SELECTED JUDGMENT NO.4 OF 2018

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT NDOLA
(CONSTITUTIONAL JURISDICTION)

2017/CC/R002

IN THE MATTER OF: ARTICLES 189 AND 266 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

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

BETWEEN:

LUBUNDA NGALA 1ST APPLICANT

JASON CHULU 2ND APPLICANT

AND

ANTI-CORRUPTION COMMISSION RESPONDENT

Coram: Chibomba, PC, Sitali, Mulembe, Mulonda and Munalula, JJC.

On 3rd October, 2017 and on 26th January, 2018

For the 1st and 2nd Applicants: Both Present in Person.
For the Respondent: Mr. B. Chiwala of Anti-Corruption Commission.

JUDGMENT

Chibomba, PC, delivered the Judgment of the Court

Cases referred to:-

1. Hobbs v CG Robertson Limited [1970] 2 All E.R. 347.
2. Wood v Commissioner of Police of the Metropolis [1986] 2 All E.R. 570.
3. Hakainde Hichilema and Another v Edgar Chagwa Lungu and 3 others- 2016/CC/0031.
4. Seaford Court Estates Ltd v Asher [1949] 2 K.B. 481.
5. Wynter Kabimba (Suing in his capacity as Secretary General of the Patriotic Front) v Attorney General and George Kunda (2011) 3 Z.R. 492.
6. Attorney General and Another v Lewanika and Others (1993-94) Z.R. 164.
7. James v Wrotham Park Settled Estates [1980] AC 74.
8. Stephen Katuka (Suing as Secretary General of the UPND) and LAZ v The Attorney General, Ngosa Simbyakula and 63 Others- 2016/CC/0010/2016/CC/0011.
9. Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v Attorney General and Another - Selected Judgment No. 34 of 2017.
10. Matildah Mutale v Emmanuel Munaile- SCZ Judgment No. 14 of 2007.
11. Dadi Jagannadham v Jammulu Ramulu & Others (2001) 7 SCC 71.
12. C.I.T. Central, Calcutta v National Taj Traders 1980 AIR 485.
13. Copper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) HCA 26.
14. Kehar Singh v State (Delhi Admn.) 1988 SCR Supl. (2) 24.
15. District Mining Officer v Tata Iron & Steel Co. – Appeal (civil) No. 4803 of 2001.
16. South Dakota v North Carolina (1940) 192 USA 268: 48 ED 448.

Statutes and other materials referred to:-

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. The Employment Act (First Schedule) (Amendment) Order, 2002 of Malawi.
3. The Technical Committee on Drafting the Zambian Constitution Report, April, 2012.
4. Ruggero J. Aldisert's Judicial Declaration of Public Policy, 10 J. App. Prac. & Process 229 (2009), page 231.
5. Longman Dictionary of Contemporary English, The Living Dictionary, New Edition.

This Judgment relates to a matter that was referred to the Constitutional Court by the High Court for interpretation of Articles 189 (2), and 266 of the Constitution as amended by the **Constitution of Zambia (Amendment) Act No. 2 of 2016** (the Constitution). The referral

was made pursuant to Article 128 (2) of the Constitution which provides that subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

The brief facts relating to this matter are that the two Applicants were employees of the Respondent who were engaged on permanent and pensionable contracts of service on 1st July and 1st August, 2015, respectively. The 1st and 2nd Applicants however, resigned from the Respondent's employment in June and May, 2016, respectively. Following their resignations from employment, the Applicants demanded to be paid their terminal benefits which have not been paid to date despite the Respondent having removed the Applicants from its payroll. Displeased by this turn of events, the Applicants, by Writ of Summons filed in the High Court at Lusaka, commenced an action seeking the following reliefs:-

> "i. **A detailed computation and payment of the terminal benefits due to us at the date of our respective exits from the employ of the Respondent.**
>
> ii. **Payment of our respective salaries, in arrears for each month elapsed from the last day of service at Anti-Corruption Commission.**
>
> iii. **A declaration that the Respondent's failure or unwilling-ness to retain us on the payroll having not paid us our terminal benefits was and is an**

infringement on our rights as enshrined under Article 189 of the Constitution of Zambia.

iv. **Interest at the prevailing Bank of Zambia lending rate.**

v. **Costs of and incidental to this action.**

vi. **Any other relief, which may seem just and equitable to the Court."**

Whilst their matter was still on going in the court below, the Applicants, by Originating Summons supported by an affidavit, applied to be referred to this Court for interpretation of the above stated Articles of the Constitution. In the Ruling dated, 12th April, 2017 the learned High Court Judge stayed further proceedings and referred the matter to this Court for determination of the following questions:-

"(a) Whether, in light of the provision of Article 266, terminal benefits accrued in respect of person's service fall within the ambit of the definition of a "pension benefit."

(b) Whether, in light of the provisions of Article 189 (2) of the Constitution, a person who has not been paid his/her terminal benefits on that person's last working day should be retained on the payroll, until payment of the terminal benefits based on the last salary received by that person while on the payroll.

(c) Whether, in light of the provisions of Article 189 (2) of the Constitution, the failure or unwillingness to retain a person on the payroll having not paid the person his/her terminal benefits is an infringement on the rights of that person."

In support of their application, the Applicants relied on the List of Authorities and skeleton arguments filed. They also augmented their written arguments with oral submissions.

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In support of the first question raised as to whether in light of the provision of Article 266, terminal benefits accrued in respect of a person's service fall within the ambit of the definition of a pension benefit, it was the Applicants' submission that in order to determine what kind of 'similar allowances' would fall within the ambit of the definition of a pension benefit in Article 266, the words "similar allowance" in respect of a person's service must be interpreted in light of the list of items stated in that provision, being "a pension, gratuity and compensation". That this position was illustrated in **Hobbs v CG Robertson Limited**[1] and **Wood v Commissioner of Police of the Metropolis**.[2] They submitted that to arrive at a sound interpretation of the Article, what amounts to a 'pension, gratuity and compensation' must first be understood. And that according to this Court's decision in **Hakainde Hichilema and Another v Edgar Chagwa Lungu and 3 others**[3], the words 'pension, gratuity and compensation' should be given their ordinary meaning as only if the ordinary meaning results in an absurd meaning should recourse be had to the purposive interpretation. In this regard, the Applicants referred us to the meanings of the words in

question as defined by the **Oxford English Dictionary**. However, we were not able to verify this as full citation was not given.

It was thus the Applicants' position that what is evident from the definitions of the terms in question is that a pension has some peculiar characteristics that are not generally found in gratuity and compensation as it is a payment generally made to retirees whereas gratuity is a payment generally made to persons under fixed term contracts which is payable entirely at the discretion of the employer. Thus, it is evident that a pension, gratuity and compensation all have characteristics that are peculiar to themselves.

It was the Applicants' further contention that the cardinal principle in the **Hichilema v Lungu**[3] case is that the Constitution must be read as a whole and that no one clause or provision should be read in a manner that alienates it from the rest of the provisions of the Constitution. As such, in determining what amounts to a similar allowance, the word "pension" must not be read in isolation of the other words, 'gratuity' and 'compensation' or vice versa in that if the word "pension" is read in isolation of the above words, an absurd meaning would result as this would only cover employees whose employment has terminated by way

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of retirement. Similarly, that if the phrase "similar allowance", was isolated from the words gratuity, pension and compensation, this would create an absurdity as this would only cover those employees on fixed term contracts whose contracts have terminated for one reason or another. And that when the words pension, gratuity and compensation are read as a whole, it is evident that these benefits have the following similar characteristics:

> **"i. They are all sums of money or allowances paid to persons for the services rendered to an employer;**
>
> **ii. The sums of money are accrued by virtue of rendering services to an employer during the course of one's employment; and**
>
> **iii. The payments are all due to an employee when employment has been terminated, that is to say, if a person resigns, retires, the time elapses on the fixed term contract or termination in any other manner provided for under law."**

It was argued that on the basis of the above, terminal benefits are *ejusdem generis* with pension, gratuity and compensation because terminal benefits have the same characteristic and serve the same purpose as a pension, gratuity and compensation in that: -

> **"i. Terminal benefits just like a pension, gratuity and compensation are sums of money or allowance paid to persons for the services rendered to an employer during the course of employment;**
>
> **ii. Terminal benefits, just like a pension, gratuity and compensation are accrued by virtue of rendering services to an employer; and**
>
> **iii. Terminal benefits, just like a pension, gratuity and compensation, are only due to an employee upon termination of employment."**

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In urging us to find that terminal benefits are a similar allowance which fall within the ambit of the definition of pension benefit as provided under Article 266 of the Constitution, the Applicants referred to the Malawian **Employment Act (First Schedule) (Amendment) Order, 2002.** They argued that this statute had recognised terminal benefits to be a similar allowance to a pension and gratuity before it was repealed. They, accordingly, urged us to find that terminal benefits fall within the ambit of a pension benefit.

In support of the second issue raised as to whether, in light of the provision of Article 189 (2) of the Constitution, a person who has not been paid his/her terminal benefits on that person's last working day should be retained on the payroll, until he/she is paid the terminal benefits, it was submitted that should this Court be persuaded by the argument that terminal benefits fall within the ambit of a pension benefit, then the Applicants' contention is that where the terminal benefits have not been paid, that person should be retained on the payroll until payment is done.

With respect to the third issue raised as to whether, in light of the provisions of Article 189 (2) of the Constitution, the failure to retain a

person who has not been paid his/her terminal benefits on the payroll is an infringement on the rights of that person, it was contended that should this Court be persuaded that a person who has not been paid his/her terminal benefits on that person's last working day should be retained on the payroll until the payment is done, then this Court should hold that the failure or unwillingness of the employer to retain that person on the payroll is an infringement on the rights of that person.

In augmenting the Applicants' skeleton arguments, the 2nd Applicant, Mr. Jason Chulu, addressed the Court first. Although he indicated that he was only going to add what was left out in the Applicants' skeleton arguments, he, however, more or less repeated the arguments raised above. We therefore shall not repeat these here as we have already summed them up above.

The 1st Applicant, Mr. Ngala, began by adopting the 2nd Applicants' submissions and highlighted a few variations. He too more or less repeated the arguments in the Applicants' skeleton arguments which we shall not repeat here save to add that as regards the interpretation of Article 266, he took the position that whether this Court adopts the literal or purposive approach, it would still arrive at the same conclusion that

the Applicants did, that terminal benefits are a similar allowance that fall within the ambit of the definition of a pension benefit.

In opposing this application, the learned Counsel for the Respondent, Mr. Chiwala, also relied on the Respondent's skeleton arguments and the List of Authorities filed in opposition to the Originating Summons which he too augmented with oral submissions.

It was submitted that Article 189, read together with the definition of "pension benefit" as defined under Article 266 have what Counsel called: "a genesis, a rationale and a context" that explains why these particular provisions are in the Constitution today. Therefore, in interpreting the questions raised above, this Court should address its mind to the genesis, rationale and context. He also submitted that in determining the genesis, rationale and context, this Court should look at the submissions of the people of Zambia, the observations and recommendations of the Mung'omba and Mwanakatwe Constitutional Review Commissions and Technical Committee on Drafting the Zambian Constitution. Counsel argued that it will be seen from these reports that the plight of retirees in Zambia was of great concern among the general public and that it is common knowledge that many retirees, especially from the public service, experienced delays in receiving their pensions

and that they consequently suffered untold misery in awaiting and pressing for their payments and that many of the retirees died before they could be paid their pensions.

It was Mr. Chiwala's position that arising from the above concerns, the people of Zambia submitted to the Constitution Review Commissions and the Technical Committee pressing the Zambian Government, to include a provision in the Constitution to cushion retirees and those who are laid off (retrenchees), from the hardships to which they were being subjected due to delay in payment of their pensions, considering that most retirees could not even find any other gainful employment. In support of this submission, Counsel cited and quoted paragraph 3.2.3.12 of the Constitution Review Commission Report, 2005, on the right to pension; the Submissions; and Observations. He also referred to Articles 65 and 252 of the first draft report of the Technical Committee and the rationale for the Articles in question.

Counsel contended that the ***travaux preparatoires*** (preparatory works that form a background to the enactment of legislation) show the intention of the Legislature behind the constitutional provisions in issue. He submitted that the Respondent therefore, strongly contends that the purpose of Articles 189 and 266 was no doubt to cushion or possibly

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alleviate the untold suffering and misery of retirees as can clearly be seen from the people's submissions and the Commission's observations and recommendations. According to Mr. Chiwala, public officers who separate themselves from public service by resignation after finding some other gainful employment, as is the case with the Applicants in this case, were never envisaged to be protected by Articles 189 and 266 of the Constitution.

Counsel contended that although the Applicants have argued at great length, firstly, that the words pension, gratuity and compensation should be given their ordinary meaning; and, secondly, that terminal benefits fall within the ambit of the definition of "pension benefit" as provided under Article 266 of the Constitution and that even though the Respondent does not dispute that terminal benefits are indeed, *ejusdem generis* (of the same kind) with 'pension, gratuity and compensation' and to the above terms being given their ordinary meaning through the combined application of the literal rule of statutory interpretation, nonetheless, that what the Respondent finds incorrect is the Applicants' position that only if the ordinary meaning leads to absurd results should recourse be had to the purposive approach of interpretation as the purposive rule is not only resorted to to eschew absurdity but that also,

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and most fundamentally, it is applied to promote the general legislative purpose underlying a particular statutory provision. In support of this position, Counsel cited the following authorities:-

1. **Seaford Court Estates Ltd v Asher**[4] in which Lord Denning stated, *inter alia*, that the literal method is now completely out of date and has been replaced by the purposive approach and that in all cases now in the interpretation of statutes courts adopt such a construction as will 'promote the general legislative purpose' underlying the provision.
2. **Wynter Kabimba (Suing in his capacity as Secretary General of the Patriotic Front) v Attorney General and George Kunda**[5] in which the High Court made extensive reference to the **Seaford**[4] case to show that there has been a modern trend to shift from the purely literal meaning towards the purposive construction of statutory provisions.
3. **Attorney General and Another v Lewanika and Others**[6] in which the Supreme Court of Zambia adopted the words of Lord Denning in the Seaford Court Estates Ltd case.
4. **James v Wrotham Park Settled Estates**[7] in which Lord Diplock stated that a purposive construction should be adopted where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. And that in so doing the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included.
5. **Stephen Katuka (Suing as Secretary General of the UPND) and LAZ v The Attorney General, Ngosa Simbyakula and 63 Others**[8] in which this Court explained what the purposive approach to interpretation of statutes entails.

Counsel submitted that since the literal rule is now considered outdated, this Court should interpret Articles 189 and 266 purposively

and adopt the reasoning in the cases cited above. And that in ascertaining the meaning and purpose of the Articles in question, the Court should also take into account the context and historical origins shown above and adopt a construction that will promote the general legislative purpose underlying the provisions in those Articles. Further, that the Court should also do what the Legislature would have done, had it had in mind the situation before this Court today. And that if the framers of the Zambian Constitution had in mind the circumstances this Court is now faced with, they would have created the necessary exception to Article 189 so that employees who separate from their employers by resignation, do not fall under the categories of retirees, retrenchees or those whose fixed-term contracts have been terminated so that they are not given the full extent of protection of Article 189.

We were, therefore, urged to so interpret Article 189, in light of the definition of "pension benefit" in Article 266, even if this entails reading words into the texts of the two provisions and to also reject the Applicants' argument that the failure or unwillingness by an employer to retain an employee's name on the payroll in the given circumstances of this case is an infringement of the (former) employee's rights.

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Counsel, then went on to discuss the Payroll Management and Establishment Control System ("the PMECS") through which Government pays civil servants and highlighted the difficulties that could be encountered if employees who resign were to be maintained on government payroll.

Counsel also raised the issue of public interest and public policy that would emanate if the Applicants' proposition were accepted. He, thus, urged this Court not to just end at applying the literal or golden and *ejusdem generis* rules in interpreting the provisions in question just because no absurd meaning results therefrom, but to instead, take into account public interest and public policy considerations as it undertakes the task of interpreting the constitutional provisions in question and in determining the question whether the peculiar circumstances in which the Applicants are, indeed, constitute an infringement of their constitutional right(s) which have given rise to a cause of action and warranting the particular kinds of remedies sought from the court below.

In support of the above submissions, Counsel referred to **Ruggero J. Aldisert's Judicial Declaration of Public Policy, 10 J. App. Prac. & Process 229 (2009), page 231** (Senior United States Circuit Judge,

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Chief Judge Emeritus, United States Court of Appeal for the Third Circuit) where, according to Counsel, the learned author explains when the courts are called upon to weigh considerations of public policy.

He thus urged us to take a leaf from the United States of America jurisdiction in acknowledging that, among the several devices available as basis for decisions such as maxims, doctrines, precedents and statutes, public policy is primary. He implored us to consider the public interest and public policy in the novel circumstances raised in this case as one of the values which the Constitution upholds is that one should only be paid what he has earned or is rightfully entitled to. And that by asking this Court to interpret Article 189 in light of the definition of pension benefit under Article 266 in their favour in so far as their retention on the payroll is concerned, the Applicants are effectively asking this Court to sanction the undesirable situation whereby people in the prime of their life would be drawing a salary from tax payers' money for doing nothing which would be outrageous and raise public outcry. And that Article 118 (2) (f) of the Constitution stipulates that one of the principles by which the courts shall be guided when exercising judicial authority is the protection and promotion of values and principles of the Constitution while Article 267 (1) (a) and (c) enjoins the Constitutional

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Court to interpret the Constitution in a manner that promotes its purposes, values and principles that contribute to good governance.

In augmenting the Respondent's written submissions in response, Mr. Chiwala submitted, as regards the use of the term *ejusdem generis* in the Respondent's Skeleton Arguments, that this term was used to the extent that terminal benefits are monies paid to an employee whose contract has been terminated. Therefore, that a pension, gratuity and compensation are at the instance of the employer while terminal benefits in the current case arose from the Applicants' resignation from employment and therefore, the difference is that the Applicants' terminal benefits are as a result of their resignation which was at their instance.

In response to the argument that Article 189 applies to the Applicants' case, Counsel repeated his earlier submission that the Article in question was designed to deal with the mischief of hardships that pensioners were going through. He, however, stressed that since the Applicants took up other employment after their resignation from the Respondent's employment, the question that arises is whether Article 189 encourages youthful Zambians to be on two payrolls. And that in the event that this Court answers the question posed above in the affirmative, then the question is, was it the intention of the Legislature to

put people who have resigned in the same bracket as pensioners? He submitted that that was not the intention and therefore, this Court should apply the purposive approach in interpreting Article 189 which would cover both the absurdity and injustice that would result from interpreting Article 189 in the manner suggested by the Applicants where a person would be employed by two employers at the same time.

In conclusion, Counsel submitted that Article 189 cannot be interpreted by using the literal rule of interpretation as it is ambiguous. And that if not well attended to by this Court, it would result in people resigning and taking up other jobs while continuing to receive salaries from up to five different previous employers and that this would be against the intention of the Legislature.

The Applicants filed lengthy Skeleton Arguments In Reply, and a List of Authorities which they relied upon and which they augmented with oral submissions. The sum total of their written and oral submissions in reply is as reflected hereunder.

In countering the submission that this Court should have recourse to the "Constitutional Review Commissions Reports" and the "First Draft Report of the Technical Committee on Drafting the Zambian Constitution" and employ the "purposive approach" in order to obtain the

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genesis, rationale and context of Articles 189 and 266 of the Constitution, it was submitted that what was held in **Hichilema v Lungu**[3] applies as it guides that the words used by the legislature must be given their ordinary meaning and also as to when the court should have recourse to the purposive interpretation. Therefore, that since the Respondent has admitted or conceded that terminal benefits are *ejusdem generis* (of the same kind) with a pension, gratuity and compensation which is the focus of Articles 189 and 266, it follows that no absurdity arises out of an ordinary interpretation of the Articles in question. Hence, by inviting this Court to nonetheless, proceed with the purposive approach of interpretation, the Respondent is asking this Court to depart from the well-founded reasoning in the above cited case.

In reaction to the Respondent's submission that Article 189 should not be interpreted in the manner suggested by the Applicants as that would result in an absurdity where a person would be employed by two employers at the same time, it was submitted that since they both resigned, the Applicants are no longer employees of the Respondent. Therefore the only reason they were supposed to be retained on the Respondent's payroll was because their terminal benefits were not paid upon leaving employment as required by Article 189 of the Constitution

which seeks to protect employees from employers who unreasonably withhold employees' pension benefits.

In response to the distinction made by Counsel for the Respondent that a pension, gratuity and compensation arise at the instance of the employer while terminal benefits in the current case arose from the Applicants' resignation from employment, it was the Applicants' contention that terminal benefits are *ejusdem generis* with pension, gratuity and compensation as they have the same characteristics and serve the same purpose. And that it therefore, follows that terminal benefits fall within the ambit of a pension benefit as defined under Article 266 because they are all payments that accrue by virtue of a person's employment and which become due on that person's last day of employment.

In response to Mr. Chiwala's submission that a person who resigns should not be protected by Article 189 as this provision is restricted to retirees only, the Applicants contended that this proposition is misplaced as in the case of **Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v Attorney and Another**,[9] this Court endorsed the principle espoused in **Matildah Mutale v Emmanuel Munaile**[10] that if the words of a statute are precise

and unambiguous, then no more can be necessary than to expound on those words in their ordinary and natural sense. And hence, Article 189 which refers to 'a person' that was employed does not place limits that the person must be a retiree and not a person who has left employment.

Further, that if the Legislature intended to restrict the application of Articles 189 to retirees only, then the restriction would be found in the Constitution itself. Therefore, in the absence of such restriction, Article 189 should not be interpreted in a manner that restricts its application to retirees only. And that even assuming that the Legislature made a mistake by omitting to make provision restricting Article 189 to retirees only, this Court cannot add words to the Constitution or read words into it as doing so would amount to usurping the powers of the legislature because a *casus omissus* cannot be supplied by the Court except in the case of clear necessity and when reason for it can be found in the four corners of the Constitution itself. As authority, the following cases, *inter alia,* were cited:-

i. **Dadi Jagannadham v Jammulu Ramulu & Others.**[11]

ii. **C.I.T. Central, Calcutta v National Taj Traders.**[12]

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The Applicants referred to Articles 252 and 62 of the First Draft Constitution on 'labour relations'. They submitted that the Legislature had recourse to the above provisions when it came up with Article 189 and that this shows that there is nothing that restricts the entitlement to pension benefits to retirees only. To press this point further, the Applicants again cited the **Malembeka**[9] case where we guided that if there are any limitations in a provision of the Constitution, these have to be found within the corners of the Constitution.

In countering the Respondent's call for the purposive approach to interpretation of the Articles in question and the argument that Article 189 cannot be interpreted by using the literal rule of interpretation as it is ambiguous, the Applicants submitted that the purposive approach is fundamentally flawed and misapplied in this matter as in applying this approach, there exists jurisprudence, guidelines and procedures that govern the Court's interpretation of a particular provision. As authority, the case of **Copper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation**[13] was cited in which Mason and Wilson JJ stated that:-

> **"When the judge labels the operation of the statute as absurd, extraordinary, capricious, irrational or obscure he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. But**

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> **the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute..."**

The Applicants also cited the case of **Kehar Singh v State (Delhi Admn.)**[14] in which the court discussed what constitutes 'ascertaining the provisions of a statute'.

It was submitted that the above cited case shows that in determining the purpose of a statutory provision, the starting point should be the statute itself, and that the provision which requires interpretation must be read in the light and context of the other provisions of the statute so as to ascribe to it a more wholesome meaning or a meaning that promotes the 'purpose' of the statute in its entirety. And that any extrinsic evidence, if called in for purposes of aiding in such construction, shall only be adduced within the 'framework of the statute'. They argued that for this Court to therefore adopt the purposive approach, all due consideration should be given firstly to the principal legislation which is the Constitution and then, within its context, to any extraneous material that would aid such construction. To press this point further, the Applicants cited the case of **District Mining**

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Officer v Tata Iron & Steel Co[15] to support their position that the process of construction combines both literal and purposive approaches.

It was further contended that the Respondent is attempting to evade the obligations placed on it by the Constitution and the spirit with which it was enacted by inviting this Court to rule against a provision that advances social posterity, human integrity and good governance by ensuring that at the time of separation, an employer promptly and efficiently settles all its dues with the separating employee as opposed to the historical trend of employers holding on to past employees' benefits for inordinate duration. As such, the Respondent cannot perpetuate this historical trend which is now contrary to the Constitution. Hence, employing the purposive approach in the current case, solely against the background of the assumptions that the Respondent has put forward would be folly, as doing so would be concomitant with artificially straining the words in Articles 189 and 266 in such a way that their meaning is essentially dispensed with. And that this would be against the guidance given in the **Kehar Singh**[14] case and the **District Mining Officer**[15] case.

That if the purposive approach is adopted, the 'ploy' by the Respondent should be thwarted in light of the clear intent and purpose of

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the Constitution and the social agenda it seeks to advance. And that the limited "purpose" of the Articles in question, the Respondent is advocating for, should not be entertained as it would result in the catastrophic outcome of providing a construction that fits into an assumption and disregards Parliament's handiwork.

In countering the Respondent's argument that interpreting the Articles in question in the manner suggested by the Applicants would encourage an employee to move from one employer to another resulting in that employee being maintained on the payrolls of multiple previous employers, the Applicants argued that Article 8 of the Constitution favours sound corporate governance and integrity as it requires that the system should be accurate and accountable. And that advancing the provision that a person should be paid on their last day of employment is not counter-productive. Therefore, the position advanced by the Respondent where former employees would go for years after leaving employment without receiving what is due to them is unjust.

In conclusion, the Applicants urged us to look at the provisions of the law in question by employing the literal approach and if need be, to adopt the purposive approach to arrive at the conclusion that the

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intention of the relevant Articles in question is not to sideline anybody owed anything by their employer.

We have seriously considered this application together with the arguments in the respective Skeleton Arguments and the authorities cited therein. We have also considered the oral submissions by the Applicants and the learned Counsel for the Respondent. It is our considered view that the main question raised in this application is, whether Article 189 as read together with Article 266 covers terminal benefits of employees who have resigned from employment to join another employer where he/she is earning a salary or who have resigned for some other reason and whether such employees should be retained on the former employer's payroll until their terminal benefits are paid.

For convenience and to avoid repetition, all the three issues raised by the Applicants in the referral will be considered together as they are interrelated. Further, the second and third issues raised depend on how the first issue is answered.

The Applicants' main contention in support of their position that Article 189 covers their terminal benefits was that if the literal rule of interpretation is applied to the provisions of the Articles in question and if

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the words used in these Articles are given their ordinary meaning, this Court will come to the conclusion that terminal benefits of employees who have resigned, but were not immediately paid their terminal benefits are covered and that as such, they were entitled to remain on the employer's payroll until their benefits are paid.

From the Applicants' submissions above, we decipher six reasons why they are of the view that the literal rule of interpretation should be applied in interpreting the provisions of Articles 189 and 266. For convenience, we have summed these up as follows:-

1. that it is only where the ordinary meaning of the words in question results in absurdity that recourse should be had to the purposive interpretation;
2. that terminal benefits are a similar allowance to pension benefits, gratuity and compensation as these were recognised to be a similar allowance to a pension and gratuity in Malawi, by the Malawian Employment Act (First Schedule) (Amendment) Order 2002 before the Act was repealed. And that in determining what amounts to a similar allowance referred to in Article 266, the provisions of the Articles in question must be read together without any of the words used being isolated from the others as doing so would result in an absurd meaning and the Court must interpret the words "similar allowance" in the light of the list of items stated in the definition of a pension benefit in Article 266;
3. that the words 'pension, gratuity and compensation' used in Article 266 have similar characteristics in that they are all forms of money or allowances that accrue and are paid to a person for services rendered to an employer during the course of employment and which become due when the

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employment is terminated either by resignation, retirement or due to effluxion of time;

4. that terminal benefits are *ejusdem generis* with pension, gratuity and compensation because they have the same characteristics with pension as they are sums of money or allowance(s) that accrue and are paid to persons for services rendered to an employer during the course of employment and which become due on termination of employment;

5. that the purposive approach is flawed and would be misapplied in this matter and that if the purposive approach is adopted by this Court in interpreting the provisions in question, all due consideration should be given firstly to the Constitution which is the principal legislation and then to any extraneous material to aid such construction within the context of the Constitution; and

6. that there is no provision in the Constitution that restricts the application of Article 189 to retirees only and that if any restriction was intended, it would be found in the Constitution itself. Hence, in the absence of such restriction, Article 189 should not be interpreted in a manner that restricts its application to retirees only. And that even assuming that the Legislature made a mistake by omitting to provide restriction to the application of Article189 to retirees only, this Court cannot add words or read words into it as doing so would amount to usurping the powers of the Legislature.

On the other hand, the thrust of the Respondent's arguments in opposition was that in an ordinary situation, the literal rule of interpretation should be applied but that however, in the current case, doing so would result into an absurd meaning being given to the provisions in question and which the Legislature could not have intended

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or envisaged when the said Articles were enacted. And that Articles 189 and 266 did not envisage protection of public officers who resign from the public service and move on to other gainful employment as it is evident from the ***travaux preparatoires*** that the intention of the Legislature behind the provisions of the Articles in question was to cushion the hardships that were faced by pensioners as a result of delayed payment of their pension money. Hence, this Court should employ the purposive rule of interpretation of the provisions in question by referring to the genesis, rationale and context of the provisions in order to give a construction that promotes the general legislative purpose underlying the provisions in the said Articles and do what Parliament would have done, had it had the situation presented by this case in mind.

We have considered the above arguments. The record will show that although the Applicants have given definitions of what they consider a pension benefit, gratuity and compensation mean, and correctly so, if we may say so, they have however, 'ingeniously', avoided to state what terminal benefits are or what they constitute. The record will show that it took some prodding from the Court for the Applicants to state what they considered to constitute the terminal benefits they claimed not to have

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been paid by their former employer and which they now allege qualify and are covered by Articles 189 and 266 of the Constitution. They finally gave these as constituting their accrued leave days, uniform and settling in allowances. The Respondent however contended that although the Applicants' terminal benefits are *ejusdem generis* with pension benefits to the extent that these are monies paid to an employee upon termination of a contract of employment, nonetheless, a pension, gratuity and compensation are at the instance of the employer whereas the terminal benefits which the Applicants are claiming in this matter arose at the Applicants' instance through resignation. As such, they do not fall within Articles 189 and 266.

We have considered the above arguments. In order for us to adequately address the issues raised under the first question argued in this application, it is imperative that we first cast here what the Articles in question state. They are couched 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."**
>
> **"266 "pension benefit" includes a pension, compensation, gratuity or similar allowance in respect of a person's service."**

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As regards the definitions of the terms 'pension, gratuity and compensation' used in Article 266, Longman Dictionary of Contemporary English, defines these terms, respectively, as follows:-

> **Pension**
>
> **"an amount of money paid regularly by the government or company to someone who does not work any more, for example because they have reached the age when people stop working or because they are ill.....**
>
> **to make someone leave their job when they are old or ill, and pay them a pension."**
>
> **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, especially in the army, navy etc"**
>
> **Compensation**
>
> **"money paid to someone because they have suffered injury or loss, or because something they own has been damaged [+for] compensation for injuries at work."**

We totally agree with the above definitions.

As regards the rules of interpretation that are applied in construing statutory provisions, we agree with the Applicants' submission that unless it results in absurdity, words used in a statute must be given their ordinary meaning or that the literal rule of interpretation should be applied. This is the position we took in the case of **Hichilema v Lungu**.[3] The **Hobbs**[1] case also fortifies this position.

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It is also correct to say that the purposive rule of interpretation is resorted to where the literal rule of interpretation results in absurdity or where it is not possible to decipher what the Legislature intended from the words used in the statute itself. The question therefore is, which rule of interpretation should be applied to this case because on one hand, the Applicants have argued with much vigour that the literal rule of interpretation should be applied while on the other hand, the Respondent has urged us to apply the purposive rule of interpretation.

It is our considered view that the starting point in determining the applicable rule of interpretation is the provisions of the Articles in question whose text we have quoted above. From the above provisions, it can clearly be seen that while a pension benefit can 'loosely' be considered to be a terminal benefit, it is not every terminal benefit that has qualities or characteristics of a pension benefit. Firstly, because ordinarily and strictly speaking, pension benefits relate to those who have reached retirement age or are retired early for some reason while resignation is a termination that occurs before retirement age. Therefore, our firm view is 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

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same as a pension benefit. We say so because we cannot decipher such meaning from the provisions of Articles 189 or 266. Thus, it can be correctly said that a pension benefit is triggered by retirement due to age or other circumstances. Whilst the benefits claimed by the Applicants in this matter are normally payable during the subsistence of the employee's employment. As such, they should be distinguished from pension benefits to which both the employee and the employer contribute to cushion off hardships to the employee at the end of his or her employable age. However, the terminal benefits claimed here which constitute accrued leave days, uniform and settling in allowances do not come within the meaning of pension benefits as they are nowhere near what a pension benefit is because leave days for instance, are only commuted to cash because the employee did not use the leave days during employment or where the conditions of service allow for commutation did not commute them whilst still in employment. Further, settling in and uniform allowances are one-off payments which in an ideal situation should be paid during the subsistence of the employment contract. Gratuity on the other hand is a contractual entitlement which cannot be said to be akin to leave days pay, or compensation which is payable before or after the employment contract terminates depending

on the circumstances of the case or the nature of the injury sustained which must have occurred in furtherance of the employer's business or while an employee is on duty. For example, under the **Worker's Compensation Act**, where due to injury or illness sustained during the course of employment, the employee is not able to continue working, compensation may be paid as a lump sum or through periodic payments to ameliorate the suffering of the injured employee.

Further, Article 189 (1) uses the terms 'promptly' and 'regularly' which we consider to be the catch words in that Article and can only relate to a pension and not to the type of terminal benefits claimed by the Applicants. Moreover, the word 'promptly' used in Article 189 (1) means that the benefit must be paid without delay while 'regularly' means that it must be paid to the beneficiaries when due, and not intermittently. The question therefore is, considering the nature or type of terminal benefits the Applicants are claiming as a basis upon which they should have been retained on their former employer's payroll, can these be said to qualify to be paid promptly and regularly? The answer is that they cannot as correctly conceded by the Applicants at the hearing because while they can be paid promptly, they cannot be regularly paid as these are one-off payments.

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Further, we are not able to comprehend from the Applicants' submissions why they claim that their accrued leave days, uniform and settling in allowances come within the provision of Article 188 which in our view is the starting point in understanding the rationale behind the enactment of Articles 189 and 266. Article 188 is couched in the following terms:-

> **"188. (1) A pension benefit shall be reviewed periodically to take into account actuarial assessments.**
>
> **(2) A pension benefit shall be exempt from tax."**

In view of the clear provision of Article 188, we fail to appreciate how terminal benefits that constitute accrued leave days, uniform and settling in allowances can be periodically reviewed so that actuarial assessments could be done or effected. Leave days pay is also not exempt from tax under Article 188 (2). In the case of uniform and settling in allowances, these are one-off payments which, as stated above, ordinarily should have been paid during the subsistence of the Applicants' employment and do not therefore, qualify to be pension benefits as defined in Article 266 of the Constitution.

We are fortified in our resort to the provisions of Article 188 because it is settled that in interpreting constitutional provisions, the Constitution must be read as a whole and that no single provision must

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be isolated from the other provisions bearing on the subject matter. The Supreme Court in the United States of America took this position in **South Dakota v. North Carolina**[16] and stated that no single provision of the constitution should be segregated from the others and that all provisions bearing on a particular subject must be considered and taken into account in interpreting a provision of the constitution so as to give effect to the greater purpose of the instrument.

The question that follows is: can the benefits claimed by the Applicants qualify as gratuity or compensation as defined in Articles 266? The Applicants have given definitions of these two terms whose texts we have quoted above. Our firm view is that the terminal benefits claimed do not at all qualify to be either gratuity or compensation and which fact the Applicants themselves conceded and acknowledged in their submissions. We shall, therefore, not belabour this point.

The Applicants have also argued with much fervour that their benefits qualify to be covered under Articles 189 and 266 of the Constitution by heavily relying on and stressing the term 'similar allowance' used in Article 266. The question however is: what constitutes "similar allowance"? We consider these to be key words in this provision. The Applicants have devoted or spent quite a lot of time

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trying to persuade us to agree that the phrase 'similar allowance' used in Article 266 in defining a pension benefit includes the terminal benefits claimed in their action in the High Court. They argued that since these became payable on termination of their employment by resignation just like where the employment contract terminates by retirement, effluxion of time or by retrenchment, their benefits fall within the definition of a pension benefit, gratuity and compensation as they are a similar allowance in terms of Article 266. 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. Therefore, the accrued leave days, uniform and settling in allowances claimed by the Applicants do not qualify to be pension benefits that are covered by Articles 189 and 266 of the Constitution.

We have already given reasons why we so hold above. We, however, wish to observe that the term "similar allowance" used in Article 266 in defining what a pension benefit is can only refer to allowances that are similar or akin to a pension benefit, gratuity or compensation and certainly not leave pay, uniform and settling in allowances. It is thus not every type of allowance or money that

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becomes due to an employee that can be a similar allowance to a pension, gratuity or compensation in terms of Article 266. We do not thus comprehend how accrued leave pay, settling in and uniform allowances could become a similar allowance to a pension as defined in Article 266 so that they qualify to be a pension benefit under Article 189. Therefore, although Mr. Chiwala conceded that terminal benefits are *ejusdem generis* with pension benefits, however, for the reasons we have given above, we do not agree with his position. We can only repeat what we have stated above that Articles 189 and 266 were not intended to encompass such claims.

We can only repeat that the mischief which the Legislature intended to correct is clearly spelt out in the genesis, rationale and 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 252 (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 of the definition of a pension benefit in Article 266 of the Constitution. We find it prudent to quote the

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summary and the rationale of the proposed Articles 252 and 256 (6) which, respectively, state as follows:-

> **"The Article provides for 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 the hardships which will otherwise result from unemployment, retirement or death of a wage earner."**

In view of this clear background to Article 189, we do not appreciate or comprehend how accrued leave days, uniform and settling in allowances can be stretched and interpreted or held to be a pension benefit or similar allowance as defined in Article 266 of the Constitution. We do not also see how those terminal benefits can fit in the rationale or background to the Articles in question. It follows that it would be folly to ignore the preparatory works that formed the background to the enactment of Articles 189 and 266 when clearly, the Legislature did not at all envisage the inclusion of accrued leave pay, settling in and uniform allowances when the Articles in issue were enacted while the mischief behind the enactment of Article 189 is plain and the intention is clear, namely, to cushion pensioners and retrenchees from the hardships they

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were experiencing as a result of delayed payment of their pension money or gratuity.

The Applicants are neither pensioners nor are they retrenchees who would be entitled to a gratuity which would have entitled them to remain on the employer's payroll until these benefits are paid. We are pursuaded in so holding by the decision in the **Kehar Singh v State (Delhi Admn.)**[14] case which the Applicants themselves cited. The principle therein is on all fours with the situation that we are dealing with in the current case. In discussing what constitutes 'ascertaining the provisions of a statute', the court in India stated that:-

> **"If the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature a rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute."(underlining ours for emphasis).**

We find the above position sound as it also applies in the case in casu. We thus note the mischief which the Legislature intended to redress when Articles 189 and 266 were enacted. In **Stephen Katuka (Suing as Secretary General of the UPND) and LAZ v The Attorney General, Ngosa Simbyakula and 63 others**,[8] we stated that the

purposive approach entails adopting a construction or interpretation that promotes the general legislative purpose. And that this requires the court to ascertain the meaning and purpose of the provision having regard to the context and historical origins, where necessary. We reiterate the above position in the current case.

Further, the case of **District Mining Officer v Tata Iron & Steel Co**,[15] which the Applicants again cited, actually supports the position that the court can in the process of construing a statute, combine both literal and purposive approaches so as to ascertain the legislative intention i.e., the true or legal meaning of an enactment by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.

As regards the Applicants' reliance on the Malawian Employment Act (First Schedule) (Amendment) Order, 2002 to support their argument that the terminal benefits they are claiming are a similar allowance to a pension benefit because the court in Malawi interpreted a similar provision to ours to include similar benefits claimed in the current case in

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the High Court, our brief response is that this is a self-defeating argument as the statute relied upon is not applicable in this country and in fact, by their own submission, this statute has been repealed in that country. We do not thus see the relevance of citing a foreign law more so as we have our own legislation which regulates payment of pension, gratuity, compensation or similar allowances.

In summing up and for the reasons given above, we reiterate our holding that the type of terminal benefits claimed by the Applicants in the current case do not fall within the ambit of the definition of a pension benefit as defined in Article 266 of the Constitution as Article 189 of the Constitution only applies to a pension, compensation, gratuity or other allowances that are similar to these.

Having found that the benefits claimed by the Appellants are not covered under Articles 266 and 189, it follows that the second and third issues raised in this referral have become otiose and we need not consider them.

Since this referral did raise serious constitutional issues, we order each party to bear their own costs.

H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

A. M. Sitali
JUDGE
CONSTITUTIONAL COURT

E. Mulembe
JUDGE
CONSTITUTIONAL COURT

P. Mulonda
JUDGE
CONSTITUTIONAL COURT

M.M. Munalula
JUDGE
CONSTITUTIONAL COURT