

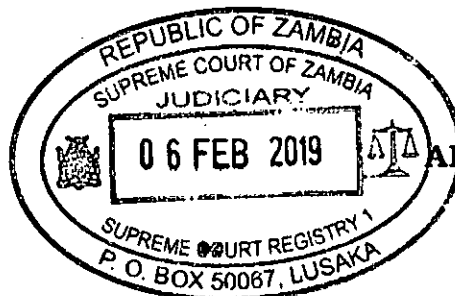
**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)**

APPEAL NO. 217/2015

BETWEEN:

HARRY CHINENE

AND



APPELLANT

AON ZAMBIA LIMITED

1ST RESPONDENT

WORKCOM PENSION REGISTERED TRUSTEES

2ND RESPONDENT

WORKERS COMPENSATION FUND CONTROL BOARD

3RD RESPONDENT

**CORAM: Mambilima, CJ, Malila and Musonda, JJS
on 7th August, 2018 and 6th February, 2019**

For the Appellant: Mr. T. Shamakamba of Messrs Shamakamba & Co.

For the 1st and 2nd Respondents: Mr. K. Kamfwa of Messrs Wilson & Cornhill

For the 3rd Respondent: Mr. J. Kabuka of J. Kabuka & Co.

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. Hughes v. Metropolitan Railway Co. (1877) ZAPP. Cas. 239
2. Krige v. Christian Council of Zambia (1975) Z.R. 197
3. Galaunia Farms Ltd v. National Milling Co. Ltd.
4. Febby Nsanje & Others v. Workers Compensation Fund Control Board: SCZ Appeal No. 1 of 2009

5. **Arthur Ndhlovu & Jacob Mwanza v. Alshams Building Materials Co. Ltd. and Jayesh Shah (2002) Z.R. 48**
6. **Attorney-General v. Marcus Achiume (1983) Z.R. 1**
7. **William Harrington v. Siliya/Attorney-General [2011] Z.R. 253**

Legislation referred to:

1. **Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia**
2. **Section 31 of the Pension Scheme Regulation Act, Chapter 255 of the Laws of Zambia**
3. **The Income Tax Act, Chapter 323 of the Laws of Zambia**

1.0 INTRODUCTION

- 1.1 On 13th November, 2015, the High Court of Zambia dismissed, for want of merit, an action which the appellant had instituted in that court seeking the recovery of a sum of K645,712,956.12 which the 1st respondent had deducted from the appellant's pension benefits and paid over to the 3rd respondent by way of refunding a like sum which the 3rd respondent had availed to the appellant in the nature of a 50% commuted pension advance. The appellant further sought to recover additional moneys against the 3rd respondent in the form of entitlements which had allegedly arisen in his favour consequent upon his retirement from the 3rd respondent.

2.0 HISTORY AND BACKGROUND CIRCUMSTANCES OF COURT ACTION

- 2.1 The history and background facts which had precipitated the appellant's action in the court below were fairly free from controversy or doubt.
- 2.2 The appellant was employed by the 3rd respondent in November, 1972 at the tender age of 17 years.
- 2.3 Over the 34 year period of his service with the 3rd respondent, the appellant not only rose through the ranks but had an opportunity to undergo training as a legal practitioner. The appellant's enhanced qualifications buoyed his career progression to the extent that, by the time he was leaving his employment with the 3rd respondent, he had risen to the second highest position in the organization namely, Board Secretary/Legal Counsel and Deputy Commissioner.
- 2.4 By a letter dated 12th January, 2007 which was addressed to the 3rd respondent's Commissioner, the appellant applied to be retired early from his employment pursuant to Clause 7.3 of the Conditions of Service which applied to senior and non-

unionised employees of the 3rd respondent. This Clause (7.3) provided as follows:

“7.3 Early Retirement

Where an officer has applied for early retirement or where management wishes to retire an employee on disciplinary grounds, etc. and the Trust does not provide for early retirement, the Board shall pay proportionate retirement benefits under this Clause for an employee who has served a minimum of 25 years or those who have attained 50 years and who wish to retire early and this amount should be recovered from the scheme upon retirement [at the] age of 55 years.”

2.5 By a letter from the 3rd respondent's Acting Commissioner dated 3rd April, 2007 to the appellant, the latter was informed about the 3rd respondent's acceptance of his request to proceed on early retirement. The appellant was also informed that his early retirement benefits were going to be paid to him in accordance with the conditions of service which were prevailing at the time.

2.6 By a letter dated 26th April, 2007 which was addressed to the appellant, the 3rd respondent forwarded a cheque for K478,207,817.88 to the latter representing 50% maximum pension commutation advance following the appellant's early

retirement. According to the said letter to the 3rd respondent, the total commuted value was K645,712,952.12 before tax as well as the amounts which the appellant owed the 3rd respondent at the time of his early retirement.

- 2.7 By an email dated 3rd October, 2009 which was addressed to the General Manager of the 1st respondent, the appellant informed the former that he was to attain 55 years on 14th November, 2009. Consequently, the appellant requested the 1st respondent to pay his pension benefits into a bank account which the appellant had nominated for that purpose. The appellant also informed the 1st respondent that he was a deferred pensioner and had since received an advance in the sum of K645,712,952 from the 3rd respondent together with other monthly payments. According to the appellant's said email, the advance which he had received was to be recovered from the pension moneys which were being held by the 1st respondent.

- 2.8 Upon attaining the statutory retirement age of 55 years in November, 2009, the appellant was paid his pension entitlement by the 1st respondent which was less the

K645,712,956.12 advance which the 1st respondent directly remitted to the 3rd respondent.

3.0 THE COURT ACTION

- 3.1 Following disagreements between the appellant and the 3rd respondent over the 1st respondent's decision to pay the sum of K645,712,956.12 to the 3rd respondent, the appellant instituted proceedings in the High Court to secure the recovery of the said sum of K645,712,956.12.
- 3.2 In its defence, the 3rd respondent averred that the 2nd respondent was obliged to deduct the sum of K645,712,956.12 from the appellant's pension benefits on account of the commuted pension advance which the 3rd respondent had earlier advanced to the appellant. According to the 3rd respondent, the said sum of K645,712,956.12 was properly deducted from the appellant's pension benefits with his full knowledge.
- 3.3 It is worthy of note that the appellant was, at all relevant times, a member of the 2nd respondent's pension scheme which was at all material times an approved pension scheme

registered as such under the Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia.

4.0 THE TRIAL AND EVIDENCE MARSHALLED

- 4.1 At the trial of the action, the appellant, then plaintiff, testified on his own behalf. He told the court that, on 12th January, 2007, he applied for early retirement pursuant to the conditions of service under which he served. At the time of his application, the appellant was 53 years old while the normal retirement age which was applicable to him was 55 years.
- 4.2 In his application letter for early retirement, the appellant quoted and reproduced Clause 7.3 of the conditions of service for Senior and Non-Unionised Members of Staff which we reproduced at 2.4 above.
- 4.3 According to the appellant's further evidence, his retirement application was accepted and his retirement was to take effect on 3rd April, 2007. Following the appellant's retirement, the 3rd Defendant's Acting Commissioner wrote to him on 26th April, 2007 regarding his retirement benefits. The Acting Commissioner's letter partly read as follows:

“Please find enclosed herein cheque No. 023702 for K478,208 being 50% maximum Pension Commutation following your early retirement from the Board’s Service on 3rd April, 2007.

The Commutation Value has been based on the factors of 11.29 as applies for commutation on the main fund, corresponding with your age of 52. The commuted value works out to K645,713 before tax and your indebtedness to the Board as at the date of early retirement.

However, your residual monthly pension of K4,766 has not been affected in any way by these factors as it is directly based on final pensionable salary and length of service....”

- 4.4 The appellant also testified that his conditions of service provided that since he had worked for 34 years, the benefits from his employer (the 3rd Respondent) were to include an element of 2 months’ notice pay plus 70 months’ salary for each year served. This, he said, was in accordance with the contract and conditions of employment which applied to him.
- 4.5 It was the appellant’s further evidence that he was a member of the 2nd respondent’s Pension Scheme and that the Pension

Scheme was being administered by the 1st respondent. He further testified that he used to contribute 5% of his salary to the scheme while his employer, the 3rd respondent, used to contribute the equivalent of 26.5% of his salary so that once he attained the age of 55 years he was to receive a pension and live on the same.

- 4.6 The appellant told the trial court that when he attained the age of 55 years he received the pension but complained of a wrongful deduction by the 2nd respondent in the sum of K645,712,956.12.
- 4.7 The appellant further testified that it was wrong for the 1st and 2nd respondents to deduct any amount of money from his Pension and pay someone else. According to him, he did not owe the 3rd respondent the money which was paid to it. He further told the court below that the rules of the Pension Fund prohibited deductions for the purpose of paying a member's creditors. It was for this reason that he was also claiming against the 1st and 2nd respondents.
- 4.8 The appellant insisted that the deduction of the amount referred to in 4.6 above was unlawful.

4.9 Under cross-examination, the appellant told the lower court that, apart from having been one of the trustees, he was a member of the pension scheme which was managed by the 2nd respondent. He further testified that the K645,712,956.12 which the 1st respondent had deducted from his pension was equal to the amount which the 3rd respondent had paid him by way of an advance.

4.10 Upon being further cross-examined by counsel for the 3rd respondent, the appellant testified that the Rules of the Pension Scheme to which he belonged did not provide for early retirement while the conditions of service relating to his employment by the 3rd respondent did.

4.11 Following the closure of the appellant's case in the court below, the 1st and 2nd respondents opened their defence by presenting one witness ("DW1").

4.12 The gist of DW1's testimony in the court below was that, in his capacity as the Chief Executive Officer of the 1st respondent, he knew the appellant as a member of the Pension Scheme which his company (the 1st respondent)

managed. He also knew the appellant as one of the trustees of the 2nd respondent.

4.13 DW1 further confirmed in his testimony that, sometime in December, 2009, the appellant notified the 1st respondent that he had attained 55 years and, consequently, desired to access his pension. Accordingly, the appellant was availed a claim form which he completed after which the process of processing his benefits was triggered.

4.14 According to DW1, the 1st respondent proceeded with the exercise of processing the appellant's pension benefits in accordance with the Rules of the Pension Scheme involved. The figures were computed and availed to the appellant who was shown how the same had been arrived at. In this regard, DW1 confirmed before the trial court that:

"Coincidentally, our calculation agreed with what he [the appellant] had calculated in his email [to us]. He did not dispute our computation."

4.15 In his further evidence, DW1 told the trial court that the appellant only started raising issues over his pension between

September and December, 2010, that is, well after he had been paid his dues.

4.16 According to DW1, the issue which the appellant raised was that the 1st respondent should not have deducted the money which they had deducted from his pension and paid over to the 3rd respondent. DW1 insisted in his testimony that the appellant himself and the trustees of the Pension Scheme involved had instructed them to deduct the money which had been deducted and paid over to the 3rd respondent.

4.17 After the closure of the 1st and 2nd respondents' case, the 3rd respondent opened its case and presented one witness ("DW2").

4.18 DW2 confirmed before the trial court that the appellant had proceeded on early retirement and was paid in accordance with Clause 7.3 of the Staff Conditions of Service which applied to him.

5.0 ARGUMENTS AND SUBMISSIONS AT TRIAL

5.1 Following the closure of the respective cases for the parties, the court below invited them to file their respective

submissions. In this regard, counsel for the 1st and 2nd respondents submitted arguments which were anchored on the doctrine of estoppel. The cases of **Hughes v. Metropolitan Railway Co.**¹ and **Krige v. Christian Council of Zambia**² were cited to support the contention that once the appellant and his employer had concluded the agreement in terms of which the former was availed a pension advance pursuant to Clause 7.3 of the conditions under which the appellant had been serving the 3rd respondent, the former was estopped from seeking to recover that advance.

6.0 **CONSIDERATION OF MATTER BY TRIAL COURT AND DECISION**

- 6.1 In his judgment, the learned trial Judge dismissed the appellant's arguments and, in doing so, agreed with the 1st and 2nd respondents' estoppel argument before announcing that the appellant was "... *estopped from claiming the ... K645,713 (rebased) from any of the [respondents].*" To support his conclusion, the learned judge cited the following passage from our judgment in **Galaunia Farms Ltd v. National Milling Co. Ltd**³:

“The basis of estoppels is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct.”

6.2 The learned trial judge further noted in his judgment that:

“[The appellant] had applied for and was granted early retirement under Clause 7.3 of the conditions of service which applied to him. That Clause allowed for the recovery of retirement benefits paid by the employer...”

6.3 The learned trial judge accordingly concluded his reflections in the following terms:

“...The [appellant] instructed the 1st and 2nd respondents to make that deduction [which they did]]. The [appellant] is the author of that deduction and I agree that it would be wrong to blame the 1st and 2nd [respondents] for it. The claim for K645,713 must, therefore, fail and it is hereby dismissed...”

6.4 With regard to the appellant’s claim that the 3rd respondent ought to have paid him his retirement benefits pursuant to Clause 7.5 of his conditions of service as opposed to Clause 7.3, the trial court noted that this claim was being raised for the first time in the appellant’s Re-Amended Statement of Claim. Notwithstanding this observation, the court below accepted counsel for the 3rd respondent’s argument based on our decision in **Febby Nsanje & Others v. Workers**

Compensation Fund Control Board⁴ namely, that it is an employee's mode of exit which determines the benefits payable to such employee.

- 6.5 In the case of the appellant, the trial court made the point that his mode of exit was early retirement pursuant to Clause 7.3 of the conditions under which he had been serving. The judge further noted that early retirement and redundancy were mutually exclusive modes of exit while the separation packages which flowed from each were not inter-changeable.

The trial court accordingly dismissed the appellant's claim in its entirety and closed its judgment by upholding counsel for the 3rd respondent's submission that the institution of the whole action by the appellant had placed him in a position whereby his personal interests had clashed with his continuing professional duties to his erstwhile client.

7.0 THE APPEAL AND GROUNDS OF APPEAL

- 7.1 The appellant was displeased with the judgment of the court below and has now appealed to this court on the basis of the

following grounds which appear in the memorandum of appeal:

“GROUND 1

The Court below erred in law and fact by recasting and dealing with the Appellant's relief in the Re-Amended Writ of Summons and held as one or in a manner that failed to give meaning to the specific claims made against the 3rd Respondent on one hand and the 1st and 2nd Respondent on the other hand as two separate claims in one suit with evidence on record.

GROUND 2

The Court below erred in law and fact with an unbalanced evaluation of evidence by dwelling only on flaws of the Appellant and not the Respondents particularly the ultra-vires or illegal aspects of Clause 7.3 of the Conditions of Service with regard to recovery of amount paid by the 3rd Defendant from the Pension Scheme.

GROUND 3

The Court below erred in law and fact when it failed to evaluate documentary evidence that Clause 7.5 in the appellant's Conditions of Service was the correct formula for the relief sought of payment in lieu of notice of 2 months' salary and 70 months' salary plus two (2) months for each year served from the 3rd Defendant.

GROUND 4

The Court below erred in law and fact when it inescapably failed to enforce the statute on pensions which forbids attachment of contributions of a member and employer and held that the Appellant is estopped from claiming the sum of

K645,713 from any of the Respondents. The Appellant had adduced evidence and cited the relevant statute and submitted that he was entitled to a refund of his pension deduction from the 1st and 2nd Defendants.

GROUND 5

The Court below erred in law and fact by embarking on a mission to attack Appellant's professional status and standing from page J13 of the Judgment."

8.0 CONTENTIONS/ARGUMENTS ON APPEAL

At the hearing of the appeal, counsel for the parties confirmed having filed their respective Heads of Argument upon which they relied.

8.1.0 APPELLANT'S ARGUMENTS/CONTENTIONS

8.1.1 For his part, Mr. Shamakamba, counsel for the appellant opened his arguments by canvassing those which related to the 4th ground of appeal. In this regard, learned counsel began by citing Section 31 of the Pension Scheme Regulation Act, Chapter 255 of the Laws of Zambia which, he argued, insulated an employee's pension contributions against attachment. The cited section reads:

"Notwithstanding anything contained in any other law, where any judgment or order has been obtained against

a member, no execution or attachment or process of any nature shall be issued against the contributions of a member, or an employer, except in accordance with the terms of the Pension Scheme and such contributions shall not form part of the assets of the member or an employer in the event of bankruptcy.”

8.1.2 The appellant’s counsel complained that, in spite of the statutory provision which we have just alluded to above having been cited in the appellant’s submissions in the court below, the same was completely ignored by that court. According to Mr. Shamakamba, Section 31 precluded the court below from reaching the conclusion which it had reached, namely that the appellant was estopped from resiling from the arrangement which he had bound himself to in relation to the pension advance which he had received.

8.1.3 Counsel then went on to cite the cases of **Arthur Ndhlovu & Jacob Mwanza v. Alshams Building Materials Co. Ltd. and Jayesh Shah⁵** and **Krige and Another v. Christian Council of Zambia²** in which we affirmed the principle that no estoppel can lie against a statute. On the basis of this principle, the appellant’s counsel submitted that the lower court had misdirected itself when it upheld the doctrine of

estoppel in the context of the issues and factors with which the trial court had been confronted.

8.1.4 Counsel further argued that the 3rd respondent's conditions of service which permitted the payment of an advance against an employee's pension entitlement were illegal, ultra-vires and void *ab initio*. Counsel further contended that even the appellant's own correspondence relating to the payment of the advance in question contravened Section 31 of Chapter 255 (as quoted above) and were of no legal effect whatsoever. Counsel accordingly urged us to set aside the judgment of the court below and order that the sum of K645,713.00 which had been deducted from the appellant's total pension entitlement in the circumstances we adumbrated early on in this judgment be refunded to him.

8.1.5 Turning to the first ground of appeal, the appellant's counsel argued, in effect, that the manner in which the trial court had recast the reliefs which the appellant was seeking in his Re-amended writ of summons had the effect of misrepresenting the appellant's segregated claims as against the 3rd

respondent on the one hand and the 1st and 2nd respondents of the other.

8.1.6 As to the second ground of appeal, the appellant's counsel's brief complaint was that the trial court did not evaluate the evidence which was laid before it on behalf of the parties in a balanced manner in the sense that while the court was able to point to the flaws in the appellant's evidence, it totally ignored the appellant's allegations of illegality and ultra-vires around the 3rd respondent's conditions of service. To support his complaint, counsel cited our oft-quoted passage in the case of **Attorney-General v. Marcus Achiume**⁶ where we said:

"[An] unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial court should make".

8.1.7 The appellant's counsel also complained that the trial court ignored the appellant's submissions around Section 2(3) (c) (iv) of the Fourth Schedule to the Income Tax Act, Chapter 323 of the Laws of Zambia which provides that:

"... no contributions made to the Fund or Scheme by the employer shall be returnable to him."

8.1.8 The appellant's counsel then turned to the third ground of appeal around which he advanced the argument that the trial court misdirected itself when it (allegedly) failed to uphold his contention that Clause 7.5 of the appellant's conditions of service embodied some relief to which the appellant was properly entitled in the way of two months' salary in lieu of notice and a total of 70 months' pay.

8.1.9 As to the fifth and final ground of appeal, the appellant's counsel criticized the lower court for having taken the view that the appellant had breached his professional duties to the 3rd respondent on the basis that he had previously served as its legal counsel and that, in that capacity, who had advised it upon the very matters which had become the subject of litigation. In counsel's view, a conflict of interest had arisen between the appellant's personal interests and those of the 3rd respondent, even as the appellant had been prosecuting this matter in the court below.

8.1.10 In sum, the appellant's counsel urged us to set aside the judgment of the court below and grant the appellant all the reliefs which he had sought in his Re-amended Writ of

Summons. The appellant's counsel also sought to have us pronounce costs in his client's favour.

8.2.0 **RESPONDENTS' ARGUMENTS/CONTENTIONS**

8.2.1 Reacting on behalf of the 1st and 2nd respondents, Mr.

Kamfwa, their counsel, opened his arguments around the fourth ground of appeal by supporting the lower court's holding that the appellant was estopped and could not properly recover the K645,713.00 against the 1st and 2nd respondents given the fact that it was the appellant himself who had instructed the 1st respondent to deduct the amount in question and pay it over to the 3rd respondent by way of refunding the 50% commuted pension advance which had earlier been paid to the appellant by the 3rd respondent.

8.2.2 Mr. Kamfwa also urged us to dismiss, as lacking in merit, the appellant's arguments founded on the provisions of Section 31 of the Pension Scheme Regulation Act, Chapter 255 of the Laws of Zambia on the basis that the appellant's action did not come within the purview of that statutory provision.

8.2.3 Counsel argued in this regard that there was nothing which the 1st and 2nd respondents did which had been of the nature of an execution or attachment in order to justify the invocation of the statutory provision earlier cited.

8.2.4 Learned counsel accordingly invited us to dismiss the 4th ground of appeal in its entirety.

8.2.5 As to the 1st ground of appeal, Mr. Kamfwa's brief argument around this ground was that the lower court did not err whether in law or in fact but correctly directed itself when it dealt with the 1st and 2nd respondents' specific claims in the manner it did in relation to that of the 3rd respondent. We were accordingly urged to dismiss this ground for lack of merit.

8.2.6 As regards the 2nd ground of appeal, counsel for the 1st and 2nd respondents' brief reaction to the appellant's assertions in this ground was that the lower court properly evaluated the evidence which the parties had placed before his Lordship before arriving at the conclusion that it was the appellant who had been responsible for the actions which the 1st and 2nd respondents took relative to the money which became the

subject of the appellant's claims. Accordingly, we were urged to dismiss this ground.

8.2.7 As to the 3rd ground of appeal, learned counsel for the 1st and 2nd respondents refrained from responding to this ground as he opined that the same did not affect his clients.

8.2.8 Turning to the 5th and final ground of appeal, counsel supported the lower court for calling into question the professional conduct of the appellant who had been a trustee of and stood in a fiduciary position with the 2nd respondent as legal advisor. In this regard, counsel supported the trial court's view that by instituting the action in the court below in the manner that the appellant had and using the information which he had gathered when he was advising both the 1st and 2nd respondents, the appellant found himself in circumstances where his interest (in the matter) conflicted with his professional responsibilities towards the 1st and 2nd respondents.

8.2.9 Counsel accordingly urged us to dismiss this ground and, indeed, the entire appeal for want of merit.

8.2.10 For his part, Mr. Kabuka, learned counsel for the 3rd respondent, fervently argued against the appeal and in support of both the reasoning of the learned trial judge and the conclusion which that lower court reached. Counsel also proposed to present his arguments in the same order in which the appellant had presented them.

8.2.11 In opening his arguments around the fourth ground of appeal, Mr. Kabuka supported the court below for having dismissed the appellant's quest to recover K645,713.00 against the respondents.

8.2.12 The gist of Mr. Kabuka's contention around the 4th ground of appeal was that the deduction of the sum of K645,713.00 from the appellant's pension entitlement and its subsequent recovery in the manner earlier explained, was instigated by the appellant's own actions and conduct. In this regard, learned counsel identified the key findings of the trial court which fully supported its decision and conclusion in the eyes of the doctrine of estoppel.

8.2.13 The 3rd respondent's counsel further argued that not even

the appellant's invocation of Section 31 of the Pension Scheme Regulation Act, Chapter 255 of the Laws of Zambia could possibly avail any oxygen to the relief which the appellant was seeking, not least because of the appellant's failure to plead this statutory provision and lay appropriate evidence to support its invocation.

8.2.14 In taking the above position, counsel observed that

Section 31 of Chapter 255 could only be properly summoned in circumstances where a judgment or order has been obtained and a pension scheme member's contributions are targeted in execution of such judgment or order.

8.2.15 In the context of the matter at hand, counsel argued that

there had been no judgment and, consequently, no execution or attachment of any nature had arisen. For completeness, learned counsel argued that the K645,713.00 which was deducted from the appellant's pension entitlement and paid over to the 3rd respondent had been so paid in accordance with terms and conditions to which the appellant had submitted and pursuant to the appellant's own prompting.

8.2.16 Turning to the 1st ground of appeal, Mr. Kabuka's point of

departure was that the trial court was spot on with respect to the manner in which it had identified the cause of action which the appellant had pleaded as well as its analysis of the evidence which had been marshalled to support the appellant's claims. Counsel then went on to observe that the trial court properly directed itself when, on the faith of our decision in **Febby Nsanje & 38 Others v. Workers Compensation Fund Control Board**⁴, it decided that, having exited from his employ and recovered his benefits via early retirement, the appellant could not also seek to recover benefits on the basis of redundancy.

8.2.17 As regards the 2nd ground of appeal, the 3rd respondent's counsel contended that the trial court did not err and properly evaluated the evidence which had been laid before it. In particular, the lower court correctly directed itself with respect to all the relevant issues which had been properly raised in accordance with the guidelines which we pronounced in **William Harrington v. Siliya/Attorney-General**⁷ where we said that a court is only properly obliged or duty-bound to pronounce itself upon the relevant and necessary issues which are raised in a matter. For this

reason, counsel submitted that the trial court acted correctly when it opted against expending time on irrelevant and unnecessary issues.

8.2.18 As regards the 3rd ground of appeal, the 3rd respondent's counsel's simple argument was that this ground did not raise any issues which were substantively different from those which the appellant raised under his first ground of appeal.

8.2.19 Counsel further contended that it was totally disingenuous for the appellant, who, as a senior legal practitioner, was no ordinary litigant to contend that he had not known the correct formula for computing his separation package some 8 years after the event and well after he had acknowledged to have received his "*full and final*" payment and declared that he had no further claim against the respondents.

8.2.20 As to the 5th and final ground of appeal, counsel for the 3rd respondent fully supported the trial judge for admonishing the appellant for having instituted the action which was escalated to this court in circumstances which revealed a possible conflict of interest between his personal interests and his professional duty to his former client.

8.2.21 Learned counsel concluded his arguments by inviting us to take into consideration the submissions which he filed in the court below when determining this appeal which he urged us to dismiss with costs.

8.2.22 At the hearing of the appeal, the advocates for the respondents augmented their respective written arguments with brief oral submissions.

8.2.23 Mr. Kamfwa, the learned counsel for the 1st and 2nd respondents began his oral augmentation by drawing our attention to what counsel described as a clear nexus between the conditions under which the appellant had been serving when he was employed by the 3rd respondent and the conditions of the 2nd respondent. It was these conditions, counsel argued, which made it possible for the appellant to secure the advance against his pension entitlement in the manner he did.

8.2.24 Mr. Kamfwa went on to observe that, after securing the advance which he had sought, the appellant authored an email in which he instructed the 1st respondent to recover the advance from the 3rd respondent. Learned counsel concluded

his oral augmentation by reiterating his earlier invitation to have us dismiss the appellant's appeal for want of merit.

8.2.25 For his part, Mr. Kabuka, learned counsel for the 3rd respondent opened his oral augmentation by drawing our attention to the fact that the appellant was not an ordinary litigant in the sense that as legal officer, legal counsel and trustee in relation to the 2nd and 3rd respondents he was one of the architects of the 2nd respondent's rules which he invoked when he proceeded on early retirement.

8.2.26 Having regard to the foregoing, counsel noted that it was totally mischievous for the appellant to seek to attack rules which he had actively participated in bringing about.

8.2.27 Mr. Kabuka also reiterated his earlier contention that the appellant had breached his professional duties to the 2nd and 3rd respondents and that he properly deserved to incur the rebuke which he received from the learned trial judge.

We are grateful to counsel involved for their helpful exertions.

9.0 CONSIDERATION OF APPEAL AND DECISION

- 9.1 We have examined the judgment of the lower court in the light of the evidence which was laid before that court and the grounds of appeal which were canvassed before us. We propose to deal with each of the grounds of appeal in the same order in which counsel argued them before us.
- 9.2 The gist of the assertion which the appellant made under his 4th ground of appeal was that the trial court erred in law and fact when it failed to enforce the statute on pensions which forbids the attachment of pension contributions by a member or an employer and proceeded to hold that the appellant was estopped from seeking to recover the sum of K645,713.00 (which had been availed to the appellant in the way of a pension advance) from any of the respondents.
- 9.3 Learned counsel for the appellant cited Section 31 of the Pension Scheme Regulation Act, Chapter 255 as the relevant statutory provision which (allegedly) embodies the prohibition asserted above.
- 9.4 For convenience, we quote the section in issue again:

“Notwithstanding anything contained in any other law, where any judgment or order has been obtained against a member, no execution or attachment or process of any nature shall be issued against the contributions of a member or an employer except in accordance with the terms of the pension scheme and such contributions shall not form part of the assets of a member or an employer in the event of bankruptcy.”

- 9.5 In counsel for the appellant’s estimation, the statutory provision we have cited above outlaws the 3rd respondent’s conditions of service pursuant to which the appellant was availed a pension advance against his full pension entitlement.
- 9.6 Counsel further argued that even the appellant’s own email to the 1st respondent in which he had authorized the recovery of the advance in question was illegal adding that even the doctrine of estoppel could not affect the operation of the statutory provision earlier cited.
- 9.7 We must say, without the slightest hesitation, that the appellant’s arguments around his 4th ground of appeal are not only totally misconceived but represent a complete

misapprehension of the meaning and effect of Section 31 of the Pension Scheme Regulation Act, Chapter 255.

9.8 It is a matter of profound disappointment indeed that a simple, clear and straightforward statutory provision such as Section 31 of Chapter 255 can be the subject of the grave misapprehensions and misconceptions which characterize the appellants' arguments around the 4th ground of appeal.

9.9 To start with, the recovery of the pension advance from the appellant in the manner we disclosed early on in this judgment had nothing to do with "*any judgment or order*" against the appellant as Section 31 clearly envisages. Indeed, there was no "judgment" or "order" which had been secured against the appellant in respect of the advance in question.

9.10 Secondly, no "*execution or attachment*" had been issued against the appellant pursuant to any judgment or order to warrant the invocation of Section 31.

9.11 Clearly, the arrangement which the appellant, on the one hand, and the 1st and 3rd respondents, on the other, had entered into had nothing to do with the statutory provision

relied upon by the appellant in respect of his 4th ground of appeal. Simply put, Section 31 of the Pension Scheme Regulation Act, Chapter 255 seeks to insulate pension contributions against any form of execution or attachment which would otherwise flow from an entry of a money judgment.

As counsel for the respondents correctly argued, the trial judge was spot-on when he held that the recovery of the advance in question arose consensually by all the parties who were involved and had nothing to do with Section 31.

9.12 As to the 1st ground of appeal, the appellant's counsel sought to fault the trial court on the alleged basis that it did not segregate and appropriately deal with the different relief which had been pleaded and appropriately supported by the appellant's evidence during the trial.

9.13 We must say, at once, that we find the criticism against the trial judge totally unjustified in the sense that the learned judge properly identified and considered the redress which

the appellant was seeking in the light of the evidence which the court examined.

9.14 It was very clear from the manner in which the appellant's arguments were projected that the appellant was, as it were, 'casting his net wide' and, rather unjustifiably, hoping to reap from two mutually exclusive modes of employment exit. Indeed, the trial judge was able to see through what the appellant was seeking to achieve and availed himself of the guidance which we offered in **Febby Nsanje & 38 Others v. Workers Compensation Fund Control Board**⁴ namely, that the mode of an employee's exit would determine what benefits the employee can receive. For the removal of any doubt, there was no suggestion, not even a faint or mild one, in **Febby Nsanje**⁴, that an employee can be the subject of two or more employment exit modes and, consequentially, can be a beneficiary of each of the different types of compensation which the law permits for each one of the exit modes in question. Such an eventuality, needless to say, would not only lead to double (or triple etc.) compensation (in favour of

the employee) but double jeopardy (in relation to the employer) each of which is legally objectionable.

9.15 In the context of the matter at hand, the appellant successfully sought one employment exit mode, namely, to be retired early in accordance with Clause 7.3 of the conditions under which he had been serving. The appellant was, accordingly, duly paid in accordance with his chosen mode of exit.

9.16 Astonishingly, when the appellant instituted his action in the court below, he deliberately turned a blind eye to what had transpired as revealed in 9.15 and sought to recover terminal benefits on the basis of Clause 7.5 – which had nothing to do with the mode of employment exit which he had successfully invoked - as it dealt with employees proceeding on redundancy.

9.17 Having regard to what we have highlighted above, we have no doubt that the trial judge was on firm ground when he declined to grant the appellant a second separation package founded on redundancy after earlier receiving his full

entitlement pursuant to his early retirement exit. The 1st ground accordingly fails.

9.18 Turning to the 2nd ground, the appellant's grievance under this ground was that the trial court did not undertake a balanced evaluation of the evidence which was placed before it and merely dwelt on the flaws relating to the appellant while ignoring the flaws in the respondent's evidence. In particular, the appellant complained that the trial judge ignored his assertions relating to the alleged illegalities around the 3rd respondent's conditions of service which, as things turned out in this matter, permitted the recovery of the pension advance.

9.19 With all due respect to counsel concerned, we do not see much value in the appellant's arguments around this ground beyond what we earlier considered in the context of the 4th ground of appeal. Indeed, we consider that the illegality argument which has been projected under this ground was fully addressed when we considered ground 4.

9.20 With regard to counsel for the appellant's assertion, founded on the passage we drew from **Achiume**⁶, that the trial court

completely ignored the provisions of the Income Tax Act, Chapter 323 which provides, in its Fourth Schedule, that “*no contributions made to the Fund or Scheme by the employer shall be returnable to him*”, we have been at pains to appreciate in which way the trial judge failed to give a “*balanced evaluation of the evidence*” which was laid before him. Indeed, our anxiety is more than justified by the fact that, instead of pointing to *the evidence* (which was really the subject matter of the passage we drew from **Marcus Achiume**⁶) which counsel claimed to have been the subject of the alleged ‘unbalanced evaluation’, counsel pointed to some statutory provision in the Income Tax Act!

9.21 In our view, the appellant’s counsel would have been more helpful if, consistent with the maxim: ‘*he who alleges/asserts must affirm*’, he had supported his allegation (relating to ‘unbalanced evaluation’ of evidence) with ***the evidence*** in issue. Ground two fails.

9.22 As to the 3rd ground of appeal, we agree with counsel for the respondent’s observation that this ground is a mere recasting of the 1st ground.

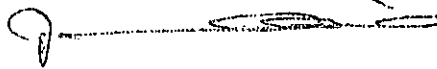
9.23 At the risk of being tautologous and, as counsel for the respondent correctly argued, the 3rd respondent's conditions of service provided for various modes of exit for employees. Each one of these employment exit modes had corresponding separation packages. The appellant opted for early retirement and was availed the prescribed package for this mode of exit. The appellant accepted the package he was paid as having represented "*full and final*" settlement of all sums which had been due to him and declared that he had no further claims against the 3rd respondent. Under these circumstances and, in the light of the legal position which we articulated in **Nsanje**⁴, it was wholly mischievous for the appellant to have set out to recover a second separation package founded on redundancy, which was a totally different exit mode from the one he had proceeded under some eight years earlier. We dismiss this ground.

9.24 As to the 5th ground of appeal, we agree with the conclusion of the trial court that although the appellant had ceased to be an employee of the 3rd respondent, the nature of his role (as legal counsel and trustee) while he was still in service was

such that the professional duties which he owed the 3rd respondent as its former legal advisor were of a continuing nature and had survived the cessation of the employment relationship.

9.25 Accordingly, we entirely agree with the court below that, having regard to the issues which were at play in that court, the appellant had placed himself in a position where his personal interests were pitted against his continuing professional duties to the 3rd respondent. Under these circumstances, the trial court's decision to admonish the appellant was amply justified.

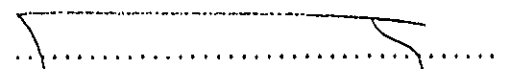
9.26 In sum, this appeal fails in its entirety. The respondents will have their costs both here and in the court below.



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I.C. MAMBILIMA
CHIEF JUSTICE



.....
M. MALILA
SUPREME COURT JUDGE



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M. MUSONDA, SC
SUPREME COURT JUDGE