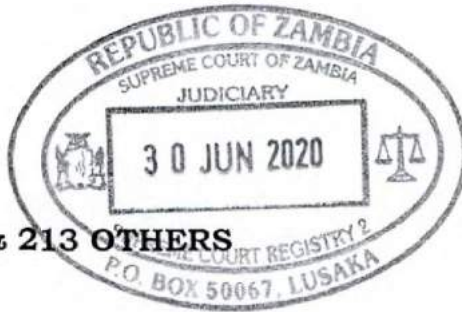


IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 001/2018
SCZ/8/230/2012

BETWEEN :



RICHARD H. CHAMA & 213 OTHERS

APPELLANTS

AND

NATIONAL PENSION SCHEME AUTHORITY

1ST RESPONDENT

STAFF PENSION SCHEME

2ND RESPONDENT

DANNY KUNDA MUSENGE

3RD RESPONDENT

JOSEPH MUSONDA

4TH RESPONDENT

HUMPHREY MWANZA

5TH RESPONDENT

BILLY CHOLA

6TH RESPONDENT

LEMMY CHIMUKA

7TH RESPONDENT

JORDAN THEU

8TH RESPONDENT

MAMBWE KATINALA

9TH RESPONDENT

Coram: Mambilima CJ, Malila and Kaoma, JJS on 3rd June, 2020
and 30th June, 2020

For the Appellants:

Mr. M. Mutemwa SC of Mutemwa Chambers with
Mrs. Kasumpa Mwansa-Kabalata of Messrs
Chalwe and Kabalata, Advocates

For the Respondents:

Mr. M. Phiri of Messrs Mwansa Phiri & Partners

J U D G M E N T

Malila JS, delivered the judgment of the court.

Cases referred to:

1. *Standard Chartered Bank (Z) Plc v. Willard Solomon Nthanga & Others* (2008) 1 ZR 129
2. *Aon Trust Corporation v. KPMG* (2006) 1 WLR 97
3. *Attorney General v. Marcus Kapumba Achiume* (1983) ZR 172
4. *BP and Expendito Chipasha Chipalo & 235 Others* (SCZ Judgment No. 12 of 2014)
5. *Catherine Chavula and 14 Others v. Barclays Bank Zambia Plc Staff Pension Fund* (Appeal No. 25 of 2015)
6. *Barclays Bank Plc Staff Pension Fund, Barclays Bank Zambia Plc v. Augustine Mwanamuwila & 58 Others* (Appeal No. 70 of 2009)
7. *ZNPF Board & Others v. Bernard Mulenga & Others* (SCZ Appeal No. 140 of 2006)
8. *Mazoka & Others v. Mwanawasa* (2005) ZR 138
9. *Atlantic Bakery Ltd v. Zambia Electricity Supply Corporation Ltd* (Selected Judgment No. 61 of 2018):
10. *BP Zambia Plc v. Interland Motors Ltd* (SCZ Judgment No. 5 of 2001)

Legislation referred to:

1. *Limitation Act (UK) 1939*
2. *Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia*
3. *National Pension Scheme Act, Chapter 256 of the Laws of Zambia*
4. *Zambia National Provident Fund Staff Pension Fund (Trust Deed and Rules of 1995)*
5. *Pension Scheme Regulation Act, 1996, Chapter 255 of the Laws of Zambia*
6. *NAPSA Circular No. 1 of 2007*
7. *Income Tax Act, Chapter 323 of the Laws of Zambia*

1.0 INTRODUCTION AND BACKGROUND FACTS

- 1.1. The appellants are a group of erstwhile employees of the first respondent whose services were terminated by way of retrenchment in December 2001.
- 1.2. Until the termination of their employment contracts, the appellants were contributing members of the second respondent, an occupational pension scheme set up under the Zambia National Provident Fund Staff Pension Fund Trust Deed and Rules dated 21st October 1995 (the Trust Deed and Rules).
- 1.3. Following their retrenchment, the appellants ceased to be members of the second respondent pension scheme.
- 1.4. The retrenchments, of course, occurred before the appellants had attained their retirement ages at 55 years. This meant that in terms of Rule 9 of the Trust Deed and Rules, they were only entitled to deferred pension to be paid upon their attaining the age of 55.

- 1.5. The appellants were paid their contributions to the second respondent but with interest on their contributions reduced from 15% to 8% as it was then established by the actuaries that the second respondent was, by the 31st March 1999, in deficit by K3,269,268,416.53 owing to non-remittance of contributions by the first respondent into the second respondent's scheme.
- 1.6. The appellants claimed, in the court below, that the non-remittance to the second respondent of the contributions deducted by the first respondent was purposely done for the first respondent's own use and benefit, and was done with the full knowledge of the third to the ninth respondents, contrary to the provisions of the Trust Deed and Rules. Further, that this made the first respondent and the third to the ninth respondents jointly and severally liable to account to the appellants.
- 1.7. In its defence, the first respondent valiantly denied the appellants' claim in the lower court and asserted that the appellants' action was, in any case, statute barred in terms of

the Limitation Act, 1939 of the United Kingdom as amended by the Law Reform (Limitation of Actions) Act of Zambia. The other respondents did not file any defence.

- 1.8. In an interlocutory application before the Deputy Registrar, the question whether the action was or was not statute barred was determined. The Deputy Registrar ruled that the cause was not statute barred.
- 1.9. At the trial of the matter, the parties were exhorted by the presiding judge, Hamaundu J (as he then was), to settle the agreed facts and frame the issues for determination. The parties consequently set out the agreed facts in the following terms:

1. **The first defendant is a corporation established under the National Pension Scheme Act, Chapter 256 of the Laws of Zambia. The first defendant operates the second defendant as an occupational pension scheme which, too, is a body corporate with its own Trust Deed and Rules and is capable of suing and being sued and is capable of doing or performing all things and acts which bodies corporate may by law do or perform. The plaintiffs were members of the first defendant until they were retrenched from their employment with the first defendant in 2001.**

2. The second defendant pension scheme was at all material times a defined benefit pension fund operating under the Pension Scheme Regulation Act, Chapter 255 of the Laws of Zambia with benefits payable to members upon retirement from the fund based on the following formula $\frac{1}{45} \times \text{final pensionable salary} \times \text{years of service} \times \text{commutation factor}$.
3. Upon their retrenchment, the plaintiffs were paid by the first defendant retrenchment benefits. The plaintiffs were also paid by the second defendant withdrawal benefits. The withdrawal benefits were by way of a refund of the pension contributions (both employers and employees), together with interest.
4. According to the Trust Deed and Rules of the second defendant, the plaintiffs had the option to remain members of the second defendant in order to receive deferred pension when they attained the age of 55.

1.10. Arising from the foregoing agreed facts, the parties structured the following questions for the determination of the High Court:

- (i) Were the plaintiffs correctly paid their benefits by the second defendant as a Defined Benefit Fund by way of the refund of the employers and employee contributions with interest?
- (ii) Were the plaintiffs, who had not reached their retirement age of 55 years, eligible for pension benefits from the second defendant in accordance with the second

defendant's Trust Deeds and Rules as read with the Pension Scheme Regulations Act, Chapter 255 of the Laws of Zambia?

(iii) What are the portable benefits under the Pension Scheme Regulations Act, Chapter 255 of the Laws of Zambia and when and to whom are they payable?

- 1.11. The trial judge heard evidence from the only witness who was called by the appellant. He also received submissions from the parties' respective counsel.
- 1.12. Having done so, and notwithstanding the issues posed by the parties for his determination, the learned judge framed his own questions for resolution, namely, (i) whether the defendant was permitted to defer payment of the plaintiff's accrued pension benefits and (ii) if not, what benefits, in a defined benefit scheme were to be paid to the plaintiffs who had left the scheme prematurely.
- 1.13. We can only surmise that the judge believed that the two questions he identified for his determination would address the three questions structured by the parties which we have reproduced at paragraph 1.10 of this judgment.

- 1.14. However, without addressing the two questions which he considered called for determination, the learned judge later on narrowed the question for resolution to only one, namely, what constitutes the accrued benefits that a member, who leaves the scheme prematurely, should take. His analysis focussed on this one question.
- 1.15. The learned judge came to the conclusion that on the facts before him, and taking into account the definition of a defined benefit scheme as it was understood in the case of *Standard Chartered Bank (Z) Plc v. Willard Solomon Nthanga & Others*⁽¹⁾ and also bearing in mind Clause 6 of the Trust Deed and Rules, the second respondent was not a defined benefit scheme, but rather a defined contribution scheme. Needless to state, that this conclusion by the learned judge flew in the teeth of the second question that he had posed for himself as reproduced at paragraph 1.12. That question clearly presupposed that the second respondent was a defined benefit scheme.

- 1.16. The judge further held that his understanding of the Pension Scheme Regulation Act was that in the case of a defined contribution scheme, a member who leaves the scheme prematurely takes his contributions and his employer's contributions together with interest during the period the member had been participating in the scheme, while in the case of a defined benefit scheme such member takes the present value of his accrued retirement pension.
- 1.17. The learned judge also held that when section 18(3)(b) refers to the present value of the accrued retirement benefits, it simply means that the scheme should take the amount that has accrued up to the time of separation and then calculate its present value. In his view, portable benefits in a defined benefit scheme are not calculated any differently from those in a defined contribution scheme.
- 1.18. The learned judge concluded that in the present case, in terms of section 18(3)(b) of the Act, the respondents were required to total up the contributions over the years and then calculate

the present value by applying interest during the period that the scheme applied to the employees.

- 1.19. In the view, the judge took on the facts of the case and the law as he understood it, the respondents had paid the appellants the correct benefits. The latter's claim was thus dismissed.

2.0 APPEAL TO THE SUPREME COURT

- 2.1. Peeved by the High Court judgment, the appellants have appealed, fronting five grounds structured as follows:

1. **The learned trial judge in the court below correctly construed the provisions of section (18(1)(f) of the Pension Scheme Regulation Act, 1996 ("the Act") when he held that deferred pensions were abolished by law in Zambia but misdirected himself when he held that accrued retirement benefits under section 18(2) and section 18(3)(a) of the Act in Defined Contribution Schemes were not calculated differently from those under section 18(3)(b) for Defined Benefit Schemes.**
2. **The learned judge in the court below misdirected himself in holding that the 2nd Defendant was a Defined Contributory Scheme contrary to the parties own agreement on the erroneous premise that only the employer contributes in defined benefit pension schemes when he should have found that in section 18(2)(a) and section 18(3)(b) of the Act the difference between the two types of schemes is not on the contribution factor but in the way benefits are taken out i.e. by**

an actuarially determined formula in Defined Benefit Schemes and return of contributions with interest in Defined Contribution Schemes.

3. The learned trial judge erred in law and in fact by holding that the Plaintiffs were correctly paid their pension benefits by way of a refund of both theirs and their employers contributions plus interest on the erroneous conclusion he arrived at that the 2nd Defendant was a Defined Contribution Scheme when he should have found that the Plaintiffs were members of a Defined Benefit Scheme and entitled to pension benefits premised on an actuarially determined formula for calculating the value of the accrued retirement pension only provided for in the Trust Deeds and Rules and express statutory provision applicable to a defined schemes.
4. The learned trial judge in the court below erred in law and in fact when he held that the Plaintiffs were correctly paid their pension benefits when the record shows that the real reason the 2nd Defendant paid the Plaintiffs by way of a refund of contributions of both employee and employer with interest was that under the Rules of the 2nd Defendant pension scheme made in 1995 were not amended to bring them in line with the Act of 1996 which abolished deferred pensions the Plaintiffs were entitled to pension premised on the formula payable only at the retirement age of 55. The judge should have found that the Plaintiffs are entitled to be paid their pension benefits at the time they left the scheme premised on the formula prorata to their length of service.

5. **The learned judge in the court below erred in law and in fact when after delving in the construction of section 18 of the Act, he failed to draw his attention to and consider the claim by the Plaintiffs against the 2nd Defendant for an account or equitable compensation and damages as the Plaintiffs were paid a refund of contributions plus interest on an actuarially reduced rate from 15% to 8% due to a deficit suffered by the 2nd Defendant which was occasioned by the non-remittance of contributions by the 1st Defendant to the 2nd Defendant.**
- 1.2. Both parties filed heads of argument in support of their respective positions. There were lists of authorities filed too. The appellants additionally filed further heads of argument. At the hearing of the appeal, both State Counsel Mutemwa, for the appellants, and Mr. Phiri, Senior Counsel, for the respondents, intimated that they were principally placing reliance on these heads of argument and lists of authorities which they each in turn orally supplemented briefly.
- 3.0. THE APPELLANTS' CASE ON APPEAL**
- 3.1. In arguing their case in support of the appeal, the appellants argued grounds 1 to 4 together and ground 5 separately.

- 2.2. The learned counsel for the appellants took issue with the lower court judge for taking a position that contradicted the parties' own statement of agreed facts and issues as regards what the operating scheme between the appellants and the respondents actually was. We have already pointed out that having deduced that the second defendant was not a defined benefit plan but a defined contribution scheme, the judge also concluded that the calculation of portable benefits in the two forms of scheme was not any different. The appellants have not disguised their profound disquiet with both of those conclusions by the trial judge.
- 3.3. It was contended that while the lower court judge correctly construed section 18(1)(f) of the Pension Scheme Regulation Act, Chapter 255 of the Laws of Zambia, as abolishing deferred pensions, he misdirected himself when he held that accrued retirement benefits in defined contribution schemes provided for by sections 18(2) and 18(3) of the Act, on one hand, and accrued benefits in defined benefits schemes provided for

under section 18(3)(b) of the Act, on the other hand, are not calculated differently.

3.4. Counsel argued that the classification of pension schemes into defined benefits and defined contributory schemes in the Act is law in this country and is consistent with international practice.

3.5. According to counsel for the appellants, the appeal should turn on the construction to be placed on section 18(3) of the Act which provides that:

(3) When a member leaves a scheme under paragraph (f) of subsection (1) in the case of... (b) a defined benefit scheme, the portable benefit shall amount to the present value of the accrued retirement pension.

3.6. According to the learned counsel, what the quoted provision means is that the benefits payable in a defined benefit scheme is different from those payable under the defined contribution scheme. In the latter, the benefits are the employer and the employees' contributions plus interest up to the point a member leaves. What must be determined, according to

counsel, is what section 18(3)(b) of the Act means when it provides for 'the present value of accrued retirement pension.'

3.7 Counsel submitted that the distinction between a defined contributory scheme and a defined benefit scheme is that the latter, which is also known as the final salary scheme, provides benefits that are defined by a formula, usually in terms of salary and/or service. The benefits under this scheme do not depend on the investment returns achieved by the fund. On the other hand, the defined contribution scheme, which is also known as the money purchase scheme, is characterised by benefits being a return on investments, and interest on contributions.

3.8. Counsel cited the English case of *Aon Trust Corporation v. KPMG*⁽²⁾ where it was held that the contribution by the employer or by both the employer and the employee to a pension scheme is not a requirement of the statutory definition of a defined benefit scheme.

- 3.9. They reminded us that the parties themselves had treated and agreed that their pension scheme was a defined benefit pension scheme and not a defined contribution scheme. Counsel went on to state that the Trust Deed and Rules have an actuarially determined formula for payment of pension benefits. The formula is reflected in the Trust Deed as $\frac{1}{45} \times$ *pensionable salary x pensionable service x pension factor*.
- 3.10. Counsel pointed us to the actuarial valuation of the second respondent in the record of appeal as improving on the formula. That formula is a mark of a defined benefit scheme. This position, according to counsel, is affirmed by the first respondent's own Circular No. 1 of 2007 appearing in the record of appeal. They quoted extensively from that circular and submitted that the parties had all along understood the scheme as a defined benefit pension scheme.
- 3.11. We were referred to the case of *ZNPF Board & Others v. Bernard Mulenga & Others*⁽³⁾ where we held that the second respondent was in fact a defined benefit scheme and that the respondents had been paid using the correct formula. There, the former

employees had been paid their early retirement pension on the formula identified by the appellants as applying to a defined benefit scheme which was also stated in the Trust Deed and the Rules. In that particular situation, pension was not deferred. Counsel quoted what we stated in that case as follows:

There is no doubt that the second appellant was a defined benefit scheme not a defined contributory scheme... we are satisfied that the payments which were made to the respondents were based on the defined benefit scheme rules and the law not the defined contribution or money purchase scheme as alleged by the respondent.

- 3.12. The learned counsel also maintained that what defines a scheme is not whether or not both the employer and/or employee contribute to the pension fund. Rather the difference lies in the manner the benefits are taken out and how the accounts are maintained. In other words, it is a pool of funds in the case of a defined benefit scheme and individual accounts in the case of defined contribution schemes. In counsel's view, the provisions of section 18(3)(a) and 18(3)(b) of the Act are thus not ambiguous. The provision should, in

counsel's submission, be interpreted using their ordinary and natural meaning in keeping with the direction given by this court in the case of *Mazoka & Others v. Mwanawasa*⁽⁴⁾.

3.13. Counsel then turned to explaining why the second respondent paid the appellants their benefits by way of a refund of both employer and employee contributions plus interest. This they stated, was because the appellants left the scheme before the retirement age of 55 years. This was in keeping with provisions of the Trust Deed and Rules of 1995.

3.14. The learned counsel quoted rule 9 of the Rules which provides as follows:

9. Leaving the Employer's Service

This Rule applies to a member who leaves the Employer's Service for any reason before normal retirement date other than early retirement.

The Members may elect:-

- (a) Refund of Pension contributions to take immediate cash refund of his own contribution with interest, at the rate of interest determined by Trustees from time to time; or**
- (b) Deferred pension where a member has made the required minimum number of contributions to take**

a deferred pension, calculated in accordance with the normal pension benefits formula applicable to the date of leaving, taking into account the number of years of pensionable service already completed at the date of leaving the service of the employer

- 3.15. Counsel went on to explain that the 1996 Pension Scheme Regulation Act abolished deferred pensions. Rule 9(b) of the Trust Deed and Rules should have been used to calculate the pension benefits (portable benefits)
- 3.16. The learned counsel distinguished the case of *Standard Chartered Bank (Z) Plc v. Willard Solomon Nthanga & Others*⁽¹⁾ which the learned lower court judge referred to in his judgment. According to counsel, in the present case, the second respondent was initially a savings scheme or a direct contribution scheme until 1995 when it converted to a direct benefit scheme. The balances from the savings scheme, that is to say, the employer and employee contributions, became the opening balances in the new defined benefit scheme. Members ceased to have individual interest accounts as, when they converted to a defined benefit scheme, their money was pooled into a fund of the pension scheme with pension benefits

now determinable by an actuarially determined formula set out in the Trust Deed and Rules.

3.17. According to counsel, the scheme involved in the *Willard Solomon Nthanga & Others*⁽¹⁾ case, on the other hand, was converting from a defined benefit to a defined contribution scheme. The amount credited to the members' account up to the date of conversion was actuarially determined by formula as a defined benefit. The resulting figures were then used as opening balances on each members' account in the new defined contribution scheme whose contribution structure was 30% employee and 70% employer. The calculation of benefits in the newly created defined contribution scheme became the total sum of contributions by the employer and the employee plus interest earned during a particular member's membership of the scheme.

3.18. The learned counsel reiterated that what defines a pension scheme as either a defined benefit or a defined contribution scheme is the manner in which benefits are taken out of the scheme, either by formula or return of contributions plus

interest. We were called upon to uphold grounds 1, 2, 3 and 4.

3.19. In arguing ground five of the appeal, counsel submitted that the trial judge misdirected himself when he did not allow the parties to lead evidence to support the claim for account or equitable compensation or damages as pleaded in the appellants' statement of claim. The mere fact that the court directed the parties to proceed by way of agreed facts and issues did not, according to the appellants' learned counsel, imply that the appellants had abandoned their other claims as set out in their statement of claim and in respect of which there was no agreement.

3.20. The court should, in counsel's view, have allowed the parties to lead evidence to support the claim for account or equitable compensation or damages as pleaded in the statement of claim.

3.21. Counsel also submitted that there was a duty on the part of the lower court judge to adjudicate upon all the issues raised in the statement of claim. The lower court judge, however,

failed to do so. In this regard, it was counsel's plea that the undetermined issues be referred back to the High Court for determination.

- 3.22. Counsel once again recounted the facts of the case in brief before submitting that the court below did not allow issues that were raised in the court below to be determined by allowing parties to adduce evidence on them.
- 3.23. In the further heads of argument filed in support of the appeal, the appellants' learned counsel augmented their arguments in various respects. They extrapolated from the provisions of section 3 and section 18(3) of the Pension Scheme Regulation Act what they perceived as the key distinction between a defined contribution scheme and a defined benefit scheme in so far as the determination of portable benefits is concerned.
- 3.24. Counsel stressed that a finding by the lower court judge that what existed was a defined contribution scheme rather than a defined benefit scheme, as understood and agreed by the parties, was not based on any evidence; it should thus be interfered with by this court in keeping with established

authorities such as *Attorney General v. Marcus Kapumba Achiume*⁽³⁾.

3.25. We were also referred to clause 20 of the Trust Deed and Rules of the second respondent's scheme before counsel submitted that this provision clearly meant that the scheme, as a defined benefit scheme, was subject to periodic actuarial valuation from which was to be derived the current value of the pension benefit.

3.26. The learned counsel referred us to a number of case authorities including *BP and Expendito Chipasha Chipalo & 235 Others*⁽⁴⁾ and *Catherine Chavula and 14 Others v. Barclays Bank Zambia Plc Staff Pension Fund*⁽⁵⁾, to buttress the submissions that members of a pension scheme are entitled to a full statement of the accrued benefits and not merely a refund of contributions and interest and that they are equally entitled to know what exactly was due to them at the time of separation.

- 3.27. Counsel finally made reference to the Income Tax Act, Chapter 323 of the Laws of Zambia, submitting that although that Act provides for approval of pension schemes for purposes of taxation, it does not provide for the manner of paying benefits to a member leaving a pension scheme before attaining 55 years.
- 3.28. At the hearing of the appeal, State Counsel Mutemwa and senior counsel Mrs. Mwansa-Kabalata took turns to supplement the heads of argument with *viva voce* submissions.
- 3.29. State Counsel Mutemwa implored us to particularly consider the relevance and applicability to the present dispute of our decision in the case of *Barclays Bank Plc Staff Pension Fund, Barclays Bank Zambia Plc v. Augustine Mwanamuwila & 58 Others*⁽⁶⁾ which, though cited at the first page of the further heads of argument, under the case law cited, is in fact nowhere spoken to in the heads of argument proper. The point he underscored was that in that case we held that section 18(1)(f) of the Pension Scheme Regulation Act, makes it mandatory for

members of a pension scheme who exit employment to be paid accrued, benefits whether or not they have attained 55 years.

3.30. Mr. Mutemwa SC, also stressed that clause 7(a) of the second respondent's Pension Rules of 1995, which purports to grant pension benefits only to members who have attained 55 years, should be deemed to have been amended by the 1996 Pension Scheme Regulation Act to include members who left the scheme before they attained the age of 55 years.

3.31. Mrs. Mwansa-Kabalata reiterated the submission that the lower court judge fell into error when he found that the existing scheme was a defined contribution plan when it was a defined benefit scheme. She added that in the parties' settled facts, the question of whether it was a defined benefit scheme was not even disputed. This was confirmed by the testimony of the witness on record.

3.32. Being a defined benefit scheme, the determination of portable benefits should have been, according to Mrs. Mwansa-Kabalata, in accordance with section 18(3)(b) of the Act. She referred to the case of *Barclays Bank Staff Pension Fund*,

Barclays Bank Plc v. Augustine Mwanamuwila & 58 Others⁽⁶⁾ and reiterated the point made by Mr. Mutemwa SC, that the appellants were entitled to be paid their pension on exiting.

- 3.33. The final point made by Mrs. Mwansa-Kabalata had to do with the submission by the respondents' learned counsel in his heads of argument, that if paid in full the appellants would be unjustly enriched. She dispelled that suggestion on the basis that the calculation of the appellants' benefits is dependent on the age and the number of years served excluding the years that are not served up to the year the employee was supposed to retire.

Counsel urged us to uphold the appeal.

4.0 THE RESPONDENTS' CASE

- 4.1. As earlier intimated, the learned counsel for the respondents filed heads of argument in response and an elaborate list of authorities.

- 4.2. In supporting the holding of the learned trial judge, counsel for the respondents submitted that the issues for determination were framed for the court by the parties and appear in the record of appeal. The lower court judge did, according to counsel, duly consider those issues and thus discharged his duty, holding that the appellants' case was unmeritorious.
- 4.3. It was further submitted that the parties having agreed on the issues to be put to the court for determination the question of requesting the court below to call for additional evidence on other claims should not arise. Counsel submitted that the appellants had the obligation and the opportunity to put across to the lower court what they considered was their case in its entirety. As it is, that opportunity was allowed to go begging. More grievously, the appellants did not request the trial court that on matters not reduced into agreed issues for determination the appellants be allowed to adduce evidence.

- 4.4. More pointedly, it was submitted that the appellants were duly and properly paid their pension benefits using the formula applicable to them. The formula $\frac{1}{45} \times \text{years of service} \times \text{pensionable salary} \times \text{commutation factor}$, was not applicable to them because this formula is tied to an employee who has attained the age of 55 years and would have contributed to the scheme up to that age.
- 4.5. The learned counsel for the respondents, having observed that none of the appellant employees had reached the age of 55 years at the time they exited the scheme, forcefully submitted that any use of the formula $\frac{1}{45} \times \text{years of service} \times \text{pensionable salary} \times \text{commutation factor}$ on such employees would result in unjust enrichment of such employees.
- 4.6. Counsel cited clause 7(a) of the Scheme Rules titled 'Pension Benefits' and submitted that the formula referred to at paragraphs 4.4 and 4.5 of this judgment applied only on retirement on the normal pension date.

- 4.7. The learned counsel posited that the lower court judge cannot be faulted for dismissing the appellants' claim since they were correctly paid their pension; that they were not entitled to any further pension benefits upon leaving the scheme before attaining the age of 55 years. Put shortly the payment of the appellants' employer and employee contributions plus interest was, according to counsel, correct because they had not reached the age of 55 years.
- 4.8. Additionally, counsel for the respondents contended that the issue of deferred pension did not arise as no appellant opted for deferred pension. In any case, he submitted further, section 18(1)(f) of the Pension Scheme Regulations Act, 1996, Chapter 255 of the Laws of Zambia, speaks of accrued benefits which does not include future benefits. That section provides that:

A Pension Scheme shall grant to members leaving the Scheme before a benefit has become payable full portability of the accrued retirement benefits at the time the member leaves the Scheme.

Counsel argued that this section does not include benefits for a period the employee has not been working and has not been contributing to the scheme.

4.9. The learned counsel raised a somewhat new point not covered in the initial submission of the appellants. This was that the respondents' scheme was an approved scheme under the Income Tax Act, Chapter 323 of the Laws of Zambia and, therefore, that it was material for one to qualify for pension benefits to have regard to the provisions of the Income Tax Act under the conditionalities of the fourth schedule and the rules which were in line with the conditionalities providing for retirement at 55 years.

4.10. He submitted further that a retirement benefit cannot properly be called as such if one has not retired (at 55 years). For one to be entitled to a retirement benefit they must first retire from a job as prescribed by the rules of their Pension Scheme – in this case the Scheme prescribes 55 years as the retirement age. Where one has not reached the retirement age, their

accrued retirement benefits get to be paid or transferred into another pension scheme or fund as preferred by the member.

4.11. It was also submitted that upon a member leaving the scheme, which is different from retirement at the age of 55, three options are available and these are:-

- (i) A member can opt for a deferred pension in which case the pension is payable upon the member attaining the normal retirement age of 55 years and the benefits are then computed as per the formula in the Scheme Rules.
- (ii) The member can opt for a refund of their own contributions with interest (this rule was amended to include the employer's contribution)
- (iii) The member can opt for a transfer of the accrued benefits to another approved Pension Scheme.

4.12. Counsel pointed out that none of the appellants opted for a deferred pension under option (i), nor did any of them transfer to another approved pension scheme under option (iii). They were instead all refunded their contributions and the employer's contribution with interest as was determined by the Actuary.

4.13. The learned counsel also contended that the submissions made on behalf of the appellants were underpinned by certain critical assumptions which were wrong. These were: first, that all the appellants retired normally – which was not the case; that the computed pension could be commuted in full – this too is not the case as the law prohibits this at paragraph 2(2)(b)(vii) of the Fourth Schedule by putting a 50% cap. The final wrong assumption identified by counsel for the respondents had to do with ‘service in years’. This, he submitted was not correct as only service under the Pension Scheme would count for benefits and not necessarily service with the employer.

4.14. Arising from the foregoing, counsel submitted that the lower court was on firm ground when it rejected the appellants’ claim. He was of the settled view that the question whether what existed was a defined benefit or a contributory benefit scheme was not an issue at all; the real question being whether the appellants were not paid their benefits in full.

- 4.15. It was also submitted that the Scheme Rules and Chapter 255 of the Laws of Zambia have no provision for treating the appellants as if they had reached 55 years at the time of their retrenchment so as to justify the use of the formula $\frac{1}{45} \times \text{years of service} \times \text{pensionable salary} \times 12$ which is specifically for those who retire normally at 55 years. According to counsel, there is no exception or special provision or rule to cater for those retrenched and are below 55 years.
- 4.16. Counsel contended that the appellants could not draw funds from where they did not invest or contribute. Their accrued pension has a cut-off point – which is the date of their retrenchment.
- 4.17. To buttress the submission that the appellants in the present appeal were correctly paid by the refund of their contributions and the employer's contribution with interest and, therefore, that there were no more benefits due to them, the learned counsel cited the case of *ZNPF Board & Others v. Bernard Mulenga & Others*⁽⁷⁾. In that case, the court held that refund of employee and employer contributions was sufficient in a

case of pre-mature retirement (retrenchment). In that case, the employees were refunded or paid both their contributions and the employer's contributions with the court subsequently holding that such payment represented the full and final settlement of the pension benefits.

- 4.18. The respondents' learned counsel also distinguished the case of *Standard Chartered Bank (Z) Plc v. Willard Solomon Nthanga & Others⁽¹⁾*. In the case at hand, the appellants were paid all accrued member contributions and employer's contributions plus interest. In any case, submitted counsel, the *Standard Chartered Bank (Z) Plc⁽¹⁾* case did not suggest that the formula is applicable to employees who do not reach 55 years.

We were thus urged to dismiss the appeal.

- 4.19. In orally augmenting the heads of argument, Mr. Phiri reiterated one point only, namely, that the formula referred to only applied to employees who had attained the age of 55 years and does not apply to those, like the appellants, who exited prematurely.

5.0. REJOINDER BY THE APPELLANTS

- 5.1. In replying to the submissions on behalf of the respondents, State Counsel Mutemwa repeated the point made by Mrs. Mwansa-Kabalata that unjust enrichment would not arise given the variables applicable in computing the benefits.
- 5.2. Mrs. Mwansa-Kabalata, for her part, stressed that section 18(1)(f) of the Pension Scheme Regulation Act, made it mandatory for a scheme to grant members leaving the scheme before the benefits became payable, full portability of the accrued benefits at the time a member leaves the scheme.

6.0. THE ISSUES FOR DETERMINATION IN THIS APPEAL

- 6.1. We are grateful to the learned counsel for both parties for their input from which we have considerably benefitted.
- 6.2. We have at paragraph 1.10 set out the questions which the parties to the present dispute had posed to the lower court to determine. We have also elsewhere pointed out that the lower court judge did not determine those questions but framed different questions which he, in the end, decided not to determine either.

- 6.3. We believe, therefore, that the questions which the parties had put to the lower court still require of us to determine, for they define the disagreement still subsisting between them as narrowed by themselves in the agreed facts and issues.
- 6.4. In stating the position as we have in the preceding paragraph, we cannot, of course, ignore the grounds of appeal and the specific legal questions they raise, namely first, whether the judge was right to hold that there was no distinction in the manner of calculation of accrued benefits between a defined benefit and a defined contribution pension scheme. Second, whether the governing scheme between the parties was a defined benefit or a defined contribution scheme and third, and perhaps more importantly, whether the appellants were correctly paid their benefits.
- 6.5. The determination of the questions identified in the preceding paragraphs in turn requires of us to identify the distinction between a defined benefit scheme and a defined contribution scheme so as to situate the operational status of the second

respondent and therefrom determine the appellants' portable benefits.

7.0. OUR ANALYSIS

- 7.1. Our understanding is that there is a marked distinction between a defined benefit scheme and a defined contribution scheme. It is the appreciation of this distinction that should help determine the issues in dispute in this case.
- 7.2. The learned judge appeared content with identifying what was clearly a superficial dissimilarity between a defined contribution scheme and a defined benefit scheme. In his words, 'a defined contribution scheme is so called because an employer and an employee contribute to it'. With regard to a defined benefit scheme, the learned lower court judge stated as follows:

What I wish to emphasise, as regards a defined benefit scheme in the sense that it was understood in the *Standard Chartered Bank v. Nthanga*⁽¹⁾ case is that there is no employee's contribution to consider. When you look at a defined benefit scheme in this sense, then it is easy to understand what the provision in section 18(3)(b) means. The provision states that when a member leaves the scheme prematurely, his portable benefits shall amount to the present value of the accrued

pension retirement. The provision does not refer to any employee's contribution because, in such scheme, the employee contributes nothing...

- 7.3. This seeming oversimplification by the learned lower court judge of the critical distinction between the two forms of occupational pension plans crystallised a misapprehension which became the genesis of further misdirection.
- 7.4. We understand a defined pension scheme or plan to be a type of pension scheme in which an employer promises a specified pension payment, lump sum or combination thereof, on retirement. That pension payment is predetermined by a formula based on the employee's earnings history, tenure of service and age, as opposed to being based directly on individual investment returns. In this regard, we are in complete agreement with counsel for the appellants.
- 7.5. Put differently, in a defined benefit plan, the benefit the employee is to receive is determined ahead of the employee's retirement time. It is 'defined' in the sense that the benefit formula is set out and known in advance. This kind of scheme thus provides eligible employees a guaranteed income for life

when they retire. That guaranteed retirement benefit amounts for each participant is based on factors such as the employee's tenure and salary.

7.6. A defined contribution scheme, on the other hand, is a scheme under which no promise for a specific retirement income is made. It is a pension scheme that builds up a pool or pot of money that can be used to provide an income in retirement. The pension pot builds up through the employee and (where applicable) the employer's contribution plus investment returns and tax relief. Again we think the appellants' position on this issue is entirely correct.

7.7. The employee, and sometimes also the employer, makes regular contributions into the employee's retirement account in a defined contribution plan. And yet, as the appellants' counsel have correctly argued, contribution by the employer is not a defining characteristic of a defined contribution scheme as the holding in the case of *Aon Trust Corporation v. KPMG*⁽²⁾ cited by the appellants' learned counsel confirms. A defined

contribution scheme can exist even where the employer does not make regular contributions to the retirement account.

7.8. Granted the position we have articulated in the foregoing paragraphs, it is, of course, incorrect to define a defined benefit scheme by the contributions and who makes them as the learned lower court judge did. While in a defined benefit scheme, employers are normally the only contributors to the plan, the plan can also require that employees contribute to it. At the end of the day who makes the contribution to such scheme does not make a defined scheme to cease to be one.

7.9. What is notably significant is that in a defined contribution plan, the formula for computing the employer's and employee's contributions is defined and known in advance but the benefit to be paid out is not known in advance. The benefit comes as a designated amount from the employer who has an account with the scheme and chooses investment for it. The investment results are, of course, not predictable and, therefore, the eventual benefit at retirement remains undefined.

- 7.10. What emerges from this is that the two pension schemes are of a totally different character and the benefit payment from them should logically be differently computed.
- 7.11. Turning to the specific grounds of appeal, the appellant complains, in respect of the first ground, that the lower court judge misconstrued the provisions of section 18(2) and 18(3)(a) of the Pension Scheme Regulation Act, when he held that the portable benefits in defined contribution schemes were not calculated differently from those under section 18(3)(b) for defined benefit schemes.
- 7.12. We have already shown that the two types of pension plans are in law distinguishable in fundamental respects, not least in the way the retirement account is built up and what determines a member's ultimate benefit.
- 7.13. Section 18 of the Pension Scheme Regulation Act, Chapter 255 confirms the essential distinction when it provides as follows:
- (1) A pension scheme shall –**
- (f) grant to members leaving the scheme before a benefit becomes payable full portability of the**

accrued retirement benefits at the time the member leaves the scheme.

- (2) For the purpose of this section and the defined contribution schemes 'portable benefits' means the total of the retirement contributions paid by the employee and the employer on the leaving member's account, plus interest during his participation under the plan.**
- (3) Where a member leaves a scheme under paragraph (f) of subsection (1), in the case of –**
 - (a) A defined contribution scheme, the portable benefits shall be the total of the retirement contributions paid by the member and the member's employer on the leaving member's account, plus interest during his participation under the plan; and**
 - (b) A defined benefit scheme, the portable benefits shall amount to the present value of the accrued retirement pension.**

7.14. The learned judge in the court below conflated the manner of calculating portable benefits in respect of a defined benefit scheme and a defined contribution scheme, holding that the calculation of portable benefits in respect of each of the two plans was the same. In his words:

In the end, the portable benefits in a defined benefit scheme are calculated not differently from those in the defined contributory scheme. The only difference is that in a defined contribution scheme, the benefits accumulate though contributions by both

the employee and the employer while in a defined benefit scheme, the benefits accumulate without the employee's contribution.

This, in our view was a wrong conclusion to make. At the risk of repetition, it is important to emphasise the constitution of the retirement fund for each of the two.

7.15. Under a defined contribution scheme, each employee has an account in which the employer and the employee make regular contributions. For employees, this could be a fixed amount or a percentage of their salary. The employer will generally match a portion of the employee contributions as an added benefit and an investment advisor then manages that pool of contributions.

7.16. Benefit levels depend on the total contributions and investment earnings of the accumulation in the account. At retirement, the employee either receives a lump sum or a fixed sum paid each year, the size of which will be dependent upon the accumulated value of the funds in the retirement account. The investment risk thus rests with the employee.

- 7.17. Valuation of portable benefits in a defined contribution scheme thus entails measuring the market value of the asset held in the retirement account. The actual size of the retirement benefit will depend upon the realised investment performance of the retirement account, the interest rate at retirement and the ultimate salary path of the employee concerned.
- 7.18. A defined benefit scheme determines the employee's benefit as a function of both years of service and the employee's salary history. The present value of accrued benefits under a defined benefit plan is computed with reference to the interest rate and the salary profile of the contributing member. It thus requires actuarial involvement.
- 7.19. An examination of section 18(3)(a) and 18(3)(b) of the Pension Scheme Regulation Act does suggest to us that, contrary to the learned lower court judge's conclusion that the two provisions provide for an identical mode of computing portable benefits, the two provisions in fact not only deal with the two different

kinds of schemes; they provide for distinct and totally different methods for computation.

7.20. Ordinarily an employee leaving a particular employer may wish to remain in the pension scheme or might want to transfer it to the new employer, or to a different pension plan or to defer receipt of the benefits until the employee reaches the retirement age as prescribed in the Pension Scheme Rules. This liberty, however, appears to have been tampered by statute.

7.21. We have at paragraphs 4.8 and 7.13 reproduced the relevant portions of section 18(1)(f). For purposes of emphasis, however, we restate the material parts of the section, in paraphrase. They provide that a pension scheme shall afford members leaving the scheme before retirement full portability of their accrued retirement benefits at the time of leaving the scheme.

- 7.22. We understand portable benefits generally to be those that have been paid into or have accrued in a pension scheme. They can transfer to a new pension scheme or to an individual leaving employment.
- 7.23. The Pension Scheme Regulation Act defines portable benefits differently depending on the kind of scheme. For a defined contribution scheme, these are the total of the retirement contributions of both the employer and the employee on the leaving member's account along with interest during the period of the member's participation in the scheme. For a defined benefit scheme, on the other hand, the portable benefit is the present value of the accrued retirement pension. The employee benefits are computed using a formula that considers factors like length of employment and salary history.
- 7.24. The lower court judge was thus plainly wrong to have held that there is no distinction in the computation of portable benefits between the two types of pension schemes.

question of the plaintiffs voluntarily opting to accept the lower amounts is also unattainable at law.

7.28. We agree, therefore, as does the appellant, with the construction placed on section 18(1)(f) of the Pension Regulation Act, by the lower court judge that deferred benefits were abolished. The critical grievance taken up in ground one is, however, that the lower court judge was wrong to have held that the accrued retirement benefits under section 18(2) and sections 18(3)(a) and 18(3)(b) of the Act were not calculated differently.

7.29. Much has been said by counsel regarding the nature of the occupational scheme that existed between the parties. The parties themselves adopted an expedited or truncated hearing process; a tailored pleading process based on agreed facts and issues. They understood the operating pension plan as a defined benefit scheme. The lower court judge, however, characterised it as a defined contribution scheme.

7.30. Even after characterising the scheme as a defined contribution plan, the learned judge strangely did not determine the calculation of the appellants' pension benefits on the basis of that characterisation. He stated [at J15] as follows:

Coming to this case, it is clear from the Trust Deed that the plaintiffs' benefits were accumulating through contributions by both the employee and the employer. Therefore, in terms of section 18(3)(b), what the defendants were required to do was to total up the contributions over the years and then calculate the present value.

7.31. It is clear from section 18(3)(b) which we have reproduced at paragraph 7.13 that it applies to a defined benefit scheme and not a defined contribution scheme. It is curious that having elsewhere in his judgment stated that the subsisting pension scheme between the parties was a defined contribution scheme, the learned lower court judge went on to decide the case on the full assumption that what existed was, after all, a defined benefit scheme. This kind of vagueness if not contradictions do not sit well in a judgment and we deprecate it.

- 7.32. We express our disapproval with the approach adopted by the lower court judge in this case. The parties had structured for themselves the agreed facts and issues for the determination of the court, never mind that such a course was taken at the behest of the judge himself. Among the facts agreed by all parties was that the scheme subsisting between them was a defined benefit scheme.
- 7.33. The learned judge chose to alter the agreed facts by literally disputing what all the parties stated through their pleading. He substituted his own construction of what the facts ought to have been, not because of any factual evidence laid before him, but from his own assumptions.
- 7.34. As there was no disagreement whatsoever as to the kind of occupational pension scheme subsisting between the parties, the learned judge had no business creating issue over the undisputed facts and then proceeding to resolve it. We thus agree with the learned counsel for the appellants that the learned lower court judge overreached himself in making a finding which contradicted the parties' own agreed position.

7.35. As we cautioned in *Atlantic Bakery Ltd v. Zambia Electricity Supply Corporation Ltd*⁽⁹⁾:

... a court should confine its decision to the questions raised in the pleadings... Litigation is for the parties, not the court. The court has no business extending the boundaries of litigation beyond the scope defined by the parties in their pleadings. In other words, a court has no jurisdiction to set up a different or new case for the parties.

7.36. We must add, for good measure, that in our adversarial system, a judge is required and is indeed obliged to decide cases on the evidence presented in court by the parties. If judges apply their own knowledge or personal perceptions not informed by the evidence presented to them, they may deprive the parties of the opportunity to address such information and perceptions with evidence and submission. The upshot of our reflection is that ground one has merit and we uphold it.

7.37. Ground two impeaches the lower court judge's holding that the second respondent was a defined contribution scheme.

7.38. We have already stated that the learned lower court judge did something rather unconventional in rejecting an agreed position of the parties and, against the weight of evidence, substituting

his own view for it. It is indeed odd that the learned judge could jettison a factual position taken by the parties as to what their scheme was, and in its place label the scheme with a totally different name and imbue it with totally different characteristics all because of one aspect – contribution by the employer to the pension income in the scheme.

- 7.39. The history of the dealings of the parties, as can be deciphered from the various documents in the record of appeal, notably the NAPSA Circular No. 1 of 2007, leave no room for speculation that the operating scheme involved in this case was a defined benefit plan.
- 7.40. The lower court judge was plainly wrong. The appellants' grouse on this ground is legitimate. Ground two of the appeal has merit and it succeeds accordingly.
- 7.41. Under ground three, the misdirection alleged concerns the payment of pension benefits using a wrong method of computation.

7.42. To us the appellants' grievance under ground three does not naturally arise from the learned lower court judge's misapprehension of the distinction on the payment formula in respect of the two different kinds of scheme, nor does it arise from his mislabelling of the second respondent's scheme. We have elsewhere stated that notwithstanding the mischaracterisation of the subsisting pension plan as a defined contribution scheme rather than as a defined benefit scheme, the judge nonetheless attempted to apply the correct provision namely, section 18(3)(b) to the appellants. He was, however, not entirely successful in this regard.

7.43. We entirely agree with the submission of counsel for the respondents that the computation of the appellants' portable benefits should have taken into consideration the current value of the accrued retirement pension. The determination of the current value entailed an actuarial valuation of the scheme within the intendment of clause 20 of the Trust Deed.

- 7.44. As members of a defined benefit scheme which they were exiting, the correct payment method applicable to them should have been that set out in section 18(3)(b) of the Pension Scheme Regulation Act, bearing in mind section 18(1)(f) of the Act. Ground three has merit as we uphold it accordingly.
- 7.45. Ground four of the appeal raises the question whether, in light of clear inconsistency between a statutory provision as contained in the Pension Scheme Regulation Act and that of the second respondent's Scheme Rule, the rules prevail. The rule in question is Rule 9 which we have reproduced at paragraph 3.14 of this judgment. The statutory provision in issue is section 18(1)(f) which is reproduced at paragraphs 4.8. and 7.13.
- 7.46. The appellants were paid both the employee and the employer's contributions with interest on the basis of a provision in the Pension Scheme Rules which provides for a formula for payment of pension benefits only at the retirement age of 55 years.

7.47. Senior counsel Phiri, for the respondents, argued with dynamism that the appellants did not fit into any of the three options available to persons who left employment before the age of 55 years and that what they received in benefits was thus aptly warranted in the circumstances.

7.48. We see the force in the learned counsel's argument, particularly if that argument is considered in isolation and on the basis of the Pension Scheme Rules alone. The logical implication of the argument is that until the appellants reached the retirement age of 55 years, they could not under the Pension Scheme Rules access their full benefits. Yet, those Pension Scheme Rules operate in a milieu of legal rules and regulations which supersede the Scheme Rules.

7.49. As stated earlier on in this judgment, we observed in the case of *Standard Chartered Bank (Z) Plc v. Willard Solomon Nthanga & Others*⁽¹⁾ that deferred pension was abolished by the 1996 Pension Scheme Regulation Act. The Pension Scheme Rules cannot thus supersede the provisions of an Act of Parliament

designed to deal with the same mischief that the Rules were perpetrating.

- 7.50. We agree with the submissions of the learned counsel for the appellants on this point. We also agree that there would be no unjust enrichment as feared by the respondents for reasons which were ably articulated by Mrs. Mwansa-Kabalata on behalf of the appellants. We thus find merit in ground four and uphold it accordingly.
- 7.51. Turning to ground five of the appeal, counsel for the appellants have, in their submissions, invited us to hold and direct that the residue of the appellants' claims, which they did not include in the statement of agreed facts and issues, should be referred back to the High Court to be tried.
- 7.52. We find the submission of counsel for the appellants around this issue rather puzzling. The parties agreed to narrow the issues by settling the agreed facts and the issues for the court's determination. They should have at that stage intimated what other issues had not been agreed upon so that the lower court judge should then have given directions on

how to proceed with those other questions. They opted not to do so. We accept the submissions of the learned counsel for the respondents that the appellants allowed an opportunity to go begging.

7.53. The effect of the order the appellants implore us to make is that after deciding on part of their grievance in finality here, another portion of the same grievance be remitted to start its round in the High Court with the possibility of it ending up here again. This is a rather inelegant way of conducting litigation. Even without thinking about the cost in terms of time and resources, the inconvenience and prejudice to the respondents is glaring.

7.54. We are of the considered position that the request to send part of the claim to the High Court for trial comes too late in the proceedings. It is reminiscent of forum shopping, broadly understood, and borders on abuse of process. As we cautioned in the case of *BP Zambia Plc v. Interland Motors Ltd*⁽¹⁰⁾:

...a party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts...

The appellants now wish to lock the stable doors after the horse has bolted. They have themselves to thank.

Ground five has no merit and is accordingly dismissed.

8.0. CONCLUSION

- 8.1. The upshot of our decision is that this appeal succeeds in respect of grounds one, two, three and four and fails in respect of ground five.
- 8.2. We order that the correct computation of the appellants' portable benefits be undertaken by the respondents forthwith and the appellants be given access to any outstanding portable benefits. We defer to the Deputy Registrar any lingering computational grievances using the guidance we have given in this judgment and in particular under paragraph 7.43.

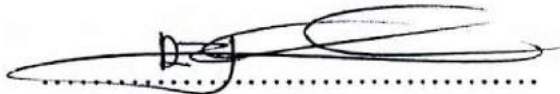
- 8.3. The appeal having substantially succeeded, the appellants shall have their costs, to be taxed in default of agreement.



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I. C. Mambilima
CHIEF JUSTICE



.....
M. Malila
SUPREME COURT JUDGE



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R. M. C. Kaoma
SUPREME COURT JUDGE