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## **TRAPPED IN LIMBO: THE CONSTITUTIONAL COURT'S NARROW INTERPRETATION OF EMPLOYEES RIGHTS TO A SPEEDY PAY OF THEIR WORKED FOR BENEFITS ON THE DATE OF SEPARATION WITH EMPLOYERS**

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### **ABSTRACT**

The Zambian Constitutional Court's recent judgment *that fixed-term contract employees are not entitled to be retained on payroll until pension benefits are paid has sparked controversy*. This paper examines the implication of this decision, scrutinizing article 189(2) and 266 of the constitution as well as section 73(1) (2) and, section 66(4), as the main provisions highlighting potential contradictions made by the court in the interpretation of pension rights which the constitution as granted to employees. In discussing this subject, the desk review of the superior courts judgments and legislations on employment law has been used. The judgement's effect on worker's rights and possible ways forward has also been discussed. In summary, the court did not holistically look at the danger of substituting the category of long-term contract employees from being retained on payroll if they are not paid at separation as by law requires. This has led to exploitation of employees' rights in that category at separation as they endure economic hardship before they can jump on another job, as employers have intentionally continued to avoid paying employees in time but use the very judgment as a scapegoat.

### **1.0 INTRODUCTION**

Zambia's constitutional court recently ruled that fixed-term contract employees are not entitled to be retained on payroll until pension benefits are paid, citing the reason that they are not on pensionable jobs. This decision emanates from the provision of Article 189(2) as read together with article 266 of the constitution. The interpretation of these provisions by the

Con-Court raises concerns about worker's rights protection.

The judgment has left many employees in a perilous position, sparking debate about the holistic interpretation of pension rights as provided for by the constitution and the Employment Code Act No. 3 of 2019.

### **1.1 The Current Law on Payment of Pension/ Gratuity**

In Zambia, the constitution is the supreme law of the land and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.<sup>1</sup> The consequence of this provision is that, no law or anything or acts of persons which can be done outside the constitution. In short, any law, or any action which is not in line with the constitution is null and void. Put simply, such a law or action does not exist. This has been demonstrated in so many situations in Zambia's case law and the specific example is the *Christine Mulundika and 7 others case*,<sup>2</sup> wherein, the Supreme Court held inter alia that:

***“the provision of the Public Order Act, specifically section 4 and 5 of the Act, which were inconsistent with the provision of constitution, should be removed for been inconsistency with the constitutions.”***

This holding demonstrates the importance attached to the constitution being the supreme law of the land. The aforementioned provisions were held to have contravened articles 20 and 21 of the constitution which forms part III of the constitution (Bill of Rights).

From this backdrop, it is important to state that the laws governing employer and employee relations in Zambia are the Zambian constitution and the Employment Code Act No. 3 of 2019 which guides the employer on how employees' wages and benefits ought to be paid upon separations with the employer, instructive to the foregoing is the provision of section 73 (1) and (2) which states in mandatory forms that:

***“an employer shall, at the end of a long-term contract period pay an employee gratuity at the rate of at least not less than twenty five percent of that employee's basic pay earned during the contract period.”***

The effect of this provision is that employees must be paid immediately at the end of the contract and there no two ways about it.

of note, the law under the definition section define long term contract as one entered into for a

period of 12 months and above and this is the category covered under section 73 of the employment code and Articles 189 and 266 of the constitution.<sup>3</sup>

It is therefore, imperative to state from the foregoing that employees who are not serving in permanent and pensionable arrangement are paid at the end of the contract what is known as **gratuity** which is also payable if the contract is not served in full as a prorate payment which payment must be prompt as provided for under the current law.<sup>4</sup>

Thus, the foregoing is also supported by the provision of section 66 (4)<sup>5</sup> which states that:

*“an employer can accrue the wages to be paid at the month end not exceeding 5 days after the stipulated month end.”*

From the cited provision above, it can safely be deduced that gratuity should be paid “at the end of the contract of employment, either terminated or its expiratory period.”

In addition, the foregoing provisions of the Employment Code Act No. 3 of 2019, works in codicil with the provisions of the constitution. Put simply, the provisions do not work in isolation with the supreme law of the land as it pertains to its guidance in payments of benefits for employees on separation.

The constitution mandates that:

“employees’ pension benefits unpaid on the last work day will stop working but should be retained on payroll until the time they are paid their benefits.”<sup>6</sup>

In addition, Article 266 of the constitution defines pension benefits to include **gratuity**, implying a broader coverage of protection. These constitutional provisions and the provisions of the employment code, clearly shows that the two are in agreement regarding this subject and they do not contradict each other when it comes to the payment of gratuity promptly and retaining such employees not paid back on payroll as they wait to be paid.

## **1.2 The Judgment and its Implication**

Notwithstanding the clear provisions of the law on pension rights, the Constitutional Court had taken a twist and departed from the true intent of the legislature under Article 189 (2) as read together with Article 266 which provides in clear terms that employees not paid pension benefits at the last day of separation should stop work put be retained on payroll until they are paid. As stated earlier, the only problem will be to start importing other interpretation, because the provision of Article 266 is very clear, it states that pension benefits include

gratuity and nothing more.

However, Con-court imported other things in the true meaning of the law and this judgment has sparked debate among union leaders and employees in general as the constitutional court in its judgement in the case of *Anderson Mwale and 2 others vs. Zambia Open University* opened that:

***“For gratuity to be captured under Article 189(2), it must be one that is covered under subsidiary legislation or law as pension. The court further added that it is not good enough to say your contract provided for gratuity and therefore you should remain on payroll. Go a little further by showing that your contract was in fact covered under pension scheme with a specific law and not merely inserted in the contract.”<sup>7</sup>***

***Put simply, what the court ruled was that unless you are serving as permanent and pensionable employee are you qualified for the retain clause on payroll. This judgment has excluded the employees serving in long-term fixed contracts. It has created another problem instead. The court in interpreting those provisions did not look at the holistic interpretation, evoking the mischief (intention) the true intent of the framers when coming up with that law, and what they intended to cure.***

The court also failed to use the principle of an employer having a deeper pocket than the employee. But settled on the use of emotions and assumption of how many times would employees' benefits from the employer without contributing anything at the time they are waiting to be paid. This decision was based on morals and not law as it is against the spirit of the provision of the constitution. The actual and true intent of the law was to provide for the respect of employee's rights to a speedy payment of their benefits in time or without any further delay after separation.

Of note, the law was to be used as a protective mechanism to prevent employees from losing out or exploited. It was to allow employers prepare and budget in advance way before the actual separation. Normally, this homework is done annually to enable employers determine how many employee are due and other eventual unforeseen separation such as resignation as well as dismissals. The provision was actually a safety catch for the dignity of employees after separation because they do not need to wait for years to be paid even when the employee was budgeted for beforehand. Therefore, if the employer is not ready to pay the separated employee promptly, it is just logical, fairly and proper that the employee is retained to the payroll as provided for by the constitution.

The Supreme Court also tried to address the importance of constitution provisions when it held inter alia in the case of **Faustine Mwenya Kabwe and Another vs, Mr. Justice Sakala, Mr. Peter Chitengi and Attorney General** that:

*“Constitutional provisions conferring individual rights and freedoms should not be narrowly construed but stretched in favour of the individual so as to ensure that the rights and freedoms so conferred are not diluted...read in part.”<sup>8</sup>*

Therefore, the con-court ruling have created a gap in the protection of fixed-term contract workers, the decision also has created an infringement on the right of employees to be paid promptly after separation as the law provides.

### 1.3 Way Forward

Firstly, there is need for legislative clarification whereby, the law in question that is to say; the constitution and the employment code are amended. The amendment could clarify pension rights coverage, ensuring fixed-term contract employees are protected and also to cure the gap that has been created. Secondly, courts when passing future judgments should follow what the law say about the subject matter and not use morals or emotions. Thirdly, advocacy by labour movements’ organisations and other civil societies can push for the protections of the vulnerable employees. The court can as well reconsider its judgment in this matter and set the record straight.

### 1.4 CONCLUSION

In conclusion, the narrow interpretation of the provision of the law by the Con-Court may undermine Zambia’s labour protections, leaving fixed-term contract employees vulnerable. To align with constitutional intent and protect workers, clarify through legislation or future ruling is crucial. Also, ensuring pensions rights are upheld regardless of the contract type. This will safeguard employees’ financial security.

### REFERENCES

#### Statutes

1. The Zambian Constitution Act No. 2 of 2016 as Amended by Act No. 3 of 2025 Cap 1 of the Laws of Zambia.
2. The Employment Code Act No. 3 of 2019

#### Cases

1. Anderson Mwale and 2 others vs. Zambia Open University (2021) CCZ 001 Christine Mulundika and 7 others vs. The People (1996) ZMSC 26
2. Faustine Mwenya Kabwe and Another vs, Mr. Justice Sakala, Mr. Peter Chitengi and Attorney General SCZ/8/93/2009