IN THE CONSTITUTIONAL COURT OF ZAMBIA **2021/CCZ/0048**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF:	**ARTICLES 128 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**
AND	
IN THE MATTER OF:	**ALLEGED CONTRAVENTION OF ARTICLE 187(1)(2) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 2016**
AND	
IN THE MATTER OF:	**ARTICLE 189(1)(2) OF THE CONSTITUTION OF ZAMBIA AMENDMENT ACT NO. 2 OF 2016**

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
31 JAN 2023
REGISTRY 1
P O BOX 50067, LUSAKA

BETWEEN:

DR. OSCAR MWIINDE **PETITIONER**

AND

THE ATTORNEY GENERAL **1ST RESPONDENT**

NATIONAL PENSIONS SCHEME AUTHORITY **2ND RESPONDENT**

Coram: Mulonda, Mulenga and Musaluke JJC on 14th October, 2022 and 31st January, 2023

For the Petitioner:	Mr. N. Nalishuwa and Mr. P. Chomba of Messrs Mulenga Mundashi Legal Practitioners
For the 1st Respondent:	Ms. N. K. Chongo - State Advocate
For the 2nd Respondent:	Mr. P. Chungu and Ms. C. Y. Mulenga of Messrs Ranchold Chungu Advocates

JUDGMENT

Mulonda, JC delivered the Judgment of the Court

Cases Referred to:

1. **Owen Mayapi and 4 Others v The Attorney General 2019/CCZ/003**
2. **Resident Doctors Association of Zambia and Others v Attorney General SCZ Judgment No. 12 of 2013**
3. **Christine Mulundika and 7 Others v The People SCZ No. 25 Of 1995 SCZ Appeal No. 95 of 1995**
4. **Re Thomas Mumba v The Director of Public Prosecutions (1984) Z.R. 38**
5. **James Mankwa Zulu and 3 Others v Chilanga Cement Plc SCZ Appeal No. 12 of 2004**
6. **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission CCZ Selected Judgment No. 4 of 2018**
7. **Hakainde Hichilema and Another v Edgar Chagwa Lungu and 3 Others CCZ Selected Judgment No. 34 of 2016**
8. **Faustin Kabwe and Another v Justice Ernest Sakala and Others 8/93/2000**
9. **National Pensions Scheme Authority v Philip Stuart Wood SCZ Selected Judgment No. 45 of 2018**

Legislation Referred to:

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **National Pensions Scheme Authority Act Chapter 256 of the Laws of Zambia as Amended by Act No. 7 of 2015**

INTRODUCTION

[1] This is a judgment relating to a petition filed by Dr. Oscar Mwiinde, the Petitioner herein. The Petition is made pursuant to Article 128 of the Constitution of Zambia (Amendment) Act

No. 2 of 2016 (the Constitution). The Petitioner alleges that the Respondents have contravened Article 187(1)(2) by withholding his pension benefit after having been retired in national interest which right is guaranteed by Article 189 of the Constitution.

[2] The Petitioner seeks the following reliefs:

i. **A declaration that retirement in national interest constitutes retirement as contemplated in Article 189 of the Constitution;**

ii. **A declaration that the Petitioner whilst being retained on the 1st Respondent's payroll pending the payment of his pension benefits is entitled to be paid the allowances that were due to him at the time of his retirement;**

iii. **A declaration that retention on the payroll entails payment of both the basic pay and allowances that the Petitioner was entitled to at the time of his employment with the 1st Respondent;**

iv. **A declaration that section 18 of the National Pension Scheme Authority (NAPSA) Act is ultra vires the Constitution to the extent that it does not recognize retirement in national interest;**

v. **An order directing the 2nd Respondent to pay the Petitioner his full pension benefits;**

vi. **An Order directing the 1st Respondent to pay the Petitioner all outstanding arrears of allowances that have been withheld from May 2017 to date;**

vii. **An Order directing the 1st Respondent to pay the Petitioner the following sums:**

(a) **Twenty-Nine Thousand Nine Hundred and Ninety-Five Kwacha (ZMW29, 995.00) as unpaid arrears of the rural retention gratuity for period February 2009 – February 2013;**

(b) **Thirty-Eight Thousand Eight Hundred and Forty-Three Kwacha and Ninety-Three Ngwee (ZMW38,843.93) in respect of arrears of the graduate's recruitment and retention allowance for period July 2009 – December**

2011; and

(c) Six Thousand Seven Hundred Kwacha (ZMW6, 700) as repatriation allowance

viii. Interest on all sums ordered;

ix. Costs; and

x. Any such other Order as this Court shall deem fit.

BACKGROUND

[3] Facts as stated in the Petition, the affidavit verifying facts and the Petitioner's witness statement are that the Petitioner is a medical practitioner and a former employee under the Ministry of Health. He was appointed in the Public Service on 2nd April, 2007 under the Ministry of Health as a medical doctor. His last deployment was in Gwembe District in the Southern Province of Zambia as District Medical Officer, a position he held from May, 2010 to 20th December, 2016 when he was retired in national interest.

[4] On 20th December, 2016 the Petitioner was retired in national interest by the President of Zambia at the age of 38 years after 10 years of service. At retirement in national interest, the last basic monthly salary of the Petitioner was ZMW17, 139.79. The Petition reveals that upon being retired, the 1st Respondent retained the Petitioner on the payroll pending the payment of his pension benefit. It was stated that the

Petitioner's allowances which were on his payslip at the time of retirement in December, 2016 were removed by the 1st Respondent in the months as follows:

i. Acting allowance in July 2017; and

ii. Housing, fuel and rural hardship allowances in September 2018.

[5] That in October, 2019, three (3) years after his retirement, the Petitioner was removed from the payroll before being paid his pension benefit and was only reinstated on the payroll in December, 2019 after representations were made to the 1st Respondent. After the Petitioner was retained on the payroll, the 1st Respondent only paid his basic salary and not the allowances he was getting at the time of retirement without any explanation. That he had enjoyed acting allowances up to July, 2017 and housing, fuel and rural hardship allowances up to September, 2018 respectively.

[6] According to the Petitioner, whilst in employment he contributed to National Pension Scheme Authority (NAPSA), the 2nd Respondent herein, and was a contributing member to the 2nd Respondent's scheme. That the Petitioner had written several times to the 1st Respondent as a former employee and once to the 2nd Respondent to request payment of his pension

benefit. The Petitioner states that the 2nd Respondent refused to pay the Petitioner his pension stating that despite him being a contributing member, the NAPSA Act as Amended by Act No. 7 of 2015 (the NAPSA Act) does not recognize retirement in national interest. That the 2nd Respondent has taken the position that the Petitioner will only be paid his pension benefit upon attaining the age of 55 years.

[7] The Petitioner contends that the Constitution provides that an employee who is retired should be paid their pension benefit promptly but that the 2nd Respondent has continued to refuse to pay him his pension benefit.

[8] The Petitioner avers that he wrote several times to the 1st Respondent seeking guidance on the payment of his retirement benefits but has largely been ignored and has not been accorded the courtesy of a response by the 1st Respondent.

[9] The Petitioner further states that after diverse letters to the 1st Respondent, the Petitioner and other similarly circumstanced former civil servants who were retired in national interest had a meeting with the representatives of the Government at Cabinet Office on 19th June, 2020. That at the said meeting

the Petitioner and the other former civil servants were offered the following options:

(a) Reinstatement in the public service with compensation for the period that they were out of service;

(b) Payment of full compensation or pension benefit for those who are unable to take up the offer of reinstatement in the public service;

(c) Payment of all outstanding salaries and allowances.

[10] The Petitioner opted to be paid his pension benefit and not take up the offer of reinstatement in the civil service. The Petitioner communicated his option to the 1st Respondent vide a letter dated 20th April, 2021. That through a letter dated 22nd March, 2021, the Public Service Management Division unilaterally reinstated the Petitioner into the public service contrary to his election not to be reinstated. The Petitioner has maintained his earlier position and opted not to take up the offer of reinstatement in the civil service but would like to be paid his pension benefit following his retirement.

[11] Further, that the Petitioner prior to being retired in national interest was entitled to Rural Retention Gratuity which was paid every three (3) years for the period February, 2009 to February, 2013 before the Scheme was abolished. He further

stated that he was also entitled to a Graduate's Recruitment and Retention allowance for the period July, 2009 to December, 2011 prior to the consolidation of allowances into the basic pay for civil servants in April, 2012.

[12] It is alleged that while the Petitioner has been retained on the payroll, he is only receiving his basic salary without allowances which he was entitled to by virtue of his employment. The Petitioner further alleges that the Respondents have contravened Articles 187(1)(2) and 189(1)(2) of the Constitution as they have denied the Petitioner his right to a pension benefit and the 1st and 2nd Respondents have withheld the Petitioner's pension benefit guaranteed by the Constitution. That he has not been paid his pension benefit since he was retired in December, 2016. Further, that he is only receiving his basic salary without the allowances he was entitled to at the time of his employment. The Petitioner alleges that he has suffered emotional, financial and mental distress and has incurred losses and damages as a result of the actions by the 1st and 2nd Respondents. He states that the action by the 1st and 2nd Respondents to deny him payment of his pension benefit, and payment of the allowances during the period of being retained

on the payroll is unconstitutional and unlawful as it contravenes Articles 187(1)(2) and 189(1)(2) of the Constitution.

[13] The Petitioner added that he had defaulted on his loan obligations as a result of the unilateral decision to remove allowances from his salary. That this had caused financial strain on repayments and had also affected his ability to take care of his family.

PETITIONER'S ARGUMENTS

[14] In the skeleton arguments, the Petitioner submitt that Articles 187(1) and (2) and 189(1) and (2) provide for an employee's entitlement to a pension benefit. It was the Petitioner's submission that the Constitution does not define what amounts to retirement within the context of Article 189 of the Constitution. He referred us to our decision in **Owen Mayapi and 4 Others v The Attorney General**[1] wherein we stated that:

> **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 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 first issue has partially succeeded to the extent that the exclusion of some types of retirement from the application of Article 189 is unconstitutional.

[15] The Petitioner submitted that in light of the above decision, it is clear that the Constitution envisages all manner of retirements and this Court should declare that retirement in national interest constitutes retirement as contemplated in Article 189 of the Constitution.

[16] It was argued that the entitlement to a pension benefit is a right that is recognized by the Constitution. He referred us to the case of **Resident Doctors Association of Zambia and Others v Attorney General**[2] wherein the Supreme Court held that:

Courts as final arbiters, when interpreting the Constitution and the laws made thereunder, which confer the freedoms there is need for the court to adopt an interpretation, which does not negate the rights. Most jurisdictions adopt a generous and purposive construction of human rights instruments, so as to confer on a person the full measure in the enjoyment of the rights.

[17] He submitted that on the strength of this case and the case of **Owen Mayapi and 4 Others v The Attorney General**[1], the Constitution also contemplates retirement in national interest.

[18] The provisions of section 18 of the NAPSA Act were produced as follows:

(1) Subject to the provisions of this Act, a member shall retire upon attaining pensionable age.
(2) A member may retire on attaining the age of -
(a) fifty-five years if, twelve months before attaining that age, the member notifies the contributing employer of the member's intention to retire at that age; or
(b) sixty-five years if, twelve months before attaining the pensionable age, the member notifies the contributing employer of the member's intention to retire at the age of sixty-five years and the employer approves the retirement.
(3) A member who retires in accordance with subsection (1) or (2) and has made not less than one hundred and eighty monthly contributions, shall be paid a pension.

[19] The Petitioner contends that this provision does not envisage retirement in national interest which is contrary to what the position of this Court is as regards the other kinds of retirement envisaged in the Constitution. He argued that section 18 of the NAPSA Act restricts the right to a pension benefit to retirees, who at the time of retirement had or have reached the age of 55 and made not less than 180 monthly contributions. It was the Petitioner's argument that this provision flies in the teeth of Article 189 of the Constitution as was decided in the **Owen Mayapi**[1] case.

[20] It was submitted that in the case of **Christine Mulundika and 7 Others v The People**[3] the Supreme Court guided that where a statutory provision contravenes a provision of the Constitution, that statutory provision is invalid to the extent that it violates the Constitutional provision. It was further

submitted that this principle of constitutional supremacy was also reiterated in **Re Thomas Mumba v The Director of Public Prosecutions**[4] where the High Court declared section 53(1) of the Corrupt Practices Act No. 10 of 1980 unconstitutional as it was in breach of Article 18(7) of the Constitution.

[21] The Petitioner also referred us to section 41 of the Public Service Pensions Act Chapter 260 which provides that:

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

[22] It was further submitted that it is clear from the Public Service Pensions Act that there is provision for payment of a pension benefit to persons that retire on grounds other than on account of age. It was submitted that the NAPSA Act, like the Public Service Pension Act, ought to make provision or envisage the payment of a pension benefit for retirement other than retirement on account of age and in this case the NAPSA Act ought to take into account retirement in national interest as a form of retirement that triggers the payment of the Petitioner's pension benefit.

[23] It was submitted that section 18 of the NAPSA Act is unconstitutional to the extent that it does not recognize retirement in national interest. That the Court should order that the 2nd Respondent pays the Petitioner his full pension benefit.

[24] It was further submitted that this Court has pronounced itself with respect to allowances that should be paid when a person is retained on the payroll. The Petitioner submitted that in the **Owen Mayapi**[1] case the Court stated that the salary also encompasses the allowances that the retiree was entitled to immediately before his retirement. The Petitioner added that the Court stated that retaining the retiree on the payroll whilst the retiree awaits payment of their pension benefit is to ensure that the retiree is not in a worse off position than he was prior to retirement. That this Court's decision in the **Owen Mayapi**[1] case means that the retiree should be paid the last basic salary that he or she received whilst in employment including all the allowances they would have received had they been in employment. He cited the case of **James Mankwa Zulu and 3 Others v Chilanga Cement Plc**[5] to further support this argument.

[25] The Petitioner referred to several decisions of this Court on the rules of interpretation of statutes and submitted that Article 189(2) entails the payment of both the basic pay and all allowances one is entitled to at retirement.

[26] It was the Petitioner's submission that he is entitled to Rural Retention Gratuity because it was paid to him prior to its abolition between 2009 and 2013. Similarly, that he is entitled to receive his Graduate Recruitment Allowance which already accrued before it was abolished.

[27] In augmenting Mr. Chomba submitted that payment of a pension benefit is triggered by a retirement. It was contended that it is not material whether this retirement was triggered by age or national interest. He relied on the **Owen Mayapi**[1] case to support this proposition. He reiterated that the NAPSA Act does not recognize other forms of retirement as recognized by the Constitution save for retirement upon attaining the pensionable age.

[28] It was further submitted that the provision stating that a pension benefit can only be paid to a person who has attained the pensionable age and has made at least 180 monthly contributions is ultra vires the Constitution because the Petitioner, who at the date of his retirement had made only

107 monthly contributions, would still be expected to wait to attain the age of 55 years and will still not be entitled to his pension benefit.

[29] It was submitted that Section 18 of the NAPSA Act requiring the pensioner to meet both the above conditions is unconstitutional and hence the reliefs sought by the Petitioner.

[30] Mr. Nalishuwa added that in the case of **James Zulu and 3 Others v Chilanga Cement**[5] the Supreme Court gave sound guidance on the issue of payment of a salary and the definition of a salary. It was submitted that the Supreme Court was categorical on all allowances that were payable to an employee. It was further submitted that the Petitioner is entitled to a pension as envisaged in Article 189 of the Constitution and to that extent the maintenance of the Petitioner on the payroll by the 1st Respondent entails that he should receive his basic salary and allowances that he is entitled to.

1ST RESPONDENT'S ANSWER

[31] In responding to the Petition, the 1st Respondent stated that the Petitioner is entitled to a sum of One Hundred and Forty-

Nine Thousand One hundred and Seventy-one Kwacha Twenty Ngwee (ZMW149,171.20) in housing allowance arrears only. That the Petitioner is not entitled to Rural Retention Gratuity as the Scheme was donor funded and only applied for a period of time and was abolished in 2013. It was the 1st Respondent's contention that the Petitioner was not entitled to the Graduate Recruitment and Retention allowance arrears as the same was consolidated into the basic pay in accordance with the Public Service Management Division Circular No. 8 of 2012. That the Petitioner is entitled to the sum of Six Thousand Seven Hundred Kwacha (ZMW 6,700) in repatriation allowance in accordance with the Public Service Management Division Circular No. B21 of 2016.

[32] The 1st Respondent confirmed that the Petitioner being a permanent and pensionable employee was by law mandated to contribute to the 2nd Respondent's Scheme. Therefore, the Petitioner being a contributing member is entitled to receive a pension benefit from the 2nd Respondent subject to fulfilling the provisions of the NAPSA Act. Further, that the 1st Respondent no longer had capacity or authority to continue remitting the Petitioner's contributions after his retirement in national interest.

[33] According to the 1st Respondent, the Petitioner had been communicated to on the question of payment of pension benefit. That the Petitioner is only entitled to payment of arrears which he is entitled to.

[34] It was contended that the 1st Respondent had not breached Articled 187(1) and (2) of the Constitution as the Petitioner was a permanent and pensionable employee contributing to a pension fund and having been retired in national interest is not entitled to a pension benefit without the satisfaction of section 18 of the NAPSA Act as read with Act No. 7 of 2015.

2ND RESPONDENT'S ANSWER

[35] In its answer, the 2nd Respondent admitted that the Petitioner was a member of the 2nd Respondent's pension fund under Social Security number 113459129 and that his first contribution was made in 2007. That he continued to be a member of the pension fund until April, 2022 when his last contribution was made. It was stated that the Petitioner's total contributions stood at the sum of Two Hundred and Fifty-Nine Thousand Seven Hundred and Sixty-Two Kwacha Fifty-Two Ngwee (ZMW 259, 762.52). It was contended that the Petitioner has not yet contributed the minimum of one

hundred and eighty (180) monthly contributions to the Scheme and the 2nd Respondent was not aware of the reason for the cessation of the Petitioner's contributions after April, 2022 and neither had the Petitioner nor the 1st Respondent indicated any such reasons. That the 2nd Respondent had not received any notification of the cessation of contributions and that the returns for the month of May 2022 did not include contributions for the Petitioner.

[36] The 2nd Respondent confirmed that the Petitioner wrote to the Scheme requesting payment of his pension in a letter dated 26th December, 2019. The 2nd Respondent submitted that it replied to the letter on 24th February, 2020 indicating that the Petitioner had not met the conditions set out under the law to be eligible for receipt of his retirement pension. According to the 2nd Respondent, this response was not a refusal to pay but a clarification of the age when the member would be eligible to obtain retirement benefits under the NAPSA Act.

[37] It was stated that retirement pension for purposes of the NAPSA Act accrues on the attainment of a specified age and that eligibility to receive a pension accrues upon the member's attainment of that age of retirement and when a

member has made more than One Hundred and Eighty (180) contributions to the Scheme.

[38] That the pension benefits that the Petitioner refers to are terminal benefits paid by an employer to an employee upon separation and not to retirement pension under the NAPSA Act. It was further stated that the provisions of Article 187(1)(2) of the Constitution do not entitle the petitioner to the receipt of a retirement benefit under the NAPSA Act before he qualifies by meeting the eligibility criteria stipulated under section 18 of the NAPSA Act. The 2nd Respondent opposed the proposition that the pension under the NAPSA Act is payable to him soon after his last day of work, even if he may have not attained the retirement age or made at least One Hundred and Eighty (180) contributions.

[39] It was the 2nd Respondent's contention that Article 189(1) and (2) relates to an employer and not a pension Fund/Scheme such as the 2nd Respondent because the 2nd Respondent has never kept the Petitioner on any payroll nor can it maintain or retain him on the payroll as envisaged in this provision. It was contended that the payment after retirement in national interest is not the same as the retirement pension due under the NAPSA Act and in any event, payment becomes due upon

satisfying the criteria stipulated for eligibility. It was contended that section 18 of the NAPSA Act is not ultra vires the Constitution` and that the Petitioner will only become eligible to receive payment when he satisfies the provisions of the law.

[40] In the 2nd Respondent's skeleton arguments it was submitted that the term pension benefit is defined in Article 266 as:

> **includes a pension, compensation, gratuity or similar allowance in respect of a person's service**

[41] That according to the Longman Dictionary of Contemporary English the terms "pension", "gratuity" and "compensation" are defined as follows:

> **"Pension**
> **An amount of money paid regularly by the government or company to someone who does not work anymore, for example because they have reached the age when people stop working or because they are ill.**
>
> **Gratuity**
> **1. A small gift of money given to someone for a service they provided.**
> **2. Tip, especially a large gift of money given to someone when they leave their job.**
>
> **Compensation**
> **Money paid to someone because they have suffered injury or loss, or because something they own has been damaged."**

[42] It was submitted that the pension benefits envisaged under Article 189 of the Constitution takes the form of terminal benefits after gainful employment comes to an end and not

the monies payable under a scheme to which a person belongs.

[43] It was argued that the pension envisaged under Article 189 of the Constitution should be distinguished from monies payable under the contributory scheme of the 2nd Respondent in that even though members become eligible as a result of employment, the basis of the payment under the scheme is contribution and not service. It was argued that the prerequisite to receipt of pension envisaged under section 18 of the NAPSA Act is that one should have met the requisite number of contributions or attained the age of fifty-five.

[44] It was further submitted that Article 189 of the Constitution does not envisage all manner of retirement from gainful employment. It was argued that it is not every type of allowances or money that becomes due to an employee that can be similar to pension, gratuity or compensation in terms of Article 266. It was argued that it is trite law under the *Ejusdem Generis* principle that where an enactment has a list that is not exhaustive, then there is a presumption under the rules of statutory interpretation that only items or matters of a similar nature can be included. It was submitted that the

phrase "similar allowance" used in Article 266 of the Constitution should only include benefits with the following:

> **a) They are all sums of money or allowances paid to persons for the services rendered to an employer; and**
> **b) the sums of money are accrued by virtue of rendering services to the employer during the course of one's employment.**

[45] We were referred to the case of **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**[6] wherein it was stated that:

> **Therefore, our firm view is that it would be wrong to say that all terminal benefits simply because they arise from termination or coming to an end of the employment contract, should be considered or interpreted to be the same as pension benefit. We say so because we cannot decipher such meaning from the provisions of Article 189 or 266.**

[46] It was submitted that there is a difference between the type of pension envisaged under Article 189 of the Constitution and the one considered in section 18 of the NAPSA Act. The 2nd Respondent implored this Court to find that section 18 of the NAPSA Act is not ultra vires Article 189 of the Constitution.

[47] Furthermore, it was submitted that Article 267 of the Constitution provides that the Constitution should be interpreted in accordance with the Bill of Rights. We were further referred to this Court's decision in the case of **Hakainde Hichilema and Another v Edgar Chagwa Lungu and 3 Others**[7] and submitted that the words pension,

gratuity and compensation should be given their ordinary meaning and only if the ordinary meaning results in an absurdity should recourse be had to the purposive interpretation. The 2nd Respondent referred us to a number of authorities on statutory interpretation and implored us to consider the genesis, rationale and context of the inclusion of Article 189 in the Constitution when determining whether section 18 of the NAPSA Act contravenes Articles 187 and 189 of the Constitution. The 2nd Respondent prayed that this Court should reject the Petitioner's argument that the unwillingness of the 2nd Respondent to maintain him on the payroll in the given circumstances is an infringement of his constitutional rights.

[48] In orally augmenting, Mr. Chungu submitted that the Petitioner's claim for a pension benefit from the 2nd Respondent falls under Article 187(1) of the Constitution. That payment under this Article is at the end of service and is either by an employer or from his contribution made to the 2nd Respondent. It was submitted that social security payments by the 2nd Respondent are not covered under Article 187 of the Constitution. Counsel submitted that Part XIV of the Constitution should be read as a whole. He submitted

that Articles 187, 188 and 189 of the Constitution should be read together to understand what pension Parliament was referring to. It was submitted that Article 189(2) clarifies the provisions under this part. It was submitted that Article 189(2) of the Constitution requires the employee to be maintained on the payroll until payment of the pension benefit. That the 2nd Respondent cannot fulfill Article 189(2) and this was not an error as this provision does not refer to social security payments from the 2nd Respondent.

[49] It was submitted that Article 187 of the Constitution is not about retirement pension. That even if this Court were to find that Article 187 of the Constitution includes retirement pension under the NAPSA Act, it was submitted that section 18 does not offend the Constitution. It was further submitted that while pension is triggered by many events, the Constitution does not define retirement and leaves the description and design of what retirement or pension would be to substantive law. It was Counsel's contention that section 18 of the NAPSA Act merely describes when a retirement pension shall accrue. Mr. Chungu argued that to pronounce section 18 of NAPSA Act unconstitutional would result in a gaping hole in the law because there would be no

certainty about when retirement pension will become payable. It was Mr. Chungu's submission that without certainty, social security becomes unsustainable. It was his contention that granting the Petitioner the reliefs sought would mean that the NAPSA retirement pension would be payable to anyone at any time when they leave their employment because section 18 of the NAPSA Act would have been vacated if it were declared to be unconstitutional.

[50] It was submitted that when it comes to private pensions, they continue to run parallel with the NAPSA Pension Scheme which is mandatory and continues alongside the private pension funds administered by the employers.

ARGUMENTS IN REPLY

[51] In the Petitioner's oral arguments in reply it was submitted by Mr. Chomba that the 2nd Respondent had misapprehended the issues. It was his contention that the issue is whether a person who had been retired in national interest is entitled to a pension benefit envisaged in Article 189(2). It was submitted that the 2nd Respondent sought to differentiate a pension benefit from the one stipulated in the Constitution and this distinction is flawed. According to Counsel for the Petitioner,

the pension benefit stipulated in the Constitution is a constitutional right which should not be narrowly interpreted. Counsel referred us to the case of **Faustin Kabwe and Another v Justice Ernest Sakala and Others**[8] wherein the Supreme Court held 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 are not diluted. It was contended that the individual must enjoy the full measure and benefits of the rights so conferred and that a derogation of rights will usually be narrowly construed. It was submitted that there is only one pension benefit and that the pension benefit envisaged in the Constitution applies to the Petitioner.

[52] With respect to the arguments distinguishing a private pension scheme and a pension under the 2nd Respondent's scheme, it was submitted that a private pension is set up by an employer who is bound by the provisions of the Pension Scheme Regulation Act on how such a fund can be administered. That the contributions made by the employer cannot be refunded to them but are for the sole benefit of the beneficiary. It was contended that such a pension can therefore not be narrowly construed.

[53] It was further submitted that the manner of payment of pension benefits under a private pension is regulated under a different statute from those under the NAPSA Act. Counsel argued that because the manner of payment is regulated by statute an employer cannot elect when to pay and how to pay except through the rules.

[54] Mr. Nalishuwa added that declaring section 18 of the NAPSA Act unconstitutional would not leave a gaping hole because the relief sought is to declare it unconstitutional to the extent that it does not recognize other forms of retirement other than those set out in section 18 of the NAPSA Act. He relied on the case of **Owen Mayapi**[1] where this Court clearly stated that retirement is not limited to age.

DECISION AND ANALYSIS

[55] We have considered the Petitioner's petition, the Respondents' answers and the arguments by the parties. The issues for this Court's determination and that are within our jurisdiction, as we see them, are threefold and are as follows:

1. Whether retirement in national interest is a type of retirement that is contemplated in Article 189 of the Constitution;

2. Whether the Petitioner is entitled to receive the allowances he was entitled to at the time of his retirement while he is being retained on the payroll as envisaged by Article 189 of the Constitution; and
3. Whether section 18 of the NAPSA Act is ultra vires the Constitution in light of Articles 187 and 189 of the Constitution.

[56] It is premised on these issues that we will determine whether the Petitioner's reliefs will be granted. We will not consider any matters that do not raise constitutional issues.

[57] The crux of the Petitioner's dispute is that he was retired in national interest in accordance with the provisions of the **Service Commission Policies and Procedures for Employment in the Public Service No. 40** as read with the **Terms and Conditions of Service No. 38 (e)**. Predicated on this retirement, the Petitioner sought for the 1st and 2nd Respondent to pay him his pension benefit in accordance with Article 187 of the Constitution.

[58] The Petitioner contends that he is entitled to receive his full pension benefit from the 1st and 2nd Respondent. The 1st Respondent contends that the Petitioner is only entitled to recover arrears for allowances that he was entitled to prior to

his retirement. According to the 1st Respondent, this does not include a claim for Rural Retention Gratuity and Graduate Recruitment and Retention allowances which the Petitioner is also claiming.

[59] The 2nd Respondent on the other hand contends that the law is very clear on when a pension falls due and is payable to a contributing member as provided by section 18 of the NAPSA Act. According to the 2nd Respondent, the pension benefit referred to in Article 189 refers to the benefits that the employer should pay the employee at retirement and not the pension under the pension fund or scheme with the 2nd Respondent.

[60] In addressing the issue, of whether retirement in national interest is one contemplated within the provisions of Article 189, we begin by reproducing the Article which 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.**

[61] The above Article has its genesis in the Report of the Technical Committee on Drafting The Zambian Constitution.

The Report gives the rational for the Article in the following terms:

> **The rationale for the Article is that, benefits need to be made promptly for a pension, gratuity and retirement 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 the 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 retirement benefits.**

[62] The term retirement in the national interest is outlined in the Terms and Conditions of Service for the Public Service, Chapter III Section 38 (e) as follows:

> **A Service Commission may require an Established Officer to retire in the national interest and this will be restricted to cases where an officer has to relinquish his or her appointment at the instance of the Government either to take up another appointment outside the Public Service or for other reasons of Government Policy.**

[63] The Technical Committee Report referred to above within the context of Article 189 speaks of benefits such as pension, gratuity and retirement package as requiring prompt disbursement to forestall hardships that may follow such delay. Further the report speaks to the requirement to retain a retiree on payroll until the terminal benefits are liquidated in full. The Terms and Conditions of Service for Public Service referred to in paragraph 62 classify retirement in

national interest as a retirement that occurs at the instance of the employer in this case the Government and could take either of two forms namely taking up another appointment outside the Public Service or being retired based on Government Policy without an alternative form of employment.

[64] The facts before us do not reveal that the Petitioner was redeployed outside the Public Service nor did he take up any other appointment outside the Public Service. We are not privy to the nature of the Government Policy under which the Petitioner was retired and we therefore hold the view that the circumstances of his retirement are akin to retirement as his separation is terminal in nature and would bring both his services and resultant emoluments to an end. This retirement in the national interest is peculiar to the public service. We noted in the case of **Owen Mayapi and Others v Attorney General**[1] at page J5 that Circular B1 of 24th January, 2019 included employees retired in national interest as being entitled to be retained on the payroll pending the payment of pension benefits in full. That being the case the Petitioner's retirement circumstances are those envisaged under Article 189 of the Constitution. In the premise we

hereby grant the declaration that retirement in national interest is a form of retirement as contemplated under Article 189 of the Constitution.

[65] The second issue for our consideration is whether the Petitioner while being retained on payroll in line with Article 189 of the Constitution is entitled to allowances which he was receiving at the time of retirement by virtue of his employment.

[66] On the second issue, the Petitioner asserts that among the allowances due to him in form of arrears which accrued upon being retired in national interest but not period while being retained on payroll includes Rural Retention Gratuity paid during the period February, 2009 to February, 2013 when it was abolished and a Graduate Recruitment and Retention Allowance paid during the period July, 2009 to December, 2011 when it was consolidated into the basic pay for Civil Servants in April, 2012.

[67] The 1st Respondent however, disputes owing the Petitioner the allowances highlighted in paragraph 66 arguing that these were not subsisting at the time of being retired in national interest but concedes owing the Petitioner housing allowance.

[68] In the **Mayapi**[1] case, we stated that:

> **"what constitutes an individual's salary for pension purposes may differ and may include allowances depending on the person's condition 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.**
>
> **The phrase 'retained on the payroll' means that such retiree 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 basic salary.**

[69] Considering what is before this Court, it is our considered view that the allowances that were not on the payroll at separation cannot form part of one's salary when being retained on the payroll. Hence, we agree with the 1st Respondent that the Petitioner is only entitled to those allowances that were payroll based at the time the Petitioner was retired in national interest up to the time his benefits were paid in full. These we note, the 1st Respondent has specifically conceded and must pay the Petitioner.

[70] We now turn to whether the Petitioner is entitled to his claim against the 2nd Respondent's pension scheme to which he had

made 107 contributions. The Petitioner contends that the failure by the NAPSA Act to provide for instances where a person retired in national interest is entitled to his pension benefit contravenes Article 187 of the Constitution. In order to determine whether the failure by the NAPSA Act to provide for retirement in national interest runs afoul the Constitution, we will examine the relevant provisions of the NAPSA Act dealing with payment of pension benefits. Section 9 of the NAPSA Act provides for payment of pension benefits. It provides that:

> **9. (1) The Authority shall pay pension benefits to a member who:**
>
> **a) retires from employment on attaining the pensionable age;**
> **(b) retires five years —**
> **(i) before attaining the pensionable age and has contributed to the Scheme for a minimum period prescribed by the Authority; or**
> **(ii) after attaining the pensionable age**
> **(c) has made contributions for at least twelve months and is certified by the medical board that he is incapable of gainful employment due to total or partial mental or physical incapacity which pension shall be determined by a formula by an actuarial study and prescribed by the Minister by statutory instrument.**

[71] Section 18 of the NAPSA Act already referred to at paragraph 18 of this judgment in detail recognizes retirement triggered by age and provides for conditions for payment of a pension benefit following such a retirement. Sections 22 and 23 of the NAPSA Act provide in detail for the conditions for payment of

pension benefits in instances of early retirement and for retirement on medical grounds.

[72] We have considered our decision in the case of **Lubunda Ngala and others v Anti-Corruption Commission**[6] where we stated as follows:

> **However, the question is what is anticipated with a pension? Clearly, what is anticipated with a pension is that it becomes effective on retirement in some cases due to age or other circumstances and certainly not resignation.**

[73] At pages J38 and J39 of the same Judgment we went on to state that:

> **We can only state that the mischief which the Legislature intended to correct is clearly spelt out in the genesis, rationale and the context of those Articles as stipulated in the Report of the Technical Committee on Drafting the Zambian Constitution. Of particular relevance is the draft Article 251(1) which was proposed to guarantee the rights of public officers to a pension, gratuity or retrenchment benefits. We also refer to draft Article 256(6) which was proposed to define what a pension benefit is. This is the precursor to the definition of pension benefit in Article 266 of the Constitution. We find it prudent to quote the summary and rationale of the proposed Article 252 and 256(6) which, respectively, state as follows:**
>
> > **"The Article provides for the payment of pension, gratuity and retrenchment benefits to public officers."**
> >
> > **The rationale for the Article is that, there is need to provide for pension of public officers in the Constitution as a right that can be enforced in a court of law. The Committee observes that such pensions are part of social security schemes whose fundamental objective is to protect individuals from hardships which will otherwise result from unemployment, retirement or death of a wage earner."**

[74] Mr. Chungu argued that Article 189 of the Constitution is clear and applies to an employer retaining a

former employee on the payroll pending the payment of their full pension benefit and could therefore not have been meant to apply to the 2nd Respondent. We find force in this argument and hold the view that the Petitioner cannot be retained on the payroll on account of payment of a pension benefit coming from the 2nd Respondent who is not the Petitioner's employer and has its own legislation governing payment of pensions.

[75] As to whether or not section 18 of the NAPSA Act runs afoul Articles 187 and 189 of the Constitution we find it necessary to consider the legal regime for payment of pensions under the NAPSA Act. The NAPSA Act under sections 9, 18, 22 and 23 provides for eligibility to receive a pension and the requirements that need to be met in order to qualify to receive a pension. Section 21 of the NAPSA Act provides for when a pension is payable to a member who has not met the requirements stipulated under section 18 of the NAPSA Act. The said section 21 provides as follows:

> **A member who has attained pensionable age and has retired from employment but does not meet the qualifications for a pension under section eighteen, shall be entitled to the payment of a lump sum as may be prescribed by the Authority.**

[76] It is worth noting that under the provisions of Section 21 of the NAPSA Act, a member who does not meet the

qualifications under section 18 of the NAPSA Act must have reached the retirement age in order to be entitled to a lump sum payment.

[77] We found it necessary to also consider that the payment of pension benefits under the NAPSA Act is dependent on the valuations made by an actuary appointed by the 2nd Respondent. Section 44(1) to (3) of the NAPSA Act provides that:

> **(1) The Scheme shall be valued by an actuary as may be required by the Authority**
> **(2) The Scheme shall be valued at intervals not exceeding three years.**
> **(3) The actuary shall-**
> **(a) prepare a report on the state of the Scheme;**
> **(b) state any surplus or deficiency in the Scheme; and**
> **(c) recommend the action to be taken**

[78] In the case of **National Pensions Scheme Authority v Philip Stuart Wood**[9] the Supreme Court observed that:

> **The actuary can make detailed recommendations and also give a picture of whether the Pension fund is in surplus of deficit.**

[79] In that case the Supreme Court went on to find as ultra vires Regulation 3 of S.I. 71 of 2000 as it widened the scope of those who qualified to get a pension contrary to section 18 of the NAPSA Act.

[80] We found it important to highlight the role of the actuary in order to give clarity to the process involved in the

administration of this type of pension fund and the process involved in determining when a pension benefit should become payable. The learned counsel Mr. Chungu in his argument opposing the Petition submitted that pronouncing section 18 unconstitutional would pronounce a gaping hole in the law because there would be no certainty about when retirement pension will become payable. He further argued that without certainty, social security becomes unsustainable and would mean that the NAPSA retirement pension would be payable to anyone at any time when they leave their employment.

[81] We find force in this argument because as seen from the provisions of the NAPSA Act, the restrictions pertaining to when a pension is payable is orchestrated in conformity with valuations made by an actuary that are made to ensure the fund is sustainable.

[82] We hold the view that the provisions of section 18 of the NAPSA Act provide the necessary controls that ensure that the pensions fund has certainty and is sustainable. These controls do not prohibit a person from accessing their pension guaranteed by the Constitution but only stipulate when the said pension will fall due for payment. It is our considered

view that this does not contravene Article 187 of the Constitution which merely guarantees a person's pension benefit. The various controls pertaining to accessing such pensions are provided for under various pieces of legislation providing for pensions including the NAPSA Act.

[83] We therefore find that section 18 of the NAPSA Act does not contravene Articles 187 and 189 of the Constitution. It therefore follows that while a retirement in national interest triggers a pension benefit under the Terms and Conditions of Service in the Public Service, it does not trigger payment of a pension under the NAPSA Act unless the provisions of section 18 are met and in cases of a medical incapacity, as provided for under section 22.

[84] Before we leave this point, we note that the Petitioner highlighted the discrepancy between the NAPSA Act and the Public Service Pensions Fund Act on the pension payable to employees who are retired in the national interest. Our short response is that these are two different pension schemes with different objects and applicable rules. The remedy thus lies in engaging the employer regarding the conditions of service and policy surrounding this form of retirement going forward.

[85] In conclusion we hold that while Article 187 of the Constitution guarantees a pension benefit, Section 18 does not contravene the provisions of Articles 187 and 189 of the Constitution. Further, that the Petitioner only having been entitled to accrued leave days and repatriation allowance as his terminal benefits after being retired in national interest, it therefore follows that the Petitioner is entitled to housing allowance arrears that the 1st Respondent has conceded to and repatriation allowance until full payment of the terminal benefits.

[86] In sum, we have granted reliefs i, iii and vii (c) in the manner outlined at paragraphs 64, 69 and 84. Reliefs ii, iv and v cannot be granted as the substantive issues upon which they were premised have failed. The other claims under reliefs (vi) to (viii) are outside this Court's jurisdiction.

[87] We Order that each party bears their own costs.

.....

P. MULONDA
CONSTITUTIONAL COURT JUDGE

.....

M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

.....

M. MUSALUKE
CONSTITUTIONAL COURT JUDGE