

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

2022/CCZ/005

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLE 189(1) AND (2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 189(1) AND (2) OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: THE FIRST SCHEDULE TO THE PUBLIC ROADS ACT NO. 12 OF 2002

IN THE MATTER OF: PUBLIC SERVICE PENSIONS ACT NO. 35 OF 1996

BETWEEN:

**DICKSON NDHLOVU
KAPEMBWA MULENGA
ELIAS MWILA
TITUS CHANSA
MASUZYO NDHLOVU**



**1ST PETITIONER
2ND PETITIONER
3RD PETITIONER
4TH PETITIONER
5TH PETITIONER**

AND

ROAD DEVELOPMENT AGENCY

RESPONDENT

**CORAM: Munalula, DPC, Mulenga and Chisunka, JJC on 27th July, 2022 and
21st September, 2022**

**For the Petitioners: Mr. P. Songolo and Mrs. A. Mwampaja of Philsong &
Partners**

For the Respondent: Mr. F. Malambo of Shephande and Company

J U D G M E N T

Mulenga, JC delivered the Judgment of the Court.

Cases cited:

1. Anderson Mwale and Two Others v Zambia Open University 2021/CCZ/001
2. Owen Mayapi and Others v The Attorney General 2019/CCZ/003
3. Godfrey Miyanda v The High Court (1984) Z.R. 62. (S.C.)
4. BP Zambia Plc v Interland and Motor Limited (2001) Z.R. 37
5. Rush and Thompkins Limited v Greater London Council and Another [1989] A.C. 993
6. Kalunga Chansa v Evelyn Hone College CAZ Appeal No. 134 of 2019
7. Levy Mwale v ZNBC 2020/CCZ/0012
8. Bric Back Limited T/A Gamamwe Ranches v Neil Kirkpatrick 2021/CCZ/002
9. Lubunda Ngala and Another v Anti-Corruption Commission CCZ Selected Judgment No. 4 of 2018
10. Gilford Malenje v Zambia Airports Corporation Limited 2021/CCZ/005

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia
2. The Public Roads Act No.12 of 2002
3. The Public Service Pensions Act No. 35 of 1996

Introduction

[1] The Petitioners filed this Petition against their former employer, Road Development Agency, the Respondent, on 8th April, 2022 seeking for this Court to pronounce itself on Article 189(2) of the Constitution in relation to their contracts of employment. Article 189 entitles retired employees to be retained on their employers' payroll if their pension benefits are not paid on

the last working day. This article has been a subject of interpretation in a number of our decisions.

Petitioners' Case

[2] In their Petition, the Petitioners allege that they were employed by the Respondent on various dates as Director-Planning and Design; Director Finance; Director Human Capital and Administration; Director Procurement; and Director Communication and Corporate Affairs, respectively.

[3] All the Petitioners were engaged on fixed contracts of three years, on various dates in 2019, 2020 and 2021, which provided for gratuity payments at the rate of thirty-five percent (35%) of their last salary.

[4] In November, 2021, the Petitioners' contracts were terminated with immediate effect. For the 1st, 2nd, 4th and 5th Petitioners, their contracts were terminated on 24th November, 2021, while the 3rd Petitioner's contract was terminated on 15th November, 2021.

[5] Upon termination of their contracts, the Respondent failed or neglected to settle the terminal dues and removed the Petitioners from the payroll as of January, 2022. Reliance was placed on Article 189 of the Constitution and their contracts supported by sections 4(2)(b) and 3(9) of Part 2 of the Second and First Schedules, respectively, to the Public Roads Act No. 12 of 2002 and sections 36 to 39 of the Public Service Pensions Act No. 35 of

1996. The Petitioners position is that based on these, they were entitled to be retained on the payroll until full payment of their pension benefits in form of gratuity since these were not paid on the dates the contracts were terminated.

[6] The Petitioners thus seek the following reliefs:

1. **A declaration that the decision by the Road Development Agency to remove the Petitioners from the Respondent's payroll without paying the said Petitioners' terminal benefits in form of gratuity is unconstitutional and contrary to the provisions of Article 189 (1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016;**
2. **An order directing the Respondent to retain the Petitioners on the Respondent's payroll until their pension benefits are paid in full;**
3. **An order directing the Respondents to pay to the Petitioners all the withheld salaries from January 2022 until payment of their pension benefits and or gratuity in full;**
4. **Interest on all sums granted from date of cause of action to the date of full and final payment at the current commercial bank lending rate;**
5. **Costs; and**
6. **Such other order that this Court shall deem just.**

[7] In skeleton arguments filed in support of the Petition, the Petitioners argued that the failure by the Respondent to pay the Petitioners their respective gratuities on the date that their contracts were terminated entitled them to be retained on the payroll. The directive issued removing them from the payroll in January 2022 was unconstitutional as it offended Article 189 (1) and (2) of the Constitution.

[8] Laying claim to their right to pension benefits in the form of gratuity, the Petitioners cited a number of our decisions. Amongst the authorities cited was **Anderson Mwale and Two Others v Zambia Open University**¹ which the

