Cap. 260 or the Local Authorities Superannuation Fund under the Local Authorities Superannuation Fund Act, Cap. 284).

[74] Counsel contended that the context of the respective laws is imperative in determining the benefits to which the constitutional provisions may be applied, and further submitted that the National Pension Scheme Act provides for retirement age, pension payable on normal retirement or due to permanent invalidity (disability), and a lump sum payment to a member who attains the retirement age but does not, nonetheless, qualify for pension.

[75] That the Act also provides for payments to specified family members under the scheme “survivor’s pension” in respect of a pension or invalidity pension that a deceased member was receiving

or was eligible to receive before he or she died or the invalidity pension that the member would have received if he or she had not died. That in circumstances where eligibility for a survivor's pension or invalidity pension are not met, a lump sum payment is paid. That the pension, invalidity pension and lump sum payment are calculated based on prescribed formulae.

[76] Counsel submitted that the pension, invalidity pension, survivor's pension, survivor's invalidity pension, and lump sum payment upon retirement due to age (though not eligible for pension for want of other eligibility criteria) all meet the definition of "pension benefit" under the constitutional provisions. That this is because they are paid by virtue of normal retirement or retirement for permanent invalidity or retirement due to attainment of retirement age (though not qualified for pension on other criteria); or in respect of death of a member who was in normal retirement or in retirement for permanent invalidity.

[77] That on the other hand, a lump sum payment to a surviving family member in respect of death of a member who did not qualify for any pension or lump sum payment upon attaining retirement

does not fall within the definition of “pension benefit”. Thus, the former ‘lump sum’ benefit falls within the class of ‘other allowance’ in the definition because it is a retirement benefit, while the latter falls outside of that class because it is not in respect of retirement.

[78] That the Public Service Pension Fund Act covers a wide range of the public service, namely the Civil Service, the Defence Forces, the police and prison services, the Zambia Security Intelligence Service and some statutory bodies. The Act defines “pension” in section 2 as “an annual pension payable during the lifetime of the recipient.” The benefits under the Act include pension on attaining pensionable age and/or other eligibility criteria; lump sum payment on retirement in certain circumstances not qualifying for pension; pension to surviving spouse or child upon death of an officer in certain specified circumstances; pension on retirement due to abolition of post (retrenchment); and the option of commutation of pension to gratuity (lump sum), upon retirement; gratuity upon death while discharging duties; gratuity upon resignation; and pension or gratuity (if not qualified for a pension), upon retirement on medical grounds.

[79] Counsel submitted that all these benefits fall within the definition of “pension benefit” except gratuity upon death and gratuity upon resignation. That the common qualifying factor being a benefit in respect of retirement.

[80] That other legislation makes provisions for specific services which cover for instance, the Defence Act, Chapter 106 of the Laws of Zambia, provides for pension in respect of servicemen on permanent and pensionable terms upon retirement in various circumstances. That it also provides for a pensionable age, which is different from that provided for in the National Pension Scheme Act and that generally provided for in the Public Service Pensions Act. That the Defence Act also provides for payment of various types of gratuity in different circumstances such as officers employed on short term basis, those whose service terminates in circumstances where they are not eligible to receive pension, such as upon resignation, discharge or dismissal from service; circumstances where either pensions or gratuity may be paid by discretion of the Republican President, or where gratuity may be paid on retirement or early retirement instead of a pension.

[81] Counsel referred to the Pensions Scheme Regulation Act No. 28 of 1996 as being an overarching statute which provides for establishment, registration and prudential regulation and supervision by the Pensions and Insurance Authority (PIA) of pension schemes and funds administered under them.

[82] Counsel submitted that the occupational pension law framework in Zambia, starting with the constitutional provisions in issue, entail in effect that no employer subscribes to or administers a pension scheme or devises contractual retirement benefits not governed and regulated by statutory law. That at the same time, the law ensures that there are statutory pension schemes capturing all sectors of employment and all eligible employees. That this system is in tandem with the object of guaranteeing the right to a pension benefit, while ensuring that the pension system operates in a manner that lends itself to transparency and effective prudential regulation and supervision.

[83] It was submitted that the Employment Code Act No. 3 of 2019 which came into force on 19th May, 2019, reinforces this position which is inherent in our laws, as it states in section 52 (7) (a) and

(c)) that employment expires at the end of the term for which it is expressed to be made or on the employee attaining the applicable retirement age, where the contract of employment is permanent in nature.

[84] That section 54 (1) (b) of the Act provides that an employer shall pay an employee a severance pay, where the employee's contract of employment is terminated or has expired, where a contract of employment is for a fixed duration, severance pay shall either be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period or the retirement benefits provided by the relevant social security scheme that the employee is a member of, as the case may be.

[85] While section 58 of the Act provides that an employee's contract of employment shall expire by reason of retirement, where the employee attains the age of retirement under a written law.

[86] Counsel thus contended that accordingly, in her view any alleged retirement and retirement benefit can only exist as defined by or under an occupational pension law or a specific piece of legislation making provision for that retirement and pension or

retirement benefit. It was submitted that the Petitioners have not demonstrated how the gratuity in issue fits into the definition of “pension benefit” in Article 266 of the Constitution.

[87] While conceding that there is a principle that constitutional provisions conferring a right should be liberally and generously interpreted, as argued by the Petitioners, Counsel argued that that principle cannot be applied *in vacuo* or in a manner where an employer or employee arbitrarily determines that an employee has been retired by the employer or that an employment benefit constitutes a pension benefit. Counsel submitted that the proposition by the Petitioners that they had attained retirement age and, therefore, that the end of fixed term contract gratuity in issue was due to their being retired from the Respondent’s service was arbitrary and untenable. That the proposition does not accord with the constitutional provisions and is not supported by any pension law or employment law in Zambia.

[88] Counsel further contended that while it was apparent that the Petitioners may have, at some point in their working history, retired and received pension benefits under some occupational pension law

and pension scheme(s), they had not shown under what law they claim to have been retired by the Respondent and under which scheme or law the gratuity they claim is a retirement benefit. That they cannot legitimately make these claims by merely making reference to the constitutional provisions in general terms.

[89] That equally, they cannot validly claim that by reason of their being “beyond the pensionable age” as defined for NAPSA, the end of their fixed term contracts, constituted retirement by the Respondent and that the gratuity constitutes a pension benefit in terms of the constitutional provisions.

[90] In concluding her arguments, Counsel referred to the Lubunda Ngala case in which she said this Court made cardinal pronouncements relating to the constitutional provisions in issue. That of central import this court determined at page J 32 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. ... Thus, it can be correctly said that a pension benefit is triggered by retirement due to age or other circumstances.”

[91] Counsel further submitted that the Court further considered the kind of benefits contemplated by the Constitution by reference to Article 189 (1) which requires that a pension benefit should be paid ‘promptly and regularly’. That the Court referring to the terminal benefits in contention in that case posed the question:

“... can these be paid promptly and regularly? The answer is that they cannot because while they can be paid promptly, they cannot be regularly paid as these are one-off payments.” (At page 34)

[92] Counsel submitted that the Court in the interpretation of Article 189, reasoned that the starting point in understanding the rationale behind the enactment of Articles 189 and the definition of ‘pension benefit’ in Article 266 is Article 188.

[93] That the Court traced the contextual history of the constitutional provisions which clearly demonstrated that the enactments were intended for benefits that are due by virtue of retirement. It was submitted that the present case, though not dealing with the type of allowances the **Lubunda Ngala** case dealt with, is on point in substance as the gratuity in issue merely “arose from the termination or coming to an end of the employment

contracts.” That although the Petitioners have made a claim to the effect that the benefit was “triggered by retirement,” they have failed to prove their claim.

[94] Counsel argued that the Petitioners’ argument relating to periodical review of a pension benefit to take into account actuarial assessments in relation to gratuity, was misconceived because periodical actuarial assessment of pension benefits is a mandatory constitutional requirement and is a universal practice and a basic standard prescribed under the overarching Pension Scheme Regulation Act, the National Pension Scheme Act and all other pension laws. That it is an objective standard which protects the value of pension benefits. The fact that it is not feasible to actuarially review an end-of-contract gratuity granted by an employer the rate of which, as in the present case, is simply stated as 35% of all the remuneration payments received by an employee simply shows that it does not fit into a pension benefit as envisaged by the constitutional provisions and the related pension laws of the country.

[95] Regarding the provision requiring that a pension must be promptly and regularly paid, Counsel submitted that the core of pension laws is to secure sustained income for pensioners. That provision for benefits such as gratuity or other lump sum amounts as retirement benefits is usually supplemental to regular pension, or in lieu of regular pension by default, or where eligibility to regular pension is not met, or by voluntary option of a beneficiary. That one-off payments are thus not the norm, but the exception.

[96] Counsel contended that in view of the general object of securing a pension that is promptly and regularly paid, the exceptional one-off payments are not, in terms of legislative policy, a concern of the constitutional enactments. That the language of the provision is such that, though explicitly leaning towards regular pension, it does not present any difficulty given the array of tools available in statutory interpretation. That the word ‘and’ between the words ‘promptly’ and ‘regularly’ would not be construed conjunctively in circumstances where a person who retired is paid a lump sum. Counsel submitted that this flexibility does not take away from the fact that when considering whether a benefit is a pension benefit

under the constitutional provisions, the question whether it is capable of being paid promptly and regularly, as explicitly stated, has central value and may in some cases lead to speedy resolution of the case at hand.

[97] Counsel further submitted that in the **Lubunda Ngala** case, the fact that while the allowances in issue could be promptly paid but could not be regularly paid was a flashlight for judicial scrutiny. It was submitted that indeed if a terminal benefit cannot be paid promptly and regularly, as in the present case, it calls for critical examination even if it is alleged to be a pension benefit.

[98] Counsel submitted that in terms of tax exemption, there would be a serious anomaly with far reaching implications for revenue collection if employers and employees were left to devise their own retirement benefits unregulated by law, whilst enjoying the tax exemption granted by the Constitution, and that this was not the intention of the framers of the Constitution. It was submitted in conclusion that the gratuity in issue could not by any legitimate consideration be a pension benefit as contemplated by the Constitution.

[99] Counsel urged us to dismiss the Petition with costs, and to order that the payments made to the Petitioners by virtue of their retention on the payroll were properly applied by the Respondent as payments towards gratuity and other terminal benefits and that any excess payments should be paid back to the Respondent.

EVALUATION AND DECISION

[100] We have considered the contents of the petition, the answer and the accompanying affidavits on both sides together with the respective skeleton arguments filed by the parties and the authorities cited therein.

[101] In the main, the Petitioners seek a declaration that the Respondent's decision to remove them from the payroll before paying them their gratuity as stated in the Respondent's letter of 28th April, 2020 is unconstitutional. They further seek an order that they be retained on the payroll and be paid their withheld salary arrears and allowances until they are paid their pension benefits which are in the form of gratuity. We shall consider these claims together as they are related.

[102] The issue we have to determine is whether the Respondent contravened Articles 187 and 189 of the Constitution by removing the Petitioners from its payroll before paying them their gratuity. Related to that issue is the question whether the gratuity due to the Petitioners at the expiry of their respective contracts of employment with the Respondent is a pension benefit for purposes of Article 189 (2) of the Constitution thereby entitling them to be retained on the payroll.

[103] Before delving into the issues raised in this matter, we wish to state that although the parties in this case argued at some length regarding their understanding of our decision in the **Lubunda Ngala** case, our view is that the decision in that case was specific to the nature of the allowances and reliefs sought by the Applicants in that case. We further take the view that this case can be determined without reference to that decision. We will therefore not review the arguments advanced by the parties regarding the **Lubunda Ngala** decision in this case.

[104] In determining the Petitioners' claims, we begin with a consideration of Articles 187 and 189 read with the definition of

pension benefit in Article 266 of the Constitution. Article 187 of the Constitution reads as follows:

- “(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.
- (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 on 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.” (Emphasis added).

[105] Article 189 provides as follows:

- “(1) A pension benefit shall be paid promptly and regularly.
- (2) Where a pension benefit is not paid on a person’s last working day, that person shall stop work but the person’s name shall be retained on the payroll, until payment of the pension benefit based on the last salary received by that person while on the payroll.”

[106] Lastly, Article 266 of the Constitution defines what a pension benefit is in the following terms:

“266. In this Constitution, unless the context otherwise requires-

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

[106] A literal interpretation of the whole of Article 187 reveals that clause (1) confers on an employee, including a public officer and constitutional office holder, a right to a pension benefit; clause (2) provides in imperative terms that a pension benefit shall not be withheld or altered to an employee’s disadvantage thereby providing protection against the arbitrary withholding or alteration of an employee’s pension benefit. Article 187 (3) is instructive and unequivocal. It states that the law to be applied to a pension benefit before the commencement of the Constitution is the law that was in force immediately before the date on which the pension benefit was granted or the law in force on a later date that is not less favourable to that employee. Further, that the law to be applied to a pension benefit after the commencement of the Constitution is the law 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.

[108] It is evident from the plain language of Article 187 (3) of the Constitution that the framers of the Constitution intended that a

pension benefit to which clauses (1) and (2) of Article 187 should apply is a pension benefit which was granted to an employee by or under an Act of Parliament. We are fortified in our interpretation by the rationale for draft Article 252 given at pages 670 to 671 of the Report of the Technical Committee on Drafting the Zambian Constitution dated 30th December, 2013, which Technical Committee comprised the framers of the Constitution, when they said:

"The rationale for the Article was to provide for pension of public officers in the Constitution as a right that could be enforced in a court of law. The Committee observed that such pensions are part of social security schemes whose fundamental objective is to protect individuals from the hardships which will otherwise result from unemployment, retirement or death of a wage earner." (Emphasis added).

[109] Draft Article 252 as recommended by the Technical Committee in the First Draft Constitution, which was the forerunner to Article 187 of the Constitution, read in full as follows:

- 252 (1) **The right of a public officer to a pension, gratuity or retrenchment benefit is hereby guaranteed.**
- (2) **Any benefit to which a public officer is entitled by or under an Act of Parliament, shall not be withheld or altered to that officer's disadvantage, except that such**

benefit may be altered by way of an upward adjustment to the extent provided by law.

- (3) The law to be applied with respect to any pension benefits that were granted to any person before the commencement of this Constitution shall be the law in force that is most favourable to that person.
- (4) The law to be applied with respect to pension benefits, other than as provided in clause (2), shall, where those benefits are wholly in respect of a period of service as a public officer, member of the Defence Force or of the national security agencies that commenced before or after the commencement of this Constitution, be the law in force that is most favourable to that person.
- (5) Pension benefits, unless otherwise charged on a fund established by or under an Act of Parliament, shall be a charge on the Consolidated Fund.
- (6) In this Article, “pension benefits” includes any pension, compensation and gratuity or similar allowance for persons in respect of their service as public officers, members of the Defence Force and national security agencies or for the widows, children, dependants or personal representatives of those persons in respect of the service. (Emphasis added)

[110] Following public consultations at district, provincial and national level, the Technical Committee changed the marginal note which previously read “Pension, Gratuity and Retrenchment Benefit for Public Officers” to read “pension benefit”. The Technical

Committee also resolved to retain clauses (1), (2) and (5) of the draft Article 252, but redrafted the Article and renumbered it as Article 224. The redrafted Article 224 which was recommended in the Final Draft Constitution of the Technical Committee, as set out at page 673 of the Report, read as follows:

- "(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.**
- (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 on 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."**

[111] It will be observed from the provisions set out above that Article 224 of the Final Draft Constitution was enacted word for word as Article 187 of the current Constitution. Similarly, the definition of pension benefit in draft Article 252 (6) of the First Draft

Constitution influenced the definition of pension benefit in Article 266 of the Constitution. It will also be observed that the intention of the framers of the Constitution regarding pension benefits was made clearer still when the definition of pension benefits was included in clause (6) of draft Article 252 in relation to clause (2) of that Article.

[112] When considered side by side, clauses (2) and (6) of draft Article 252 read as follows:

- (2) Any benefit to which a public officer is entitled by or under an Act of Parliament, shall not be withheld or altered to that officer's disadvantage, except that such benefit may be altered by way of an upward adjustment to the extent provided by law.
- (6) In this Article, "pension benefits" includes any pension, compensation and gratuity or similar allowance for persons in respect of their service as public officers, members of the Defence Force and national security agencies or for the widows, children, dependants or personal representatives of those persons in respect of the service.

[113] It will be observed that when read side by side, clauses (2) and (6) of draft Article 252 put, beyond debate, the question of what the framers of the Constitution intended to provide for as pension benefits in the Constitution.

[114] Having said that, in order for us to determine whether the Respondent breached Articles 187 and 189 of the Constitution by removing the Petitioners from its payroll before paying them their gratuity, we must first settle the question whether the gratuity to which the Petitioners were entitled at the end of their contracts was a pension benefit in terms of Articles 187 and 189 of the Constitution as envisaged by the framers of the Constitution. The question which comes to the fore in this case is what is a pension benefit in terms of Article 187 and 189 of the Constitution?

[115] In answering that question, we are alive to the definition of pension benefit in Article 266 of the Constitution which includes a pension, compensation, gratuity or a similar allowance in respect of a person's service. However, the issue is not whether gratuity is included in the definition of pension benefit in Article 266. Rather, the issue is whether the particular gratuity claimed by the Petitioners in this case, and which is in issue, is a pension benefit for purposes of Articles 187 and 189 of the Constitution. It is settled law that when interpreting the Constitution, all the provisions touching on the subject for interpretation must be considered

together and that no provision should be read in isolation from the other provisions.

[116] Therefore, in this case, the definition of pension benefit should be interpreted in the light of the substantive provisions of Articles 187 and 189 of the Constitution. As we already stated earlier in this judgment, Article 187 (3) of the Constitution sheds clear light on what pension benefits the framers of the Constitution intended to provide for in Articles 187 to 189 of the Constitution by referring to the law to be applied to a pension benefit.

[117] The framers of the Constitution provided for an employee's right to a pension benefit in broad terms in the Constitution and left the details of the pension benefit to be stated in an Act of Parliament as clearly implied by Article 187 (3). 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.

[118] In that regard, we take judicial notice that there are several pension laws contained in Acts of Parliament including the Public Service Pensions Act, Chapter 260 of the Laws of Zambia, relating to pensions and other benefits for persons employed in the public service, the National Pension Scheme Act, Chapter 256 of the Laws of Zambia which constitutes the National Pension Scheme out of which pension benefits are paid to members and the Judges (Conditions of Service) Act, Chapter 277 of the Laws of Zambia which provides for, inter alia, retirement benefits for judges, to name a few. Our taking judicial notice of the pension laws is based on the provisions of section 6(1) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, which states that every Act, Applied Act or British Act shall be a public Act and shall be judicially noticed as such.

[119] Given that the pension benefit referred to in Articles 187, 188 and 189 of the Constitution, is a pension benefit granted by or under a relevant pension law or other law, 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.

[120] In the present case, the Petitioners contended that the gratuity due to them under their expired respective contracts of employment is a pension benefit which qualifies them to be retained on the payroll pursuant to Article 189(2). They premised their contention on the definition of pension benefit which includes gratuity in Article 266 of the Constitution. They argued that since their right to a pension benefit was conferred on them by Article 187 of the Constitution, and that since a pension benefit under Article 266 includes a gratuity, it cannot be circumvented by the Respondent's conditions of service which are inferior to the Constitution.

[121] The Petitioners argued that according to the Technical Committee's report, which we referred to earlier in this judgment, the rationale for enacting Article 189 (2) was to cushion retirees from hardships as they wait for payment of their pension benefits and that this would be achieved by ensuring that such retirees continued to receive their salaries until the Government pays them

their pension benefits. That the rationale for the enactment of Article 189 (2) equally applies to persons who serve on fixed term contracts which provide for gratuity at the end of the contract. That if gratuity is not paid to such persons, and in circumstances where they are no longer employees of an employer and are of advanced ages as the Petitioners in this case are, they would face the same hardship as retirees whose benefits have not been paid.

[122] In the Petitioners' view, since gratuity is included in the definition of a pension benefit, a person employed on a fixed term contract which provides for gratuity, and who is not paid their gratuity at the end of the contract, and is no longer in the employ of the concerned employer, should be retained on the payroll until their gratuity is paid. They, therefore, allege that the Respondent breached Articles 187 and 189 when it removed them from the payroll without paying them their gratuity.

[123] In rebuttal the Respondent contended that the issues at the core of the dispute are the questions whether the Petitioners were retired from the Respondent's employment; and whether the gratuity in issue is a pension benefit, in terms of Articles 187 and

189, so as to entitle the Petitioners to retention on the Respondent's payroll until they are paid. The Respondent took the position that the Constitution has not created any pension or pension benefits and that going by the wording of Articles 187 to 189, it was not the intention of the framers of the Constitution to do so.

[124] That what the Constitution has done is, *inter alia*, to enshrine an employee's right to a pension benefit, prohibit the withholding of a pension benefit or its alteration to an employee's disadvantage; state the law to be applied to a pension benefit; provide for the prompt and regular payment of a pension benefit and require retention of a person on the payroll, if the person is not paid their pension benefit on the last working day, until payment of the pension benefit.

[125] The Respondent emphasized that the Petitioners were not serving on permanent and pensionable conditions of service but on fixed term contracts which entitled them to an end-of-contract gratuity. Further, that the term gratuity as used in the employment contracts in issue was not a retirement or pension benefit but fitted in the category of money paid to a person who had provided a service

as per ordinary meaning of the word assigned by the **Oxford Advanced Leaners Dictionary** cited earlier on.

[126] The Respondent argued that, on the other hand, the context in which the word gratuity appears in Article 266 of the Constitution assigns it a special meaning determined by the subject matter, which is pension, and that the onus is on the Petitioners to prove that the gratuity in issue fits into this context. It was argued that the Petitioners' alleged retirement and retirement benefit can only exist as defined by or under an occupational pension law or a specific piece of legislation providing for that retirement and pension or retirement benefit. The Respondent contended that the Petitioners had not demonstrated how the gratuity in issue fits into the definition of pension benefit in Article 266 of the Constitution. The Respondent thus denied that it breached Articles 187 and 189 of the Constitution and reiterated that the gratuity in issue is not a pension benefit in view of our decision in the **Lubunda Ngala** case.

[127] As we already stated earlier in this judgment, Article 187(3) read with the definition of pension benefit in Article 266 are central to the resolution of the dispute in this matter and to the

determination of the question whether the gratuity in issue is a pension benefit as it states what pension benefit was envisaged by the framers of the Constitution. In light of the clear provisions of Article 187(3), it was incumbent upon the Petitioners to adduce cogent evidence to prove that the gratuity in issue was a pension benefit granted to them by or under a relevant pension or other law, which law they should have clearly cited. However, they did not adduce any such evidence. It is settled law that the burden of proof in a civil action lies on the party who asserts the affirmative of the issues. The learned authors of Phipson on Evidence, 17th edition in paragraph 6-06 at page 151 state the following regarding the burden of proof in civil cases:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him."

[128] As Counsel for the Respondent rightly submitted, in view of the provisions of Article 187 (3) which provides for the law which will be applied in respect of a pension benefit, whether a gratuity

payable in a specific case is a pension benefit can only be determined in the context of the relevant pension law or other law. As the Petitioners did not adduce any evidence that the end of contract gratuity due to be paid to them by the Respondent was a pension benefit granted to them by or under a pension or other law, we find that the Petitioners have not proved the allegation that the Respondent breached Article 187 and 189 by removing them from the payroll. We therefore decline to grant them the declaration that their removal from the payroll was unconstitutional and dismiss the claim. We further dismiss the rest of the claims and reliefs sought as they were premised on the first claim. In sum, the petition wholly fails and is dismissed.

[129] Notwithstanding the dismissal of the petition, we hasten to state that whereas the Respondent urged us to order that the payments made to the Petitioners by virtue of their retention on the payroll were properly applied by the Respondent as payments towards gratuity and other terminal benefits and that any excess payments should be paid back to the Respondent, these are not constitutional issues which we can determine in these proceedings.

[130] Since this litigation enabled us to settle an important constitutional issue relating to pension benefits, each party will bear their own costs of this action.

.....
H. Chibomba

**H. CHIBOMBA
PRESIDENT, CONSTITUTIONAL COURT**

.....
A. M. Sitali

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

.....
M. S. Mulenga

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

.....
M. M. Munalula

**M. M. MUNALULA
CONSTITUTIONAL COURT JUDGE**

.....
M. Musaluke

**M. MUSALUKE
CONSTITUTIONAL COURT JUDGE**