

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2024/CCZ/003

IN THE MATTER OF: ARTICLE 128 OF THE CONSTITUTION OF ZAMBIA AS
AMENDED BY ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLE 187 OF THE CONSTITUTION OF ZAMBIA AS
AMENDED BY ACT NO. 2 OF 2016

IN THE MATTER OF: ARTICLE 189 OF THE CONSTITUTION OF ZAMBIA AS
AMENDED BY ACT NO. 2 OF 2016

IN THE MATTER OF: THE DECISION BY THE RESPONDENT TO STOP
REMITTING MONTHLY CONTRIBUTION TO PENSION
AUTHORITY

IN THE MATTER OF THE DECISION BY THE RESPONDENT TO REFUSE
SALARY INCREMENT TO THE PETITIONERS WHO
ARE RETIREES RETAINED ON THE PAYROLL
PENDING PAYMENT OF PENSION BENEFITS

BETWEEN:

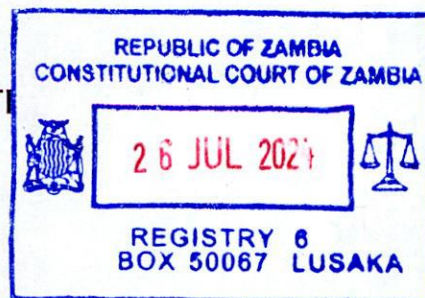
AGNICIOUS MUSHABATI

PETER ZULU

HARDIE SIKUMBALI

AND

NATIONAL PROSECUTION AUTHORITY



1ST PETITIONER

2ND PETITIONER

3RD PETITIONER

RESPONDENT

CORAM: Sitali, Chisunka and Mulife, JJC on 13th June, 2024 and 26th July,
2024

For the Petitioners: **In Person**

For the Respondent: **Mrs. S. Mwamba Besa, Senior State Advocate,
National Prosecution Authority**

J U D G M E N T

Sitali JC delivered the judgment of the Court

Case cited:

1. Owen Mayapi and others v Attorney General, 2019/CCZ/003

Legislation cited:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016, Articles 187 (1) and (2) and 189 (1) and (2).

[1.0] INTRODUCTION AND BACKGROUND

[1.1] The petitioners filed a petition against the respondent on 14th March, 2024 seeking that it may be determined and declared that the respondent's decision to refuse the petitioners a salary increment whilst they are retained on the payroll pending payment of pension benefits is unconstitutional and null and void; that the decision to stop remitting the pension contribution to the pension authority violated Articles 187 and 189 of the Constitution and should be resumed forthwith; that the deduction of Two Thousand Three Hundred and Eleven Kwacha Sixty-One Ngwee (K2,311.61) from their February salary was

unconstitutional and should be reimbursed with interest; a declaration that the respondent's decision to tamper with the petitioners' salary increment or salary scale is null and void as it will disadvantage the petitioners or alter their pension benefits contrary to Articles 187(2) and 189 (2) of the Constitution; a declaration that the respondent's decision to reduce the petitioners' salary is null and void and absurd as it is against the intended purpose of cushioning retirees from hardship caused by delayed payment of their pension benefits; interest; costs; and any other relief that the Court will deem fit.

[1.2] The brief background to the petition is that the petitioners are former employees of the National Prosecution Authority who were deemed to have retired by the Industrial Relations Division of the High Court (the IRD) after they successfully challenged their summary dismissal by the respondent. The Court ordered the respondent to retain the petitioners on the payroll pending payment of their pension benefits. The petitioners were thus retained on the payroll based on their last salary. However, they contend that the respondent has breached Articles 187 and 189 of the Constitution by denying them a salary increment and not remitting their pension contributions to the pension authority, as the respondent's action will alter their pension benefits.

[2.0] PETITIONERS' CASE

[2.1] The petition was filed together with an affidavit verifying facts sworn by Agnicious Mushabati, the 1st petitioner. The facts of the case as set out in the petition and affidavit verifying facts are essentially that following the judgment of the IRD, the respondent retained them on the payroll. However, the Acting Chief Administrator subsequently informed the 1st and 2nd petitioners by letters written to them, that they had been retired by the Zambia Police Service. The petitioners alleged that the purported retirement of the 1st and 2nd petitioners by the Zambia Police Service was intended to deny them their rightful pension benefits as the retirement benefits provided for in the respondent's terms and conditions of service are more favourable than those of the Zambia Police Service where the 1st and 2nd petitioners were transferred from.

[2.2] Further, that the petitioners' latest pay slips indicated an engagement date of 2016 when that was not the case as their service in the Zambia Police Service and the Department of National Parks and Wildlife respectively, was continued when they were transferred to the respondent. The petitioners alleged that for the respondent to calculate their retirement benefits based on the engagement date stated on the latest pay slip would violate Article 187(2) of the Constitution as it would alter their pension benefits.

[2.3] The petitioners further stated that in January 2024, the respondent successfully negotiated for a salary increment with the Emoluments

Commission effective from 1st January, 2024. They asserted that they received that increment as provided by the law and, in their understanding, in line with our decision in the case of *Owen Mayapi and Others v the Attorney-General*⁽¹⁾. By letters dated 20th February, 2024, however, the respondent notified them individually that they had been overpaid and proceeded to deduct the amount overpaid from their February salaries. They contended that their retention on the payroll pending payment of pension benefits will not depict the purpose for which Article 189 was enacted, if they are not given a salary increment.

[2.4] The petitioners also stated that the respondent contravened Articles 187 and 189 of the Constitution when it stopped remitting pension contributions to the pension authority; and that doing so would alter their pension benefits which ought to be calculated based on their last salary while on the pay roll. They further contended that the Constitution provides for pension benefits based on the last salary received by a person while retained on the payroll and not whilst in employment.

[2.5] The petitioners further alleged that their right to protection of their pension benefits guaranteed by Articles 187 and 189 of the Constitution has been and continues to be violated as the respondent has deliberately subjected them to an unequal salary compared to those on the same salary scale within the respondent institution. The petitioners, thus, contended that the respondent breached Articles 187 and 189 of the Constitution by failing to increase their

salaries and by not remitting their pension contributions while they are retained on the payroll.

[3.0] RESPONDENT'S CASE

[3.1] On 3rd April, 2024, the respondent filed an answer to the petition and an opposing affidavit, sworn by Mwaka Chipunza Zulu, a Senior Human Resource Management Officer in the respondent institution. The respondent asserted in its answer and affidavit that it had complied with the order of the IRD and restored the petitioners on the payroll pending payment of their pension benefits. It further asserted that contrary to the petitioners' allegation in the petition that it was trying to deny them their rightful pension benefits, the petitioners' pension benefits would be calculated based on the respondent's terms and conditions of service as they were deemed retired on 14th December, 2020 while working for the respondent and not the Zambia Police Service.

[3.2] The respondent stated that the incorporation of the petitioners from the Zambia Police Service entailed continuous service, and that the engagement date was stated on the attestation form at the Zambia Police Service. The respondent asserted that it, therefore, cannot alter their pension benefits. The respondent added that the inserted date of engagement on the payslip

was caused by the respondent's migration from one payroll to another, which migration caused distortion in the information. It asserted that the date would be corrected.

[3.3] Regarding the salary increment, the respondent asserted that the Emoluments Commission conveyed the respondent's terms and conditions of service for the year 2024 and adjusted salaries upwards. It asserted that the petitioners were separated by retirement with effect from 14th December, 2020. That although they were retained on the payroll, they are not entitled to the said salary increment as they are no longer employees of the respondent and cannot benefit from conditions of service that came after their retirement as that would amount to unjust enrichment. The respondent contended that it had not infringed the petitioners' constitutional rights.

[3.4] The respondent further stated that the delayed payment of the petitioners' pension benefits was not occasioned by the respondent because pension benefits are paid by the Public Service Pension Fund (PSPF); and further, that it had done its part by submitting the 1st and 2nd petitioners' files to the PSPF and was awaiting the 3rd petitioner's retirement letter from the Public Service Management Division as he was transferred to the respondent institution from the Ministry of Tourism and Arts.

[3.5] The respondent asserted that it was legally right to stop remitting pension contributions to the PSPF and the National Pension Scheme Authority (NAPSA) on behalf of the petitioners because, by law, retirees are not expected to continue remitting pension contributions.

[3.6] In conclusion, the respondent stated that the petitioners had failed to clearly demonstrate how the respondent had infringed their rights and are therefore not entitled to any of the relief they seek. The respondent therefore contended that the petition lacks merit and should be dismissed with costs.

4.0 PETITIONERS' REPLY

[4.1] The petitioners filed a reply in which they contended that the respondent only complied with the order of the IRD to retain them on the payroll and did not comply with the rest of the Court orders. They further stated that they are entitled to the increment of salary because the Board of the respondent (the Board) has not formally written to them to confirm their retirement after the Court deemed them as retired. They alleged that they are, therefore, not separated from the respondent because the Board, which is the appointing authority and has an obligation to comply with the judgment, has not formally informed them in writing of the mode of separation, whether it is early retirement or not. They alleged that since the mode of separation determines the computation of

pension benefits, there is no unjust enrichment in this case. They reiterated that the wrong engagement date stated on the payslip would affect the computation of their pension benefits.

[4.2] They went on to state that the 1st and 2nd petitioners could not be retired by the Zambia Police Service Commission, as it was not their employer and ceased to have control over them when they were transferred to the respondent. Lastly, the petitioners asserted that the respondent had breached the Constitution by attempting to alter their conditions of service, failing to pay a full salary and to remit the pension contributions on their behalf and delaying to pay their pension benefits.

5.0 THE HEARING

[5.1] At the hearing of the petition, the petitioners relied on the petition, the affidavit verifying facts and in reply and on the skeleton arguments which they orally augmented. Similarly, the respondent relied on its answer, opposing affidavit and skeleton arguments which were augmented orally.

6.0 EVALUATION AND DECISION

[6.1] We have considered the contents of the petition, the answer and the accompanying affidavits on both sides as well as the skeleton arguments and oral submissions.

[6.2] In the main, the petitioners seek a declaration that the respondent's decision to deny them a salary increment whilst they are retained on the payroll pending payment of their pension benefits is unconstitutional and null and void; and that the decision to stop remitting pension contributions to the pension authority on their behalf violated Articles 187 and 189 of the Constitution. They further seek a declaration that the respondent's decision to tamper with their salary increment and to reduce their salary is null and void. We shall consider these claims simultaneously as they are related.

7.0 ISSUES TO BE DETERMINED

7.1 The main issue we have to determine is whether the respondent contravened Articles 187 and 189 of the Constitution by not increasing the petitioners' salary and remitting their pension contributions whilst they were retained on the payroll. Related to that issue are the questions whether a retired person who is retained on the payroll pending payment of retirement benefits is entitled to an increase of salary, and secondly, whether an employer should continue remitting pension contributions to the pension authority in respect of a retired person who is retained on the payroll pending payment of pension benefits.

[7.2] In support of their petition, the petitioners alleged that the respondent had violated Article 187 (2) of the Constitution by withholding their pension benefits for nearly four years and not formally retiring them from the

respondent Authority in accordance with the Court's declaration which deemed them retired. They also contended that their pension benefits were likely to be altered by the respondent first, by its decision to stop remitting pension contributions on their behalf; secondly, by refusing to increase their salary whilst they are retained on the payroll and thirdly, by inserting a wrong engagement date on their respective 2024 payslips, which date was later than the date on which they commenced working for the respondent. They contended that as a result of this, their pension benefits would not be calculated based on a correct salary and engagement date.

[7.3] It is the petitioners' contention that the Constitution provides that pension benefits are based on the last salary received by a person while on the payroll and not whilst in employment. The petitioners cited the case of *Owen Mayapi and others v Attorney General*⁽¹⁾ in support of their contention that a person retained on the payroll pending payment of pension benefits is entitled to a salary increment. The petitioners asserted, in conclusion, that the right conferred on them by Article 189 of the Constitution should not be restricted or taken away by withholding a salary increment as that would restrict the purpose of enacting Article 189 of the Constitution.

[7.4] The respondent, on the other hand, contended that the petitioners were retired from the respondent from the date of dismissal, that is 20th December,

2020, and were restored to the payroll in accordance with the judgment of the Court. That, as retirees, the petitioners are entitled to be paid what they were receiving through the payroll at the time of their retirement until their pension benefits are paid by the Public Service Pension Fund and their terminal dues are paid by the respondent.

[7.5] It contended that its decision to stop payment of the 2024 salary increment to the petitioners and to deduct the amount wrongly paid to them was not unconstitutional as the provisions of Article 189 (2) of the Constitution aim to cushion employees from hardship caused by delay in payment of their pension benefits. The respondent stated that this does not entitle the petitioners who are retirees to subsequent salary increments.

[7.6] The respondent argued that Article 189 (2) of the Constitution and the interpretation we provided in our judgment in the *Owen Mayapi*⁽¹⁾ case support the position that the petitioners should continue to be paid what they were receiving through the payroll at the time of their retirement and are not entitled to subsequent salary increments. Lastly, the respondent asserted that the petitioners had failed to demonstrate how any of their constitutional rights had been infringed by the respondent.

[7.7] In answering the questions whether a person who has retired and is retained on the pay roll awaiting payment of pension benefits is entitled to a

salary increment; and remittance of pension contributions to the pension authority, we have considered the provisions of Articles 187 and 189, respectively. Article 187 (1) and (2) provides as follows:

187. (1) *An employee, including a public officer and constitutional office holder, has a right to a pension benefit.*
- (2) *A pension benefit shall not be withheld or altered to that employee's disadvantage.*

[7.8] Article 189 goes on to provide as follows:

189. (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.*
(Emphasis added)

[7.9] A literal interpretation of Article 187 (1) and (2) which we set out above reveals that Article 187(1) confers on an employee a right to a pension benefit. Article 187(2) provides in mandatory terms that a pension benefit shall not be withheld or altered to an employee's disadvantage and thus provides protection against the arbitrary withholding or alteration of an employee's pension benefits.

[7.10] Article 189(1) and (2) of the Constitution is equally clear and unambiguous. Article 189(1) clearly provides that a pension benefit shall be paid promptly. Article 189(2) expressly states first, that if a pension benefit is not paid on a person's last working day, the person will stop work; and secondly, that the person's name will be retained on the pay roll based on the last salary received by that person while on the pay roll until the person's pension benefit is paid.

[7.11] It is evident from a reading of Article 189(1) and (2) of the Constitution that the Article principally addresses the timely payment of a pension benefit. Thus, the framers of the Constitution intended first and foremost, that a pension benefit should be paid promptly and on a person's last working day. The default or fall back position is that if such pension benefit is not paid on the last working day, the person stops work but is nonetheless retained on the payroll until the pension benefit is paid.

[7.12] The aim of this provision is to cushion a retired person from hardship which would result from the delayed payout of such person's pension benefits, if the person were not retained on the payroll while awaiting payment of the pension benefit. Article 189(2) clearly and expressly provides that the salary on which such a person is retained on the payroll is the last salary which such a person received while on the payroll. Article 189(2) of the Constitution

therefore restricts the salary which a person who is retained on the payroll can receive to the last salary which the person received while on the payroll.

[7.13] In the *Owen Mayapi*⁽¹⁾ case, which the parties on both sides cited to us in support of their respective positions, we asserted at page J31 of our judgment that:

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

[7.14] We further explained in that case that:

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.

[7.15] We reiterate the above observations in this case. For the avoidance of doubt, we wish to clearly say that we did not state in our judgment in the *Owen Mayapi*⁽¹⁾ case, that a person retained on the payroll pending payment of pension benefits is entitled to a salary increment, as the petitioners wrongly submitted in support of their case.

[7.16] The express provision of Article 189(2) of the Constitution that a person who is not paid a pension benefit on the last working day will stop work but be retained on the payroll based on the last salary received by that person while

on the payroll negates the petitioners' assertion that a person retained on the payroll, in those circumstances, is entitled to a salary increment.

[7.17] Further, since such a person has stopped work and is only retained on the payroll pending payment of the pension benefit, such a person's pension benefit will be calculated up to the last working day based on the last salary the person was receiving immediately prior to the date of retirement. That being the case, the petitioner's contention that they are entitled to a salary increment whilst they are retained on the payroll pending payment of their pension benefits and that the respondent should continue to remit pension contributions to the pension authority on their behalf, during that period, is at variance with the clear provisions of Article 189(2) of the Constitution and is untenable.

[7.18] In other words, since the petitioners were deemed as retired by the IRD from 14th December, 2020, they are no longer employees of the respondent with effect from that date. They are therefore not entitled to a salary increment or the remittance of pension contributions to the pension authority whilst they are retained on the payroll. Further, their assertion that the respondent has breached Articles 187 and 189 (2) of the Constitution by denying them a salary increment and not remitting their pension contributions to the pension authority post 14th December, 2020 whilst they are retained on the payroll pending payment of their pension benefits is based on their erroneous understanding of

what is meant by the phrase “based on the last salary received by that person while on the payroll.”

[7.19] In short, the petitioners have not proved that the respondent contravened Articles 187 and 189 (2) of the Constitution by not awarding them a salary increment and not remitting pension contributions to the pension authority. They further have not proved that the respondent has altered or intends to alter their pension benefits to their detriment in contravention of Article 187 (2) of the Constitution. We find, based on the evidence before us, that the respondent has not breached Article 187(1) and (2) and Article 189(2) of the Constitution.

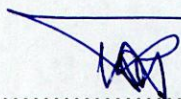
8.0 CONCLUSION

[8.1] In the circumstances, we decline to grant the petitioners a declaration that the respondent’s decision to deny them a salary increment while they are retained on the payroll pending payment of their pension benefits is unconstitutional and null and void; and the further declaration that the respondent’s decision to tamper with their salary increment and to reduce their salary is null and void. We further decline to grant them the related orders that the decision to reduce their salaries and the deduction of Two Thousand Three Hundred and Eleven Kwacha Sixty-One Ngwee (K2,311.61) from their February salary was unconstitutional and should be reimbursed with interest.

[8.2] In sum, all of the petitioners' claims have failed. The petition therefore wholly fails and is dismissed. Each party shall bear their own costs.



.....
A. M. Sitali
CONSTITUTIONAL COURT JUDGE



.....
M. K. Chisunka
CONSTITUTIONAL COURT JUDGE



.....
K. Mulife
CONSTITUTIONAL COURT JUDGE