

IN THE SUPREME COURT OF ZAMBIA Appeal No. 181/2009
HOLDEN AT KABWE
(Civil Jurisdiction)

B E T W E E N:

ZAMBIA STATE INSURANCE CORPORATION LIMITED
APPELLANT

AND

ZAMBIA BOTTLERS LIMITED PENSION SCHEME	1ST
<u>RESPONDENT</u>	
COPPERBELT BOTTLING COMPANY PENSION SCHEME	2ND
<u>RESPONDENT</u>	
ZAMBIA METAL FABRICATORS PLC PENSION SCHEME	3RD
<u>RESPONDENT</u>	
ZAMBIA OXYGEN LIMITED (NOW BOC) PENSION SCHEME	4TH <u>RESPONDENT</u>
KAFIRONDA EXPLOSIVES LIMITED (NOW AFRICAN EXPLOSIVES) PENSION SCHEME	5TH <u>RESPONDENT</u>

Coram: Mambilima, DCJ, Chirwa and Chibomba JJS.
On 3RD April, 2010 and on 14th August, 2012.

For the Appellant: Mr. W. Kamfwa of Cornhill & Wilson.
For the Respondents: Mr. S. Simuchoba of NKM.

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases and other materials referred to:-

1. Secretary General of the United National Independence Party (UNIP) vs. E. M. C. Chipimo (1983) Z. R. 125
2. National Milling Company Limited vs. Vashee (Chairman of Z. N. F. U) (2000) Z. R. 98
3. Chitty on Contracts, 26th Edition, Paragraphs 673 and 676.
4. Oxford Concise English Dictionary
5. McGregor on Damages, 16th Edition, Page 687
6. Danny vs. Gooda Walker (No. 3) (1996) Z. R. 168
7. Chitty and Jacobs, Queen's Bench Forms, 21st Edition
8. Conservative and Unionist Central Office vs. Burrell (Inspector of Taxes) (1982) 1 W.L.R 522; (1982) 2 ALL E. R. 1
9. Willis vs. Association of Universities of the British Commonwealth (1995) 1 Q. 140 at page 145

10. Official Custodian for Charities and Others vs. Parway Estates Development Limited (in Liquidation) (1984) 3 ALL E.R.
11. Bushwall Properties vs. Vortex Properties (1975) 2 ALL E. R. 214
12. President of India vs. La Pintada Cia Navegaciona 2 ALL E. R. 773
13. Wallersteiner vs. Moir (No. 2) (1975) 1 Q. B. 373
14. Bartlett vs. Barclays Bank (1980) Ch 515
15. B. P Exploration Co. (Libya) vs. Hint (1983) 2 AC 352
16. Joyce vs. Yeomans (191) 2 ALL ER 21
17. Lufeyo Matatiyo Kalala vs. The Attorney General (1977) Z. R. 310
18. Union Bank (Z) limited vs. Southern Province Co-operative Marketing Union Limited 1995/1997) Z. R. 207
19. Credit Africa Bank Limited (In liquidation) vs. John Dingani Mudenda (2003) Z. R. 66
20. Westdeutsche Landesbank Girozentrale vs. Islington L. B. C. (1996) A. C. 699
21. J. Z. Car Hire vs. Malvin Chala and Scirocco Enterprises Limited (2002) Z. R. 112
22. Zulu vs. Avondale Housing Project Limited (1982) Z. R. 172
23. Attorney General vs. Achiume (1983) Z. R. 1
24. Zaza vs. Zambia Electricity Supply Coporation Limited (2001) Z. R. 107
25. Keembe Estates Limited vs. Galunia Farms Limited, SCZ Appeal No. 182/2002
26. Pocahontas Fuel Co. vs. Ambatielos 27 Com. Cas. 148
27. The Marquis of Anglesey vs. Gardner (1901) 2 CH 548

Legislation referred to:-

1. Pension Regulations Act No. 28 of 1996.
2. Pension Scheme Act, Chapter 225 of the Laws of Zambia.
3. Income Tax Act, Chapter 323 of the Laws of Zambia.

The appellant appeals against the Judgment of the High Court at Lusaka, in which the learned trial Judge held that the respondents had sufficient representative interest to sue or to be sued. And also on the portion of the Judgment where the learned Judge awarded the respondents damages in the sum of K1,246,406,961 with interest.

The facts leading to this appeal are that the appellant was Manager of the respondents' Pension Schemes. Subsequently, the respondents gave notice to the appellant to transfer their funds to newly appointed Fund Managers. Several meetings were held to explore how best the funds could be transferred to the new Fund Managers. There was, however, disagreement on the question of interest. The respondents commenced an action in the High Court's Commercial Registry at Lusaka, claiming the following reliefs:-

- "1. A declaration that the termination of the contracts of management between the Plaintiffs and the Defendant by the Plaintiffs is lawful and as such the Plaintiffs are entitled to benefit or credit of the accrued value or assets of the transferred Schemes.**
- 2. General damages for wrongful failure, neglect or refusal by the Defendant to transfer the accrued value or assets of the Plaintiffs standing the cumulative figure of K10,574, 464,680.00 (as at 31st October 2004) particulars of which are stated in the accompanying Statement of Claim particularly the Schedule thereof.**
- 3. Special damages arising from the differential in earnings of the Fund from the Defendant's declared rate of return at 20 percent per annum and the new Manager's declared rate of return at 38 percent per annum from the respective dates of transfer of the Plaintiffs' Schemes as stated in the accompanying Statement of Claim and as calculated in the Schedule thereof standing cumulative figure of K9,486,792,017.00 (as at 31st October 2004).**
- 4. Interest.**
- 5. Further or other relief.**
- 6. Costs."**

The parties settled the first relief at Mediation leaving the other five reliefs to proceed to trial. After hearing the parties, the learned Judge in the Court below came to the conclusion that the respondents had sufficient representative interest to sue and to be sued and then he awarded the respondents damages and interest on ground that the respondents were entitled to demand an early transfer of their accrued benefits to a new Fund Manager.

Dissatisfied with this decision, the appellant appealed to this Court advancing three grounds of appeal as follows:-

- “1. The learned trial Judge erred in law when he held that the Plaintiffs though being unincorporated entities have sufficient representative interest to sue or to be sued.**
- 2. The learned trial Judge erred in law and misdirected himself when he awarded the plaintiffs damages in the sum of K1,246,406,961.00 with interest at 20% from the plaintiffs effective dates while acknowledging that the defendant had transferred the plaintiffs accrued benefits with interest.**
- 3. The learned trial Judge erred both in law and in fact when he held that in the absence of any agreement between the plaintiffs and the defendant for the payment of accrued benefits, the plaintiffs were entitled to demand an early transfer of their accrued benefits to their new Fund Manager.”**

The learned Counsel for the appellant, Mr. Kamfwa, relied on the appellant’s Heads of Argument.

In support of the first ground of appeal, it was argued that the law on capacity to sue is settled. That in **Secretary General of the United National Independence Party (UNIP) vs. E. M. C. Chipimo**¹, this Court held that the Secretary General of United National Independence Party was not a corporation, sole or legal entity and hence could not sue or be sued by virtue of his office.

Our attention was drawn to the case of **National Milling Company Limited vs. Vashee (Chairman of Z. N. F. U)**², in which we cited with approval, **Chitty on Contracts**³ where the learned authors stated that an unincorporated association is not a legal person and cannot sue or be sued.

It was submitted that the question whether or not an entity has the right to sue depends on the capacity and not on the interest. Therefore, that there is no authority that supports the learned trial Judge's ratio as the respondents in this case were unincorporated associations. Our attention was also drawn to **Section 3 of the Pensions Scheme Regulation Act** which defines a "**Pension Scheme**" as "**any private, occupational or person defined benefit or defined contribution pension scheme savings or plan.**"

It was submitted that a Pension Scheme is therefore, not an association but a mere plan. Reference was made to **Oxford Concise English Dictionary**⁴, which defines a '**Scheme**' as "**A systematic plan or arrangement for work or action.**"

It was argued that the learned Judge, therefore, fell into grave error when he held that a mere plan, due to sufficient interest could sue, notwithstanding the law on capacity. And that as such, this Court should uphold the first ground of appeal.

In support of the second ground of appeal, it was submitted that the learned trial Judge misdirected himself when he awarded the respondents damages in the sum of K1,246,406,961.00 with interest at 20% from the respondents' effective dates while acknowledging at the same time that the appellant had transferred the respondents' accrued benefits with interest. Our attention was drawn to page 22 of the record where the learned trial Judge stated that:-

"What is evident is that the Defendant transferred a total sum of K6,493,032,953.00 with interest to the new Fund Manager. It would appear that the above amount which covered the accrued benefits of all the five Plaintiffs was transferred by the Defendant inside the period of ten years without any agreement."

It was contended that after making the finding of fact that the accrued principal (sum) was paid (transferred) with interest, it was an error and a misdirection for the trial Judge to award damages to the respondents as the law is clear and settled on remedy for loss of use of money. Further that the learned authors of **McGregor on Damages**⁵, borrowing the words of Philip J, in **Danny vs. Gooda Walker**⁶, stated that **“interest is awarded for the loss of use of money.”**

It was argued that since the appellant transferred the accrued benefits with interest to the New Fund Managers, the respondents were adequately compensated for the loss of use of their money. And that, therefore, the award of damages by the learned Judge had no basis and was wrong in law and should, accordingly, be set aside.

In support of ground three, it was pointed out that the respondents were managed by the appellant under very clear rules. That as correctly found by the learned trial Judge, these rules did not provide for scheme transfer but discontinuance. That in this case, the respondents invoked the discontinuance Clause by giving one year notice to the appellant. And that in accordance

with that Clause, the balance in the account was, however, supposed to be paid by the appellant over an agreed period not exceeding 10 years and that this agreed period of not exceeding 10 years was realistic considering the nature of the assets of the Pension Funds which may be in various forms such as property, bonds, equities, etc.

It was submitted that since the learned trial Judge correctly observed that the scheme rules did not provide for transfer but discontinuance, he ought to have also seen that it was only reasonable to expect that the period over which the transfer was to take place would not be comparatively shorter than the period required for making out payments in the case of a discontinuance. That this is so as the learned Judge had at the same time observed, and rightly so, that early transfer of cash was not possible in view of the constraint faced by the appellant to dispose of some of the investments comprising 85% in properties in order to realize the much needed cash to pay the respondents. And hence, interest ought not to have been allowed.

It was contended that the rules provided for a maximum period of 10 years for transfer of the accrued funds and that in the

absence of any agreement to the contrary, the only recourse would have been to allow transfer within the maximum period provided by the Scheme Rules. Therefore, that for the Court below to hold as it did, is tantamounting to allowing one party to the agreement to unilaterally impose a provision on transfer. And that this is contrary to the law of contract which requires that parties be at consensus ad idem on all conditions. This Court should, accordingly, uphold the third ground of appeal. And that on account of the foregoing, the appeal should be allowed with costs.

On the other hand, in opposing this appeal, the learned Counsel for the respondents, Mr. Simuchoba, relied on the respondents' Heads of Argument filed.

In response to the first ground of appeal, it was argued that the original Plaintiff in this matter was **Saturna Regina Pension Trust Fund (Registered Trustees)**, a multiple employer Trust, to whom the five respondents Pension Scheme vested at law. However, that by an application, the appellant induced the Court below to substitute the original Plaintiff with the current five respondents as contained in the Ruling of 27th August, 2003. It

was contended that the appellant is therefore, estopped from impugning what was done by the trial Court following its (the appellant's) application on the status of the then Plaintiff.

Reference was made to the 'General Notes' in **Queen's Bench Forms**⁷, where the authors stated that:-

"Nevertheless, there are several kinds of unincorporated bodies, consisting of two or more persons bound together for one or more common purposes, which may be regarded as having separate legal entity and a juridical personality sufficient to enable them to sue or to be sued in their own name or through the medium of trustees who hold their property in trust for them. Thus, a trade union is not and may not be treated as if it were a body corporate but is nevertheless capable of suing and being sued in its own name for any cause of action whatsoever. Similarly, an employers' association may be a body corporate or alternatively an unincorporated association and in such case it is capable of suing and being sued in its own name for any cause of action whatsoever."

The cases of Conservative and Unionist Central Office vs. Burrell (Inspector of Taxes)⁸, Willis vs. Association of Universities of the British Commonwealth⁹, Official Custodian for Charities and Others vs. Parway Estates Development Limited (in Liquidation)¹⁰ were also cited.

It was argued that in appeal No. 158 of 2003, the appellant raised a similar ground of appeal but was not successful in

impeaching the trial Judge's decision. Therefore, that this issue is res judicata.

In response to the second ground of appeal concerning the award of 20% interest on the sum of K1,246,406,961.00, it was contended that the appellant is deliberately misconstruing the basis upon which the trial Judge awarded interest on the damages. That the appellant was found liable on transfer of accrued assets to the new Fund Managers post the effective dates as shown in the schedule.

It was argued that it is trite law that interest may be awarded as an inherent part of damages and that the cases of **Bushwall Properties vs. Vortex**¹¹ and **President of India vs. La Pintada Cia Navegacionsa**¹² clearly illustrates this. Further that the Court has a general equitable discretion to award interest in a suitable case where the facts merit it. And that in **Wallersteiner vs. Moir**¹³, it was held that the Court can award interest where the Defendant improperly benefited from a fiduciary position. That the cases of **Bartlett vs. Barclays Bank**¹⁴ and **B. P Exploration Co. (Libya) vs. Hint**¹⁵, discussed instances where a Court has discretion to award interest.

Reference was also made to the case of **Joyce vs. Yeomans**¹⁶, in which the Court in England held that interest could not be awarded on damages for loss of future earnings or future earning capacity, as the damages do not relate to money that has been withheld from the Plaintiff. And that the fact that interest is awarded for the loss of use of money, does not mean that interest which is essentially the time value of money can supplant the liability to pay damages. That simply put, interest is awarded as a contingent to some head of claim and that in this case, it was awarded on damages for withholding transfer of accrued assets on the effective dates.

In response to the third ground of appeal, it was contended that the learned trial Judge found the appellant's contention untenable because there was no agreement between the parties to pay out over a period not exceeding 10 years. It was argued that discontinuance had not occurred as what the respondents requested for was transfer of their accrued assets from one Scheme Manager to another. And that the Schemes merely moved domicile and that both **the Pension Scheme Regulation, Chapter 255 of the Laws of Zambia** and **the**

Income Tax Act, Chapter 323 of the Laws of Zambia, Schedule 4 thereof, allow transfer. It was submitted that transfer is the same as portability of accrued assets as used in the two pieces of Legislation cited above.

It was contended that the appellant tried to impeach the legality of the transfer or portability of the Schemes in spite of the clear position of the law as found by the learned trial Judge. And that therefore, all grounds of appeal lack merit and hence the appeal should be dismissed with costs.

We have seriously considered this appeal together with the Heads of Argument, the authorities cited and the Judgment by the learned Judge in the Court below. It is our considered view that the first ground of appeal raises the question whether the respondents had capacity to sue and to be sued in their own names.

In support of the appellant's argument that the respondents did not have capacity to sue in their own names, it was submitted that as mere Pension Schemes, the respondents are neither corporation sole nor legal entities. In responding to this issue, we

wish to state that our perusal of the record has confirmed the respondent's position that the original Plaintiff in this matter was Saturnia Regina Pension Trust (Registered Trustees). Page 43 of the Record of Appeal also evidences this as an amendment to the Writ of Summons is reflected and was made on 28th October, 2004 whereby Saturnia Regina was substituted with the current respondents as Plaintiffs. The application to amend was prompted by the appellant. Therefore, the appellant is estopped from impugning that which it agitated for by now pleading lack of capacity of the respondents.

Further, the learned authors of **Queen's Bench Forms** have authoritatively stated, in their "General Notice", that:-

"...there are several kinds of unincorporated bodies, consisting of two or more persons bound together for one or more common purposes, which may be regarded as having separate legal entity and a juridical personality sufficient to enable them to sue or to be sued in their own name or through the medium of trustees who hold their property in trust for them. Thus, a trade union is not and may not be treated as it were a body corporate but is nevertheless capable of suing and being sued in its own name for any cause of action whatsoever. Similarly, an employers' association may be a body corporate or alternatively an unincorporated association and in such case it is capable of suing and being sued in its own name for any cause of action whatsoever."

It is therefore, our firm view that the learned trial Judge was on firm ground when he held that the respondents had sufficient

representative interest to sue and to be sued over their Pension Schemes with the appellant.

For the reasons given above, the first ground of appeal fails on ground that it has no merit.

With respect to the second ground of appeal which raises the question whether it was proper for the learned trial Judge to award interest of 20% to the respondents when the appellant had transferred the respondent's accrued benefits with interest, the major argument is that it was a misdirection for the trial Judge to award interest/damages to the respondents as the principal sum was paid to the new Fund Manager with interest. Hence, the respondents were adequately compensated for loss of use of their money and that to further award them damages, is wrong at law and should be set aside.

We have considered the above arguments. It is agreed that interest is awarded for the loss of use of money. Authorities in this respect abound. However, in this case, it is apparent that the appellant did not promptly transfer the Pension Scheme Funds to the New Fund Manager when requested. As a result of this delay

in transferring their Schemes to the new Scheme Manager, there can be no doubt that the respondents must have suffered loss of use of their money. This was the basis upon which the learned trial Judge awarded the 20% interest to the respondents as the respondents could not have the value of their money on demand. We, therefore, find that the learned trial Judge was on firm ground when he awarded the respondents interest at 20% as damages on their accrued benefits with interest. We find no merit in the second ground of appeal.

The third ground of appeal raises the question whether in the absence of any agreement between the parties concerning the payment of the accrued benefits, the respondents were entitled to demand early transfer of their accrued benefits to their new Fund Managers. The major argument by the appellant on this ground is that as found by the learned trial Judge, the rules of the Pension Scheme did not provide for Scheme transfer but for discontinuance.

We have considered the arguments advanced in support of this ground of appeal. We have also perused the agreement. It is our considered view that the learned trial Judge was on firm

ground when he found that what the respondents requested for was a transfer of their Pension Schemes to new Fund Managers and not discontinuance. It is, therefore, correct to say that discontinuance did not take place as this was a transfer. We, accordingly, find no merit in the third ground of appeal.

All the three grounds of appeal having failed, the sum total is that this appeal has failed as the same has no merit. The same is dismissed.

As for the Cross-appeal, the respondents who are the Cross-appellants have filed two grounds of Cross-appeal. These are that:-

- 1. The learned trial Judge erred in law and fact when he held that Special Damages had not been proved. The non admission of the NET RETURN ON INVESTMENTS WORKINGS by Deloitte and Touche were not the only basis or support for Special Damages but the pleadings and totality of the evidence adduced as well.**
- 2. The learned trial Judge erred in law and fact when he held that Compound Interest was not recoverable on account of there being no express agreement by the parties. In the circumstances of this matter and the dealings between the parties, it is evident that the payments made by the Appellant to the Respondents so far have included Compound Interest which evidences acquiescence to sustain the claim for Compound Interest”**

In support of the first ground of Cross-appeal, it was argued on behalf of the Cross-appellants, that special damages as

pecuniary loss occasioned to the Cross-appellants were precisely quantified. That the Cross-respondent did not, at trial, impeach the quantification of loss of special damages as only the Auditor's net return on investor's workings was not admitted in evidence. And that the Auditor's letter dated 20th March, 2008 was not the basis as it was only supportive of the claim for special damages as pleaded. Therefore, that the non-admission in evidence of the Auditor's letter was because of the disclaimer stated in the said letter. It was pointed out that "the preparations of the workings," was for internal management purposes even though "the workings," were based on the Statutory Audited Financial Statements for the year ending 31st March, 1993 to 2007 and other related records. That the letter in question would qualify for admission in evidence under the proviso in Section 3(1)(b) and Section 3 (2), (a) of "the Disclaimer" and that on the face of that letter, it makes it reasonably impracticable to secure the attendance of its author as a witness. And that if it was admitted, it could have been relied upon by the Cross-appellants' witness who is a Member of the Fund Manager for whose use "the workings" were made by the Auditor.

In support of this contention, the case of **Lufeyo Matatiyo Kalala vs. The Attorney General**¹⁷, was cited in which it was held that:-

“(ii) Before the Court can exercise its discretion to admit a statement without the maker being called as a witness, it must be satisfied that undue delay or expense would otherwise be caused.”

That, therefore, the first ground of the Cross-appeal should be upheld as it has merit.

In support of the second ground of the Cross-appeal concerning the non award of Compound interest, it was argued that Compound interest was pleaded in full and that details of the rates and dates of the relevant periods in assessing the amount of Compound interest claimed was given. Further, that the claim for the Compound interest as pleaded was not controverted materially by the appellant. And that although it was argued that there was no agreement between the parties on Compound interest, in the genesis of this matter, an express agreement on Compound interest such as one in a formal loan agreement is demonstrated by the parties in their peculiar occupation as they deal on the basis of Compound interest. That in this case, evidence was adduced but that this evidence was not controverted. And that

the interim payment of transfer included compound interest and that this fact alone proves that Compound interest was in reality a common ground, consensual or acquiesced between the parties as it was a form of trade practice in the Pension Investments Business.

The cases of **Union Bank (Z) Limited vs. Southern Province Co-operative Marketing Union Limited**¹⁸ and **Credit Africa Bank Limited (In liquidation) vs. John Dingani Mudenda**¹⁹ were cited. It was contended that these cases emphasize the requirement of agreement by the parties to an unusual rate of interest such as Compound interest. And that in the **Mudenda**¹⁹ case, this Court stated that:-

“We do not agree...for the simple reason that the concept of Bank practice is a peculiar concept to commercial banking; as such members of the public wishing to borrow from Banks are presumed not to know what Bank practice is in relation to the charging of Compound Interest.”

That, however, in the current case, it cannot be said that one party would surprise or ambush the other on Compound interest. Further that the appellant has in fact, made some partial settlement to the Cross-appellants in which Compound interest was paid. Therefore, that the appellant should be estopped from resisting paying Compound interest on the Judgment sum.

Reference was made to **Chitty on Contracts**²⁰ in which the learned authors stated that:-

“Such an agreement may also be inferred from a course of dealing between the parties, e. g. if it has been...paid without objection in similar accounts. Similarly, an objection to pay interest may arise from the custom or usages of a particular trade or business.

And that:-

“Compound Interest is payable either by agreement or custom, but not otherwise.”

And that:-

“Compound Interest will be awarded in equity against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. The justification for this is that, if he has improperly obtained or retained or misapplied trust money, then he must account for the profit which he made, or ought to or is presumed to have made, from the use of the money.”

Reference was also made to the cases of **Wallerster vs. Moir**,²¹

President of India vs. LA Pintada Compania Navigacion SA,¹² and **Westdeutsche Landesbank Girozentrale vs. Islington L. B. C**²².

It was argued that the Cross-appeal should, therefore, be allowed with costs as the grounds of the Cross-appeal have been

supported by comprehensive pleadings, sound application of the relevant principles of law and cogent evidence.

On the other hand, in opposing the first ground of Cross-appeal, it was contended, in the Cross-respondent's Heads of Argument, that the learned Judge was on firm ground when he disallowed the claim for special damages as the same was not supported by any authority. That the Cross-appellants did not also prove the loss to justify an award of the special damages claimed. And that mere production of a comparative schedule at page 201 of the record as the basis for the claim for special damages cannot stand. Therefore, that the learned Judge rightly dismissed this claim on the authority of **J. Z. Car Hire vs. Malvin Chala and Scirocco Enterprises Limited**²¹ in which we held that mere production of a chart of hire charges was not proof of special damages.

In response to the second ground of the Cross-appeal on non- award of Compound interest, it was contended that the learned Judge was on firm ground when he disallowed the claim for Compound interest as the same was not supported by law. Further that the legal position regarding the award of Compound interest

was restated by this Court in the case of **Union Bank (Z) limited vs. Southern Province Co-operative Marketing Union Limited**¹⁸ in which we held that unusual interest such as Compound interest required agreement. Therefore, that the trial Judge found as a fact that there was no agreement between the appellant and the respondents for charging Compound interest and hence, he was on firm ground in declining to award Compound interest.

In response to the argument that the charging of Compound interest was common ground between the parties because Compound interest was charged during partial settlement at mediation, it was submitted that this argument should be disregarded firstly because parties are barred from referring to what was or was not said during mediation.

Secondly, that the learned trial Judge made a finding of fact that there was no evidence of Compound interest having been agreed by the parties or that it was in existence as a custom as stated at pages 21 and 28 of the Record of Appeal. It was submitted that this Court should, therefore, be very reluctant to

interfere with such a finding. The case of **Zulu vs. Avondale Housing Project Limited**²³, was cited in which we held that:-

“The appellate Court would only reverse findings of fact made by a trial Court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts.”

The cases of **Attorney General vs. Achiume**²⁴, and **Zaza vs. Zambia Electricity Supply Corporation Limited**²⁵ were also cited in support of this position. It was submitted that this Court, should therefore, dismiss the Cross-appeal with costs.

We have considered this Cross-appeal together with the arguments advanced in the respective Heads of Argument and the Judgment by the Court below and the authorities cited. The Cross-appeal raises two issues. These are whether the Cross-appellants are entitled to special damages claimed and whether the Cross- appellants are entitled to compound interest.

With respect to the first ground of the Cross-appeal concerning the non-award of special damages, the major contention is that since special damages were pleaded and that since the claim for damages was not controverted by the Cross-respondent, these should have been awarded. Our response is that the learned trial Judge was on firm ground when he

disallowed the Cross-appellants' claim for special damages. This is because the claim for special damages was not supported by any evidence.

It is however, a fact that the document sought to be relied upon by the Cross-appellants under this head to support their claim for special damages was not admitted in evidence in the Court below. It was therefore, folly for the Cross-appellants to attempt, though subtly, to rely on this document before us. Further, it is settled law that the Courts will not award a claim for special damages unless the same is specifically proved. We did comb through the record and we found no tangible evidence to support the Cross-appellants' claim that they were entitled to special damages. We do not see why we should now depart from this settled and sound principle of law in this case. We, therefore, find no merit in the first ground of the Cross- appeal. The same is dismissed.

With respect to the second ground of the Cross-appeal concerning the non-award of the Compound interest, the major argument in support of this ground is that compound interest was pleaded in full and that the details and dates were also given for

the purpose of assessing the amount due as compound interest. And that the claim for Compound interest was not controverted even though it was argued that Compound interest was not agreed. That, however, Compound interest ought to have been allowed in this case on the basis of the peculiar occupation of the parties as the charging of Compound interest is customary in the Pension trade. And was therefore, consensual and/or acquiesced to by the parties as a form of their trade practice. Further that in fact, in the earlier payments made by the Cross-respondent, compound interest was included in the payments.

We have considered the above issues. In the case of **Union Bank (Z) limited vs. Southern Province Co-operative Marketing Union Limited**¹⁸ and other authorities, we have made it clear that the charging of compound interest is by agreement of the parties or that it must be acquiesced to. In the current case, we do not find any agreement for charging of compound interest. We also found no evidence to show that the charging of compound interest was ever acquiesced to by the Cross-respondent.

We also find that there is no evidence to support the Cross-appellants' claim that the charging of compound interest was in existence as a custom, trade or practice.

On the contention that compound interest was included during the partial settlement of the claim at Mediation; as much as we agree that this may have been the case, it is however, trite that this type of evidence cannot be relied upon as parties are barred from relying on what was agreed or not agreed upon during Mediation.

As for the claim that there was evidence of dealing, the critical question is whether there was evidence to show a course of dealing which could have entitled the Court below to find that the Cross-respondent was obliged to pay compound interest. As to what is meant by a "**Course of dealing**", we defined this in the case of **Keembe Estates Limited vs. Galunia Farms Limited**² where we stated that :-

"Course of dealing means that past business between the parties raises implication as to the terms implied in a fresh contract where no express provision is made on the point at issue."

We cited the case of **Pocahonsa Fuel Co. vs. Ambatielos**²⁶

and the case of **Re Marquis of Anglesey vs. Gardner**²⁷. We also stated that to form a ‘course of dealing’, there must be a series of events and not one event.

In this appeal, we find no evidence that shows that the charging of compound interest was in the course of dealing between the Cross-appellant and the Cross-respondent.

Therefore, the second ground of the Cross-appeal also fails as it has no merit. The same is dismissed.

Both grounds of the Cross-appeal having failed, the sum total is that the Cross-appeal has failed. The same is dismissed.

Since the appellant did not succeed in the main appeal and since the respondents who were Cross-appellants did not succeed in the Cross-appeal, we order that each party bear its own costs.

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I. C. MAMBILIMA
DEPUTY CHIEF JUSTICE

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D. K. CHIRWA
SUPREME COURT JUDGE

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H. CHIBOMBA
SUPREME COURT JUDGE