IN THE SUPREME COURT OF ZAMBIA **Appeal No. 2 of 2022**

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

NYAMBE MARTIN NYAMBE	**1ST APPELLANT**
GABRIEL MWELWA & 24 OTHERS	**2ND APPELLANT**
LEVYSON LWESELA	**3RD APPELLANT**
EVANS MWENYA	**4TH APPELLANT**
KASONGO LINGSON AMOS & 64 OTHERS	**5TH APPELLANT**

AND

KONKOLA COPPER MINES PLC **RESPONDENT**

(IN LIQUIDATION)

Coram: Malila CJ, Wood, and Mutuna JJS
On 9th May, 2023 and 19th October, 2023

FOR THE APPELLANTS: Mr. S. A. G. Twumasi, Kitwe Chambers.

FOR THE RESPONDENT: Mr. Elijah C. Banda SC, Mr. Tundo Chibeleka, Messers ECB Legal Practitioners.
Mr. Maxwell Mainsa, Ms. Glory Chipoya -In-House Counsel KCM.

J U D G M E N T

Wood JS, delivered the majority Judgment of the Court.

Cases referred to:

1. *Colgate Palmolive (Zambia) Inc v Shemu and Others, Appeal No. 11 of 2005 (unreported)*
2. *Rosemary Ngorima and 10 Others v Zambia Consolidated Mines Appeal No. 97 of 2000*
3. *Lungu v Kalikeka, Appeal No. 114/2013*
4. *Oliver Chinyama v Spectra Oil Corporation Limited Appeal No. 18/2018*
5. *Jacob Nyoni v The Attorney General (2001) Z.R. 65*
6. *Nkhata and 4 Others v The Attorney General of Zambia [1966] Z.R. 124*
7. *Attorney General v Thixton (1966) Z.R. 10*
8. *Godffrey Miyanda v The Attorney General (1985) Z.R. 185*
9. *GDC Logistics Zambia Limited v Joseph Kanyanta & 13 Others, Selected Judgment No. 17 of 2017.*
10. *Zambia Consolidated Copper Mines v Jackson Munyika Siame & 33 Others (2004) Z.R. 193*
11. *Bank of Zambia v Vortex Refrigeration Company and Dockland Construction Company Limited Appeal No. 004/2013*
12. *Kitwe City Council v William Nguni (2005) Z.R. 57*
13. *Musonda Mutale v African Banking Corporation Limited SCZ/08/05/2020 or [2022] ZMSC 29*
14. *Bailey v De Crespigny (1869) LR 4 QB 180*
15. *ZCCM Investments Holdings v Cordwell Sichimwi [2017] ZMSC 51*
16. *Zesco Limited v Alexis Mabuku Matale [2016] ZMSC 40*

Legislation referred to:

1. *The National Pension Scheme Act Cap. 256 ss. 2, 18*
2. *The National Pension Scheme (Amendment) Act No. 7 of 2015*
3. *The Income Tax Act Cap. 323*
4. *The Income Tax Act (Amendment) Act No. 19 of 2015*
5. *Constitution of Zambia (Amendment) Act No. 2 of 2016 Articles 187(1), 187(3)*
6. *Interpretation and General Provisions Act, Chapter 2, ss 13, 14 (3)*
7. *English Law (Extent of Application) Act, Chapter 11 s. 2*
8. *The Employment Code Act No. 3 of 2019 s. 36 (1), (3)*

Other sources referred to

1. *W. Sithole & C. Chungu. A guide to Employment Law in Zambia, UNZA Press, 2021.*

Introduction

1. This is an appeal against a judgment of the Court of Appeal which held inter alia that the appellants were not entitled to be

retired on the basis of legislation which was enacted after they had executed contracts of employment. The question falling for determination and at the core of this appeal is simply, whether amendments to law have retrospective application? I have been asked to deliver the judgment for the majority. Our learned brother Mr. Justice Mutuna who has dissented, will deliver the minority judgment.

Background

2. The background to the matter is that the appellants were engaged to work for the respondent company on diverse dates and in different capacities, the earliest being in 1985. Their respective contracts of employment stipulated that they were engaged on a permanent and pensionable basis and would retire at age fifty-five. Retirement at that age was also as provided by the relevant laws that were in existence at the time being, the **National Pensions Scheme Act No. 40 of 1996 Cap. 256;** the **Constitution of Zambia;** and the **Income Tax Act, Cap. 323 of the Laws of Zambia.**

3. On 14th August, 2015 the **National Pensions Scheme Act No. 40 of 1996** was amended by the **National Pension Scheme**

(Amendment) Act, No. 7 of 2015 ("Act No. 7 of 2015"). There were two notable amendments relevant for determination of the issues in this appeal. The first, related to definitions provided in **Section 2** which amended the retirement age to now read that, *"pensionable age"* means the age of sixty." The second amendment made was to **Section 18** which now provided that a member can retire upon attaining *"pensionable age"*. Sub-section **18 (a),** provided for early retirement and stated that a member *may* retire at fifty-five years, on giving twelve months' prior notice to the employer. Late retirement at sixty- five years, was provided for in sub section **18 (c)** on the giving of twelve months' prior notice but subject to the employer's approval.

4. The appellants on diverse dates, but in the period spanning between 2015 to 2016, attained age fifty-five and the respondent, in accordance with the terms of their contracts of employment, individually gave them six months' prior notice, following which they were retired. The appellants protested their said retirements, contending that they ought to have been retired at age sixty as provided by the new law which was then in force.

Proceedings before the High Court and decision

5. The appellants pursued their grievance by filing a Notice of Complaint in the **Industrial Relations Division** of the **High Court (IRD),** claiming that the respondent had prematurely terminated their contracts of employment in bad faith, irregularly, unfairly, wrongfully, with spite and malice.

6. Upon trial of the matter, the learned High Court Judge agreed with the appellants and found that they had indeed been prematurely retired at fifty-five years and that their retirement was unlawful, null and void for being contrary to the laws then in force, which placed normal retirement age at sixty years.

7. It is premised on those findings that the appellants were awarded payment of retirement benefits they would have received had they attained sixty years; damages for breach of retirement laws equivalent to six months' salary, allowances and other perquisites.

Proceedings in the Court of Appeal and decision

8. Dissatisfied with the IRD judgment, the respondent appealed to the Court of Appeal on five grounds, faulting the learned trial Judge as having erred in both law and fact when;

[1] He held that the respondent prematurely retired the appellants at the age of fifty-five years.

[2] After citing Article 187 (3) of the Constitution, as amended by Act No. 2 of 2016, he held that the National Pension Scheme (Amendment) Act, No. 7 of 2015 as well as the Income Tax (Amendment) Act, No. 19 of 2015 was the law in force at a later date and thus applicable to the appellants, retrospectively.

[3] He held that the new retirement age of sixty, applied to the appellants, as opposed to fifty-five which was incorporated in the appellants' contracts of employment.

[4] He deemed the appellants as having been retired at sixty and ordered payments of the pension benefits, they would have received at the age of sixty which amounts to unjust enrichment.

[5] He awarded 6 months' salary as damages for breach of retirement laws and or contracts, when there is no such measure at law.

9. On the first ground of appeal, the Court of Appeal determined that the learned High Court Judge misdirected himself when he found that the appellants were prematurely retired at age fifty-five. In coming to that conclusion, the Court of Appeal considered that the parties had agreed to the retirement age of fifty-five years in their various contracts of employment which were binding on them. The case of **Colgate Palmolive (Zambia) Limited v Shemu and Others**[1] was cited as authority for the holding.

10. Regarding grounds two and three of the appeal on whether, **Act No. 7 of 2015** and the **Income Tax (Amendment) Act, No. 19 of 2015 ("Act No. 19 of 2015")** which both introduced the new

pensionable retirement age of sixty years applied to the appellants. The Court of Appeal maintained that the appellants' contracts of employment provided for fifty-five years as the retirement age which age was binding on the parties.

11. The Court of Appeal held that the amendments only affected those of the employees who never made any irrevocable options to retire at the age of fifty-five before the amendment and those who joined after the amendment. It further found that the appellants had accrued rights based on their conditions of service and could not rely on the retirement age as amended which did not apply to them. Our decision in **Rosemary Ngorima and 10 Others v Zambia Consolidated Copper Mines Limited**[2] was relied on for that finding.

12. Against the backdrop of the finding that retirement at age fifty-five was an entrenched term of the appellants' contracts of employment, the Court of Appeal in grounds four and five of the appeal, held that the trial court erred when it deemed the appellants to have been retired at the age of sixty years. The order made for payment of pension benefits the appellants

would have received had they worked up to sixty years was, as a result, found to amount to unjust enrichment.

13. On the award of six months' salary, allowances and perquisites, the Court of Appeal held that the trial court misdirected itself when it made the said awards, as the appellants had not proved that their respective contracts were breached by the respondent so as to entitle them to damages.

14. Having found that the appellants were properly retired at age fifty-five, the cross-appeal seeking enhancement of the damages awarded by the IRD, from six months' salary and other perquisites to twenty-four months, was equally dismissed for lack of merit.

Grounds of Appeal to this Court

15. Unhappy with the Court of Appeal judgment entered in favour of the respondent, the appellants have now appealed to this Court on seven grounds, contending that the Court of Appeal misdirected itself in law and fact;

[1] *When it held that the appellants were not retired prematurely at the age of fifty-five years which was contrary to the facts and law.*

[2] *When it held that the appellants cannot rely on the retirement age in the amended National Pension Scheme Act as it does not apply to them when the said amendment does.*

[3] *When it correctly held that the National Pension Scheme (Amendment) Act No. 7 of 2015 and Income Tax (Amendment) Act No. 19 of 2015 only affected those who never made irrevocable options to retire at the age of fifty-five years before the amendment and those who joined the respondent after the amendment, but applied the said holding to the facts of this case wrongly.*

[4] *When it held that the appellants were awarded pension benefits for periods that they did not work and this amounted to unjust enrichment, when the High Court Industrial/Labour Division deemed the same to be an appropriate remedy of compensation to exercise in its discretion under section 85A of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.*

[5] *When it held that the appellants did not establish that their respective contracts of employment were breached by the respondent and were therefore not entitled to damages when the appellants' contracts of employment were governed by the retirement laws of the Republic of Zambia and the same constituted part of the contracts of employment.*

[6] *When it exercised its discretion to award costs to the respondent in the High Court and Court of Appeal without any reason and against the established traditional principle of sparing former employees from costs in respect of failed litigation from matters emanating from the High Court Industrial/Labour Division.*

[7] *When it dismissed the appellants' cross-appeal for lack of merit, when the said appeal of the respondent should not have succeeded by reason of the grounds of appeal advanced herein from [1] to [6].*

Appellants Arguments in Support of the Appeal

16. Heads of argument and a list of authorities were filed by learned Counsel for the appellants in support of the grounds of appeal. In ground one of the appeal, it was argued that contracts are grounded in common law and the application of common law is subject to the provisions of the Constitution of Zambia and any

other written law. The submission was that contracts cannot oust what written law provides for as the retirement age. Reliance for the submission was placed on **Articles 187(1), 187(3), 266 of the Constitution of Zambia;** and **section 2 of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia** as well as the decision of this Court in the case of **Lungu v Kalikeka.**[3]

17. Learned Counsel for the appellants went on to argue that, common law and particularly contract law, can only be applied where there is a lacuna in the Constitution or any of our written law. Hence, the moment the law on retirement age was amended, the appellants' contracts ought to have been equally amended so as to conform with the new law. The submission was that the Court of Appeal misdirected itself in disagreeing with the trial court, that the appellants were retired prematurely.

18. It was also learned Counsel's contention that the Court of Appeal did not properly address its mind as to whether the **National Pension Scheme Act of 1996** was applicable to the parties or not. That **Section 2** of the said Act, as amended by

Act No. 7 of 2015, defined pensionable age as being sixty years, and that **Section 13** of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**, provides that a repealed written law remains in force until the substituted provisions come into operation.

19. The submission on the point was that, as of 14th August, 2015 the effective retirement age for the appellants was sixty years, as amended by **Act No. 7 of 2015**. That it would be a recipe for anarchy if parties can allege that they can opt out of the law by way of contract. In support of that proposition, the Court of Appeal decision in **Oliver Chinyama v Spectra Oil Corporation Limited**[4] was relied upon as held that, prior to the amendment of the **Employment Act**, an employer could have a notice clause in their contracts of employment and could terminate the employment contract without citing any reason for doing so.

20. However, by amendment **Act No. 15 of 2015**, an employer could no longer hide behind a notice clause and invoke it without giving a valid reason for termination. The net effect as held by the Court of Appeal was that following the amendment,

employment contracts with provisions for termination by notice without giving reasons were in conflict with the provisions of **Section 36 (1)** and **(3) of the Employment Act**, and were unlawful.

21. It was submitted that, the principles of law in the **Oliver Chinyama**[4] case are the same as those in the present appeal, save that they were *in casu*, differently applied by the same court. That the record needs to be set straight so as to correct the position of the law, on whether contract law can oust written laws of the Republic of Zambia.

22. That argument was stretched to ground two of the appeal and the submission was that, it was a misdirection for the Court of Appeal to have found that the appellants cannot rely on the retirement age provided in the **National Pension Scheme Act,** as amended. That the amended statute clearly applies to the parties and the applicability was not an issue in both lower courts.

23. Coming to ground three of the appeal, learned Counsel submitted that the record shows none of the appellants made an irrevocable option to retire at fifty-five years and that the

respondent did not accord the appellants such an option. The case of **Jacob Nyoni v The Attorney General**[5] was called in aid of the submission that, **Act No. 7 of 2015** only affects those who never made irrevocable options to retire at the age of fifty-five before the amendment and those who joined the respondent company after the amendment.

24. The decision of this Court in **Nkhata and 4 Others v The Attorney General of Zambia**[6], amongst others, was cited as authority for the submission that an appellate court will not reverse findings of fact made by a trial court, unless it is satisfied that the findings in question were perverse or made in the absence of relevant evidence. Counsel went on to submit that, the Court of Appeal after quoting the **Jacob Nyoni**[5] case, applied the principle incorrectly by reversing the finding that none of the appellants had made an irrevocable option to retire at fifty-five years.

25. According to Counsel, the appellants had accrued rights to retire at fifty-five years as early retirement and a right to retire at sixty years as the revised normal retirement or pensionable age, as that was the law in force at the time that they attained

their respective retirement ages. Learned Counsel for the appellants noted that they were well aware of the import of **Section 14 (3)** of the **Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia,** which in essence provides that, where a later written law repeals another existing written law, such repeal shall not affect the operation of the repealed written law or affect any privilege, obligation or liability acquired, accrued or incurred under the written law so repealed.

26. It was however, argued that the appellants' right to retire at the age of fifty-five required them to attain that age, which they had not yet reached by 14th August, 2015 when the retirement age was revised. The appellants cited the cases of **Attorney General v Thixton**[7] and **Godfrey Miyanda v The Attorney General**[8] for the submission that, the law preserves rights acquired or accrued which are specific rights, given on the happening of an incident or event, specified in the statute.

27. In that regard, learned Counsel contended that when the appellants reached the age of fifty-five, after 14th August, 2015 there was an accrued right to retire at fifty-five years as early

retirement and a right to retire at the age of sixty years, as the revised retirement or pensionable age in accordance with **Act No. 7 of 2015**. That this position is supported by the **Constitution of Zambia Article 187 (3) (a)** which clearly states that;

> *"The law to be applied with respect to a pension benefit:*
> *(a) Before the amended Constitution is the law that was in force immediately before the date on which the pension benefit was granted, or the law in force at a later date that is not less favourable to that employee;"*

28. In ground four of the appeal, the argument was that the Court of Appeal erred when it held that the appellants were awarded pension benefits for periods that they did not work, which amounted to unjust enrichment. It was submitted that, the **Industrial and Labour Relations Act, Cap. 269** in **Section 85A** empowers the IRD to grant any remedy it considers just and equitable. As authority for the submission, counsel relied on the case of **GDC Logistics Zambia Limited v Joseph Kanyanta & 13 Others.**[9]

29. On the contention that laws form part of employment contracts, which was the subject of ground five of the appeal, the appellants argued that it is trite law that the statutes may imply

certain terms and conditions of employment. That the **National Pension Scheme Act,** is one such statute that implies the retirement age of employees and that any subsequent changes to the Act, do have an impact on employment related matters.

30. On the issue of costs, which was the subject of ground six of the appeal, the argument was that this Court has in various decisions not ordered costs against former employees in failed litigation that emanated from the IRD. That the Court of Appeal was unfair and had gone against this well-established principle when it condemned the appellants to costs, despite the appellants having been successful before the trial court.

31. Lastly, in ground seven of the appeal, the submission was to the effect that, the Court of Appeal should have considered the cross-appeal and determined it in the appellants' favour, if it agreed with the same reasons now advanced by the appellants in grounds one to six of their appeal. The appellants prayed that the appeal be allowed with costs.

Respondent's Arguments in opposition to the Appeal

32. In its written arguments filed in response to the appeal, the respondent contended that the Court of Appeal was on firm

ground when it reversed the findings of the trial court, found merit in the respondent's appeal, and entered judgment in its favour.

33. Specifically addressing grounds one and two of the appeal, the respondent submitted that an employment contract is different from an ordinary contract. That the reason for this is anchored in the principle of freedom of contract that should not offend provisions of employment legislation. The learned authors of **'A Comprehensive Guide to Employment Law in Zambia'**, were cited for the submission. It was nonetheless, contended by learned Counsel for the respondent that, it must be borne in mind that employment legislation as well as the Constitution are still subject to amendments in order to meet the needs of society better. That the law therefore, gives guidance on the effect such amendments will have on contractual relations entered into before they come into effect.

34. In that regard, the submission was that the appellants could not rely on the **Constitution of Zambia** as amended by **Act No. 2 of 2016**, which only came into effect after they had already signed their contracts of employment that were entered into

between 2010 and July, 2015. It was contended that the said contracts provided for normal retirement at the age of fifty-five, which was informed by the pension legislation obtaining at the time, and included the **Constitution of Zambia**, as amended by **Act No. 18 of 1996;** the **National Pension Scheme Act, Cap. 256;** and the **Income Tax Act, Cap. 323**.

35. That the last two pieces of legislation, referred to at paragraph 34 provided for fifty-five years as the retirement age. The respondent caused that age to be incorporated as a specific term of its contracts of employment with the appellants. Retirement at age fifty-five was thus, an entrenched condition of employment which was freely entered into by the appellants and was binding on them, as per our decision in **Rosemary Ngorima**[2].

36. Counsel for the respondent submitted that, the appellants' proposition that after the passing of **Act No. 7 of 2015**, which amended the retirement age from fifty-five to sixty years, their employment contracts ought to have been amended to reflect this, disregards the freedom to contract and offends the law that was then in existence. It is for this reason that the principle of

freedom of contract should not offend provisions of employment legislation.

37. It was submitted that the legislative amendments notwithstanding, the employment contracts remained valid, and that there are established and settled principles of law and statute that guide on the effect of such changes and how to apply them when they occur.

38. **Section 14 (3)** of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia** and the case of **Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 Others**,[10] were cited as authority pointing to the presumption that legislation shall not apply retrospectively, unless a retrospective effect is clearly intended and explicitly stated. That **Act No. 7 of 2015** did not abrogate the accrued right to retire at fifty-five years which was entrenched in the appellants conditions of service and could not be altered other than by mutual consent.

39. It was further argued that, even assuming the appellants relied on **Article 187 (3) (a) of the Constitution of Zambia,** the same appears to reinforce the principle of non-retrospective

application of the law, as it clearly provides that, the law to be applied with respect to pension benefits is the law that was in force immediately before the commencement of the new law.

40. It was submitted that the appellants were conferred with their pension benefits upon signing their respective contracts of employment, and that the law in force at the time provided for retirement at the age of fifty-five years which was duly incorporated in their said contracts.

41. The argument regarding **Article 187 (3) (b) of the Constitution** which deals with pension benefits after the commencement of the Constitution of 2016, was that the word 'or' used in the provision is disjunctive. According to Counsel, this means that where there is no law in force immediately before the date on which the pension benefit is granted, the employers and employees revert to what would be considered the law at a later date that is not less favourable to that employee. The submission was that, as a legal regimen that provided for pension benefits and as the retirement age was already in existence, the option in **Article 187 (3) (b)** cannot apply to the matter at hand.

42. The respondent pointed out that the appellants have also cited **Section 13 of the Interpretation and General Provisions** in contending that when **Act No. 7 of 2015** came into force, their employment contracts ought to have been amended. The submission on the point was that, **Section 13** ought to have been read together with **Section 14 (3)** of the same Act, in order to appreciate the overall effect of the repeal of written laws.

43. The respondent also referred to the Court of Appeal decision of **Spectra Oil Zambia Limited,**[4] which the appellants argued, raised the same principle of law of retrospective application as the case in *casu,* but for the fact that it was there, applied differently. The respondent countered that the appellants have misapplied and misconstrued the holding of the Court of Appeal in that, prior to the enactment of the **Employment (Amendment) Act No. 15 of 2015**, the **Employment Act Cap. 268** already had a provision that enabled an employer to terminate the contract of an employee and there were various means the termination could be effected under **section 36**.

44. It was submitted that the **Spectra Oil Zambia Limited**[4] case is thus distinguishable from the one *in casu* as it was not

concerned with retrospective application of the amended Act, as to affect accrued rights. That the said case merely simplified or expounded the language as relates to termination of employment contracts, but did not extinguish the contractual right of the employer to terminate.

45. It was further argued that applying the law retrospectively, would have a substantial prejudicial effect not only on the respondent in the present appeal, but also to employers across the nation. The submission was that, the Court of Appeal did address its mind as to whether the **National Pensions Scheme Act No. 40 of 1996** was applicable to the parties and it found that it was, as it was agreed that the retirement age would be fifty-five years, and also that **Act No. 7 of 2015** and **Act No. 19 of 2015** did not apply to the appellants as the law does not operate retrospectively. Hence, the appellants cannot rely on the retirement age contained in the said Acts.

46. With respect to ground three, the respondent's position was that, the appellants failed to highlight the exact finding of fact made by the High Court which they argue was reversed by the Court of Appeal. The submission, in that regard, was that there

was no finding made by the High Court stating that the appellants did not make irrevocable options to retire at fifty-five.

47. It was argued that, the irrevocable option to retire at fifty-five was exercised by the appellants at the time when they entered into their contracts of employment with the respondent. That a protest at a later date by one party to the terms of the contract does not, in and of itself, change the terms agreed upon in the contract.

48. Counsel submitted that, the finding by the Court of Appeal that the amendment that changed the retirement age only applied to employees who had not made an irrevocable option to retire at fifty-five and those who joined the respondent after the amendments is not a finding of fact, but a settled principle of law on the applicability of amendment laws. A ruling in the case of **Vortex Refrigeration**[11] was cited as authority. The case of **Colgate Palmolive (Z) Inc**[1] was further relied upon for the submission that, the Courts will treat contracts entered into freely and voluntarily as binding on the parties.

49. It was further submitted that the appellants have completely

misunderstood what an accrued right is and misapplied the principle by contending that, their right to retire could only accrue when they turned fifty-five and that when the amendments had come into force, they had not yet attained that age. The respondent relied on **Section 14 (3) (a)-(c)** of the **Interpretation and General Provisions Act,** for the submission that, the right to retire at age fifty-five accrued to the appellants at the time they entered into their contracts of employment. That there is no condition in their contracts stating that the appellants would only decide when to retire upon turning the age of fifty-five.

50. It was submitted that, the subsequent changes in the law were not meant to change the contractual position of the parties. That the appellants had already satisfied the conditions needed to acquire the right to retire at age fifty-five at the time when they freely and voluntarily entered into employment contracts with the respondent. The respondent underscored the point that to hold otherwise, would result in supporting the appellants' proposition that parties under a contract are not

bound by the terms they agree between themselves until time to perform arrives, which was flawed.

51. On ground four, relating to the award of pension benefits to the appellants for periods not worked as amounting to unjust enrichment, the case of **Kitwe City Council v William Nguni**[12] was relied upon. This Court there, categorically stated that it was unlawful to pay an employee a salary or pension benefit for a period not worked, as it amounts to unjust enrichment.

52. With reference to our decision in **GDC Logistics Zambia Limited**[9] where we guided that the IRD can make an order or award in accordance with **Section 85A of the Industrial Relations Act**, the respondent's submission was that, the award or order made must be rooted in both law and fact. he submitted that there was no basis in law or fact, for the appellants to be awarded pension benefits for periods not worked which constitutes unjust enrichment.

53. On grounds five and seven, the respondent gave an example of **section 138 (2), (5) in the Employment Code, Act No. 3 of 2019** which expressly provides for contracts of employment made prior to the commencement of the Act that are

inconsistent with the new law, to be regularized within one year of the Act coming into force.

54. The submission on the point was that this was done in recognition of the need for a transitional period to properly effect the new law. That contracts concluded before the enactment of the new law are sacrosanct and the amendment did not automatically apply to them.

55. In comparison, it was noted that **Act No. 7 of 2015** and **Act No. 19 of 2015** both contain no such transitional provisions deeming amended laws as automatically applicable to contracts entered into earlier. The submission was that the appellants had misapprehended the law and decision made by the Court of Appeal. That without transitional provisions and a deeming section, the appellants' employment contracts cannot automatically incorporate the amendments. Counsel submitted that ground five lacks merit, and that the rationale in the **Jacob Nyoni**[5] case to uphold the retirement age agreed by the parties should prevail.

56. On ground six of the appeal relating to costs, the respondent acknowledged that generally, a successful party should not be

deprived of his costs unless their conduct during proceedings merits the court's displeasure, or where their success is more apparent than real. The submission however, was that the Court of Appeal considered the circumstances of the present case, key among them being that there are over 64 appellants seeking to benefit from the judgment. Hence, that there was a great stretch to defend the appeal.

57. The respondent also referred to **Rule 44 of the Industrial and Labour Relations Rules** and opined that, in recent decisions of this Court there has been departure from the said rule, such as our decision in **Musonda Mutale v African Banking Corporation Limited**[13] where costs were awarded outside the rule. We were urged to side step **Rule 44** on the basis that the IRD should be somehow protected from 'being used to abuse' the court process. It was submitted that, the Court of Appeal was on firm ground in ordering costs against the appellants and that we should uphold that order.

Appellants' Arguments in Reply

58. The appellant's filed heads of argument in reply to those of the respondent and on grounds one and two, the contention was

that in various authorities, the courts have struck down existing contracts that are in conflict with an enactment. To illustrate the point, reference was made to the English case of **Bailey v De Crespigny**[14] where the court held that the contract was frustrated by a later amendment to the law.

59. The appellants reiterated the argument that in the case of **Jacob Nyoni,**[5] that this Court made it clear that an enactment of legislation can affect an existing contract unless one party makes an irrevocable option where it is so provided. That Mr. Nyoni had made an irrevocable option to retire at sixty and the new law providing for retirement at fifty- five years did not take away his right to retire at sixty years. By parity of reasoning, it was submitted that, since the appellants did not exercise an irrevocable option or any option at all to be retired at fifty-five years, they were entitled to be retired under the new law.

60. It was further argued that pursuant to **Article 187 (3) (a) of the Constitution**, the principle of retrospective application of the law does not arise as the benefit accrued after the commencement of **the Constitution (Amendment) Act** and **Act No. 7 of 2015**, which is the date that the pension benefit

was granted. That since both pieces of legislation came into force at a later date and are more favourable to the appellants, they are the legal regimen that govern the retirement age which is now sixty years and applicable to the appellants.

61. The submission was that there is no right of the appellants that had accrued and would have been extinguished by the revised normal retirement age of sixty years by **Act No. 7 of 2015**. It was therefore correct for the appellants to choose to exercise their option under the law pursuant to which they wished to retire, as provided by **Article 187 (3) (b) of the Constitution.** The appellants again alluded to the **Oliver Chinyama**[4] case as an example of a law (the amended Employment Act), that applied retrospectively, to contracts already concluded.

62. It was submitted in that respect that, with effect from 14th August, 2015 **Act No. 7 of 2015** revised the retirement age to sixty years and the said law was in force at the time that the appellants were prematurely retired by the respondent. That although the Constitution does not provide for a retirement age, it does provide for the law to be applied with respect to a pension

benefit and that the principle of freedom of contract is subject to the Constitution of Zambia and any other written law.

63. In the rest of the copious arguments in reply, the appellants maintained their earlier position that there was no condition or circumstance warranting the Court of Appeal to reverse the findings of fact made by the High Court, stating that, none of the appellants had made or exercised an irrevocable option to retire at fifty-five years.

Consideration of the Appeal and Decision of this Court

64. We have considered the record of appeal, the heads of argument in support and in opposition to the appeal made by counsel for the parties on either side and the law to which we were referred.

65. Although the appellants have launched seven grounds of appeal, the view we take is that the said grounds, save for ground six on costs, all hinge on determination of the questions: (i) whether the appellants were bound to retire at fifty-five years as stipulated in their contracts of employment and in line with applicable legislation at the time of their engagement/commencement of employment; or (ii) whether the new mandatory retirement age of sixty years as provided in

amendment **Act No. 7 of 2015** was retrospectively, applicable to the appellants?

66. In order to answer the questions posed, we will consider the general position of the law with regard to retrospective application. The learned author of **Bennion on Statutory Interpretation, 6th Edition**, **Jones, O., at page 291**, has this to say:

> ***"The true principle is that lex prospicit non respicit, (law looks forward and not back). Retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."*** (boldfacing for emphasis supplied)

67. This Court has been confronted with the issue of retrospective application of laws previously. When the question arose in the case of **Jackson Munyika Siame & 33 Others**[10] and more recently, in **ZCCM Investments Holdings v Cordwell Sichimwi**[15] our holding was that, it is a well settled presumption that any legislation is not intended to operate

retrospectively but prospectively, particularly so, where the enactment would have prejudicial effect on vested rights.

68. Against that backdrop of the law restating the principle that generally, law does not apply retrospectively, evidence on record in the present appeal shows that it was not an issue in contention that upon engagement by the respondent, each of the appellants' individual contracts of employment provided for fifty-five years as the retirement age as provided by the relevant laws in existence at the time. The appellants however, argue that the pension benefit accrues on attaining retirement age as that is when it is granted. That having attained their respective retirement ages after the new law was in force, this is the law applicable to them. **Article 187 (3) (a) and (b) of the Constitution of Zambia,** was relied upon which states that:

"The law to be applied with respect to a pension benefit –

(a) Before the commencement of the Constitution, shall be the law that was in force immediately before the date on which the pension benefit is granted or the law in force at a later date that is not less favourable to that employee, and;

(b) *After the commencement of the Constitution, shall be the law in force on which the pension benefit was granted or the law in force at a later date that is not less favourable to that employee."*

69. To the extent of relevance to the matter at hand, the word *'grant'* in **Black's Law Dictionary** is defined as, *'to give or confer something with or without compensation, or to formally transfer by deed or other writing, property.'* It is clear from this definition of the word *'grant'* that the word *granted* as used in **Article 187 of the Constitution** simply means a pension benefit that has already been 'given', 'conferred' or 'vested' to an employee to whom the benefit is awarded by way of contract or by law.

70. We find the argument that the appellants' right to retire at the age of fifty-five years had not accrued by 14th August, 2015 and only did so after the said date, as spiritedly argued by Counsel for the appellants, most disingenuous to say the least. The appellants by that argument are merely attempting to tie their entitlement to a pension benefit, by placing reliance on a future legislation that was not within their contemplation at the time of contracting. In the **Jacob Nyoni**[5] case, this Court underscored the need to uphold contractual obligations. Non retrospective application of the law was amplified in a ruling of a single judge (now Chief Justice) in the case of **Vortex Refrigeration**[11] where he opined that:

> *"the law is not intended to trap the unwary or the unsuspecting by insisting that today the relations shall, without more, be governed and determined on the basis of a future law, or conversely, that a law that comes into effect today shall generally apply to relations of parties consummated in the previous year."*

71. It is further worthy of note, that the alternatives provided by **Article 187 (3)** as quoted at paragraph 67, in fact support the general principle of non-retrospective application of the law, by stating that the applicable law is the law in force immediately before the pension benefit was granted, which in this case is **Act No.40 of 1996, Cap. 256.**

72. We agree with the respondent that **Article 187 (3) of the Constitution** is inapplicable in the circumstances of the present appeal as the same came into effect after the fact, in January of 2016 and there was already a provision in the 1996 Constitution, subsisting at the material time, which applied to the appellants, thus invoking the application of the first part of **Article 187 (3) (a)**.

73. The right to retirement benefits, all things being equal, is guaranteed in the contract of employment on engagement, which is long before retirement age is reached. It is the actualization of the retirement and payment, that is dependent

on attaining that age and as agreed upon by the parties, are tied to one's birth date. The right to a pension benefit on retirement at age fifty-five in the circumstances of the present appeal, was a contractual term which was binding on the appellants. That being the case, it could not be departed from without the agreement or consent of both parties to vary the term. This was our holding in the **Jacob Nyoni**[5] case where we said that, an accrued pension right is part of one's conditions of service and cannot be altered by the court.

74. Briefly, the salient facts in that case were that Mr. Nyoni joined the pre-independence Northern Rhodesia Civil Service as a Clerk on 1st August, 1956. The retirement age for male employees was fifty-five years and fifty for females. Following amendments to the law, Local Conditions of Service introduced in 1961 increased the retirement age for males to sixty and fifty-five for females. Civil servants were requested to choose to either remain under the old conditions or join the new conditions. Mr. Nyoni opted for the new conditions and in the appropriate Form he was required to complete for the purpose, he, unequivocally indicated under part D that: "I do not wish to retain the rules

that apply to me regarding my pensionable age and I have completed Part C and D. I wish to transfer to Local Conditions as a Clerical Officer Division II with effect from 1st December, 1961."

75. A subsequent amendment to the law of 1968 reduced the retirement age back to fifty-five years and Mr. Nyoni was retired based on that law at age fifty-five. His claim for premature retirement was unsuccessful in the High Court. On appeal, this Court held as follows;

> *"....we find that the appellant made an irrevocable option in 1961 to retire at the age of 60 years and that this became a condition of service he opted to serve on. The amendment to the Civil Service (Local Conditions) Pensions Act by Act number 11 of 1968 did not take away this right which became entrenched in the appellant's conditions of service."*

76. It was noted in that regard, that the new law reverting retirement age to the previous fifty-five years, could only affect those of the employees who did not give irrevocable options to retire at sixty years. That is the context in which the pronouncement was made.

77. In essence the holding merely reinforced the binding effect of the contracts of the other employees who did not exercise the

option and as such, their retirement age remained at age fifty-five as stipulated in their contracts of employment and binding on them.

78. Applying the same rationale of upholding the terms agreed by the parties in their contracts as binding, unless varied by mutual consent. The appellants in the present appeal, were bound by the contractual term to retire at fifty-five years which was never varied by the parties by mutual consent or at all.

79. In as much as the appellants have spiritedly argued in support of the proposition that amendment **Act No. 7 of 2015** could apply retrospectively, so as to alter their mutually binding contracts, we are inclined to disagree as that proposition is not supported by law. The appellants, as well as the Court of Appeal, misapprehended the import of an irrevocable option in the context of the facts in the **Jacob Nyoni**[5] case.

80. By its very nature, an irrevocable option, is an alternative that *must* be offered. On the facts of the present appeal, the respondent as employer, should have offered the appellants as employees, for them to elect whether they should continue on the same terms previously agreed or opt for new terms

introduced by the new law, as happened in the case of **Jacob Nyoni.**[5] It is only on agreement by the appellants, that their contracts of employment could have been varied by mutual consent and become binding on the parties. It is certainly not as a matter of right. It simply means an employee has been given the option to choose when they will retire and it is discretionary in nature.

81. There was no such option offered to the appellants by the respondent *in casu.* Although the **Act No. 7 of 2015** amendment has different age ranges for retirement, these are not available to the appellants as the law does not apply retrospectively, unless it is intended to and is explicitly so stated.

82. We are fortified in drawing that conclusion by **section 10 of the Acts of Parliaments Act, Cap. 3** which provides that;

> S.10 *"Where an Act is made with retrospective effect, the commencement of the Act shall be the date from which it is given or deemed to be given such effect."*

The above quoted provision in very plain language requires that an Act made with retrospective effect will clearly state that it applies retrospectively, and specify the date of

commencement of such application. Where there is no mention of retrospective effect, it follows that the Act is prospective.

84. Further, in that regard, **section 14 (3) (b) and (c)** of the **Interpretation and General Provisions Act, Cap. 2** underscores the obligation to insulate contracts from subsequent amendments of the law and provides that;

> ***14. "Where a written law repeals in whole or in part any other written law, the repeal shall:***
> ***(b) not affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed"***
> ***(c) not affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed."*** *(underlining for emphasis supplied)*

85. Even without considering the clauses on the pensionable age in the appellants' contracts of employment, it is clear that the law that applied to them at the time of entering their individual contracts remains the provisions of **National Pensions Act, Cap. 256 of the Laws of Zambia** before the enactment of amendment **Act No. 7 of 2015**. The **Colgate Palmolive (Zambia) Inc**[1] case restated the principle that public policy requires that men of full age with competent understanding have the utmost liberty in contracting and to enter such

contracts freely and voluntarily and the terms of their agreement must be enforced by the courts of law.

86. As earlier alluded to, evidence on record shows there was no consent from the employer to vary the appellants' retirement age stipulated in their contracts as fifty-five years. In the absence of variation by mutual consent, the parties were bound by the retirement age stated in their respective contracts of employment as fifty- five years.

87. Evidence on record further reveals that in compliance with that obligation the respondent set the retirement process in motion by notifying the appellants individually in writing, six months prior to their attaining the retirement ages, following which the respondent proceeded to retire them and paid them all the retirement benefits due to them.

88. The retirement process having thus, been set in motion, pursuant to section **14 (3) (b) and (c)** of the **Interpretation and General Provisions Act, Cap. 2** reproduced at paragraph 80; amendment **Act No. 7 of 2015** did not apply retrospectively to the appellants. In the event, it could not and did not affect the retirement process that was based on contracts of employment

that were binding on the parties, which contracts had incorporated age fifty-five as the retirement age, as provided by the law in existence on the respective dates of the appellants' engagement.

89. It is for the reasons highlighted at paragraphs 77- 85, that we uphold the Court of Appeal findings that the appellants were not retired prematurely. That they were wrongly awarded pension benefits for periods not worked which amounts to unjust enrichment; and that there was no breach of contract as to entitle them to damages. When the issue arose in the cases of **Zesco Limited v Alexis Mabuku Matale**[16] and **Kitwe City Council v William Ng'uni**[12], we expressed our dismay regarding orders of the trial court awarding damages to employees for periods not worked, in the following words:

> *"....you cannot award a salary or pension benefits.....for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."*

90. We affirm that holding. Grounds one to five and seven (the latter having being hinged on the successful outcome of grounds one to five), must inevitably, all fail.

91. Lastly, on ground six regarding the award of costs against the appellants in the High Court and the Court of Appeal. **Rule 44 of the Industrial and Labour Relations Court Rules** provides that costs shall only be ordered against a party that has been guilty of unreasonable delay, improper, vexatious or unnecessary steps or other unreasonable conduct, in a matter. The record of appeal having disclosed no such conduct by the parties on either side, we agree with the appellants that each party ought to bear their own costs in this Court and in the courts below.

92. A recap of our findings in sum, is as follows:

1. Parties to a contract are bound by the terms they agree between themselves which must be within the confines of the relevant laws in force at the material time of contracting.
2. A subsequent amendment or repeal of the law has no bearing on existing contracts unless the amendment explicitly so provides.
3. Amendments to the law introduced by **Act No. 7 of 2015** and **Act No. 19 of 2015** did not explicitly provide for retrospective application.
4. There having been no mutual variation of the retirement age by consent of the parties from fifty-five to sixty years, the

appellants were bound to retire upon attaining age fifty-five as stipulated in their respective contracts of employment which were binding on them.

93. In concluding, as only one out of the seven grounds of appeal advanced by the appellants' has succeeded, the appeal is hereby dismissed.

DR. M. MALILA
CHIEF JUSTICE

A. M. WOOD
SUPREME COURT JUDGE

DISSENTING JUDGMENT

Mutuna JS, delivered the following minority judgment of the court:

Cases referred to:

1) **Colgate Palmolive (Zambia) Limited v Shemu and others Appeal No. 181 of 2005**
2) **Rosemary Ngorima and 10 others v Zambia Consolidated Copper Mines (Mufulira Divisions) Appeal No. 97 of 2000**
3) **Indo Zambia Bank Limited v Mushaukwa Muhanga (2009) Z.R. 266**
4) **Oliver Chinyama v Spectra Oil Corporation Limited Appeal 18 of 2018**
5) **Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 others (2004) Z.R. 193**
6) **Jacob Nyoni v Standard Chartered Bank Plc SCZ judgment No. 19 of 2011**
7) **Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
8) **Bank of Zambia v Vortex Refrigeration Company and Docklands Construction Company Limited Appeal No. 4 of 2013**
9) **Kitwe City Council v William Nguni (2005) Z.R. 57**
10) **GDC Logistics Zambia Limited v Joseph Kanyanta and others Appeal No. 144 of 2014**

Legislation referred to:

1) **Constitution of Zambia (Amendment) Act No. 2 of 2016**
2) **National Pension Scheme (Amendment) Act No. 7 of 2015**
3) **National Pension Scheme Act No. 40 of 1996**
4) **Employment Code Act No. 3 of 2019**
5) **Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia**
6) **Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia**
7) **Income Tax (Amendment) Act No. 19 of 2015**

Works referred to:

1. **Markandey Katju and S.K. Kanshik *N.S. Bindra's Interpretation of Statutes* (9th Edition) LexisNexis Butterworths, 2002.**

1) Abstract

1.1 I have read the decision of the majority members of the court as reflected in the opinion of Wood JS, and respectfully disagree with it. As a result, I have decided to deliver a dissenting judgment.

1.2 The dissent is prompted by the fact that I disagree with the decision by the majority, that the provision of the ***National Pension Scheme (Amendment) Act, No. 7 of 2015*** (Act No. 7 of 2015) which increased the retirement age from fifty-five years to sixty years, does not have retrospective effect. The decision of the majority is that Act No. 7 of 2015 is only applicable to employees who were engaged after its enactment.

1.3 The basis upon which the decision was reached by the majority was *that " ... amendment Act No. 7 of 2015 did not apply retrospectively to the Appellants ..., it could not and did not affect the retirement process that was based on contracts of employment that, were binding on the parties*

which contracts had incorporated age fifty-five as the retirement age, as provided by the law in existence on the respective dates of the Appellants' engagement". The position I have taken is that the majority have taken a narrow interpretation of the relevant section, as I have demonstrated later. In arriving at my decision, I have considered the relevant provisions of the law and conduct of the parties post the enactment of Act No. 7 of 2015.

1.4 I am of the firm view that the question posed in this appeal, which is correctly identified in the introduction to the majority judgment, called for the court to look at the intention of the Legislature at the time of enacting Act No. 7 of 2015 and in so doing, look at what factors prompted the Legislature to enact Act No. 7 of 2015. There is also need to look at the actions taken by the Respondent soon after the enactment of Act No. 7 of 2015 which reveal that it understood the Act to have retrospective effect.

2 Introduction

2.1 My brother Wood JS in delivering the decision of the majority, has identified the issue for determination in this

appeal as being: whether amendments to the law have retrospective application? He has answered the question on behalf of the majority by holding that, generally law does not apply retrospectively.

2.2 The comforting thing is that, I not only agree with the question posed but I also agree with the answer. My point of departure is that the circumstances of this case are unique and call for a more robust and not general interpretation of what the law says and examination of the conduct of the parties post the enactment of Act No. 7 of 2015.

3 Background

3.1 The background to this appeal has been aptly summed up by Wood JS. At the expense of repetition, the facts are that, the Appellants were employed by the Respondent on various dates from 1985, in various positions. At the time of being employed they all executed individual contracts of employment with the Respondent which, among other things, set the age of retirement as being fifty-five years. This was in accordance with the governing law at the time,

the ***National Pension Scheme Act No. 40 of 1996*** (Act No. 40 of 1996).

3.2 During the tenure of the Appellants' employment with the Respondent, Act No. 40 of 1996 was amended by Act No. 7 of 2015 on 14th August 2015. Section 2 of that Act defined the phrase, *"pensionable age"* to mean, the age of sixty years. This provision effectively raised the retirement age from fifty-five years to sixty years and is at the heart of the dispute in the appeal. The Respondent promptly issued a memorandum to all of its employees, including the Appellants, notifying them of the enactment of Act No. 7 of 2015 and its effect.

3.3 When the Appellants attained the age of fifty-five, between the years 2015 and 2016, the Respondent, acting in accordance with the provisions of the contracts which stipulated the retirement age to be fifty-five years, gave the Respondents six months prior notice of its intention to retire them. The Appellants protested and sought to invoke the provisions of Act No. 7 of 2015, contending that they

should be retired at sixty years in accordance with the new law.

3.4 The Respondent insisted on retiring the Appellants at fifty-five in accordance with their contracts prompting the Appellants to take out an action in the High Court.

3.5 The Learned High Court Judge heard the matter and found in favour of the Appellants. The Judge held that the Appellants had been prematurely retired at fifty-five years, therefore, their retirement was unlawful and null and void for being contrary to the laws then in force. As a consequence of the said finding, the Judge awarded the Appellants payments equal to the retirement benefits they would have received if they had attained the age of sixty years; damages for breach of retirement laws equivalent to six months' salary; and allowances and other perquisites.

3.6 On appeal to the Court of Appeal, the decision of the Learned High Court Judge was reversed. The Court of Appeal held as follows:

3.6.1 The Learned High Court Judge misdirected, himself when he found that the Appellants were prematurely

retired at age fifty-five. This holding was based on the fact that the parties had specifically agreed on the retirement age of fifty-five in the contracts of employment which were binding on them. It restated the widely referred to decision in the case of ***Colgate Palmolive (Zambia) Limited v Shemu and others***[1] that courts will enforce contracts entered into freely by parties.

3.6.2 As for the effect of section 2 of Act No. 7 of 2015, the Court of Appeal held that it only applied to those employees who joined after the Act came into force. The court held further that the Appellants had accrued rights arising from their conditions of service and could not rely on the new retirement age which did not apply to them. It relied on the case of ***Rosemary Ngorima and 10 others v Zambia Consolidated Copper Mines Limited***[2].

4 Appeal to the Supreme Court and Arguments by counsel

4.1 The Appellants have launched seven grounds of appeal. Five of these grounds of appeal question the holding by the

Court of Appeal that Act No. 7 of 2015 did not have retrospective effect in terms of the retirement age and thus did not apply to the Appellants. They also question the holding that the Appellants and Respondent were bound by the terms of their employment as enshrined in the contracts of employment in relation to the retirement age of fifty-five years.

4.2 The other two grounds of appeal question the award of costs in favour of the Respondent and the dismissal of the cross appeal in which the Appellants sought an award of exemplary damages.

4.3 In opening the arguments for the Appellants, counsel began by referring to the provisions of the ***Constitution*** which provide for an employee, public officer and Constitutional office holder being entitled to a pension benefit. Counsel also referred to Articles 266 and 187(3)(a) which respectively, define a pension benefit and the law applicable to pension benefits. He argued that the application of common law and contract law is subject to

the provisions of the ***Constitution***. Further, contracts cannot oust what written law provides as retirement age.

4.4 Counsel advanced his argument and contended that common law and particularly contract law can only be applied when there is a lacuna in the ***Constitution*** or any other written law. It was counsel's argument that as soon as the retirement age was changed by way of amendment to the law, the Appellants' contracts should have been amended to conform to the law.

4.5 Counsel referred to the decision in the case of ***Indo Zambia Bank Limited v Mushaukwa Muhanga***[3] in which it was acknowledged that an employment relationship is contractual and that its tenure is up to the time when the employee attains retirement age. The significance of this was that counsel contended that the retirement age of the Appellants was in accordance with Act No. 7 of 2015 and, therefore, the retirement age was sixty. Counsel also made reference to the decision of the Court of Appeal in the case of ***Oliver Chinyama v Spectra Oil Corporation Limited***[4] in which the court held that

with the coming into effect of the ***Employment Code Act*** in 2015, employers could no longer hide behind the notice clause and terminate employment without reasons. Effectively, the new employment law was binding on both past contracts and future contracts.

4.6 The second limb of counsel's argument contended that the Court of Appeal misdirected itself when it held that Act No. 7 of 2015 was not applicable to the Appellants. Counsel's arguments here were that the Appellants contributed to NAPSA, therefore, the Act was applicable to them. He made further arguments on this point which I have not summarized for reasons which are apparent in the latter part of this judgment. Counsel argued further that the Court of Appeal erred in holding that Act No. 7 of 2015 only applied to employees who did not make an irrevocable option to retire at fifty-five years. He argued that the Appellants protested when the Respondent gave them notice to retire at fifty-five years thereby signifying their intent to continue work up to sixty years.

4.7 Counsel concluded his arguments by attacking the decision of the Court of Appeal reversing the award of damages and its refusal to award exemplary damages and condemning the Appellant's to costs:

4.8 Counsel for the Respondent began their arguments by stating that the Appellants could not rely on the provisions of the ***Constitution*** as amended because it came into force after they had executed their contracts of employment. These contracts of employment, counsel argued, stipulated the age of fifty-five years as the retirement age because this was the statutory age for retirement at the time. They argued further that since these contracts were entered into freely and voluntarily, they were valid and binding on all parties until full performance in accordance with the decisions in ***Rosemary Ngomira and 10 others v Zambia Consolidated Copper Mines***[2] and the ***Colgate Palmolive (Zambia) Limited***[1] case.

4.9 The second argument advanced by counsel was in relation to the extent of application of English law of contracts on the ***Constitution*** and other laws in Zambia. They argued

that the English law of contracts is indeed subject to the ***Constitution*** and other statutes in Zambia but the fact that these laws in Zambia may be changed cannot be ignored. To that extent, section 14(3) of the ***Interpretation and General Provisions Act*** states that where a law changes by way of amendment or repeal, it does not affect the previous operation of the changed law or anything done under the said law. Consequently, the change in the retirement age from fifty-five years to sixty years in Act No. 7 of 2015 did not alter the provisions of the employment contracts which subsisted between the parties.

4.10 To reinforce their arguments, counsel drew the attention of the court to the decision in the case of ***Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 others***[5] in which the court stated as follows:

> **"We accept that it is a well settled principle of law that there is always a presumption that any legislation is not intended to operate retrospectively but prospectively, and this is more so where the enactment would have prejudicial effect on vested rights."**

This principle, it was argued, has been restated in a number of other cases such as the ***Jacob Nyoni v Standard Chartered Bank Limited***[6] to give one example, which, according to counsel, was on all fours with the current appeal. To this end, counsel submitted, the Court of Appeal was on firm ground when it held that the lower court misdirected itself in finding that the Appellants were prematurely retired at the age of fifty-five years.

4.11 According to counsel, the Court of Appeal was also on firm ground when it held that a law that comes into effect subsequent to parties executing a contract, cannot affect their relationship as it relates to the contract. The Appellants and Respondent both had accrued rights based on the conditions of their contracts of employment which they cannot alter subsequently unless by mutual consent.

4.12 Reverting back to the provisions of the ***Constitution*** counsel argued that even assuming that it was applicable, the proper interpretation to be given to Article 187(3)(a), using the purposive rule, is that it acknowledges that laws have prospective and not retrospective application. The

fact that there is an option in the article for application of a law enacted at a later date as long as it was not less favourable, does not alter this position. Counsel argued that this was due to the fact that the parties in the action were bound by the contract which represented the old law as there was no law in force at the time which offered an alternative.

4.13 Counsel then addressed the contention by the Appellants that the effect of Act No. 7 of 2015 is similar to the provision of the ***Employment Code Act*** on termination which now required the employer to give reasons for termination. They contended that the ***Employment Code Act*** already had provision enabling an employer to terminate the services of an employee, therefore, the insistence on giving of reasons was not an abrogation of the old provision. Counsel concluded arguments on this point by stating that the case of ***Oliver Chinyama v Spectra Oil Zambia Limited***[4] which the Appellants referred to in aid of their arguments did not deal with

retrospective effect of laws but rather termination of employment contracts.

4.14 The next argument which the Respondent advanced challenged the contention by the Appellants that the High Court had made a finding of fact that they had not made an irrevocable option to retire at fifty-five years, therefore, they ought to have been retired at the later age of sixty. This finding, the Appellants argued ought not to have been reversed by the Court of Appeal because it did not meet the test set in the ***Zulu v Avondale Housing Project Limited***[7] case.

4.15 Counsel argued that the High Court made no such finding but rather that the Appellants protested when they were retired at age fifty-five. The irrevocable option to retire at that age is contained in the contract of employment which binds the parties to their agreement in terms of the retirement age. To support the foregoing argument, counsel drew our attention to the following decisions of this court ***Bank of Zambia v Vortex Refrigeration Company and Docklands Construction Company***

Limited[8]; Colgate Palmolive [Z] Inc V Able Shemu and others[1] and ***Jacob Nyoni v Attorney General[6]***. All these cases speak to the binding effect of a contract when entered into by parties freely. They concluded arguments on this issue by submitting that a law only has retrospective effect if it specifically states so. An example of such law they argued, was the ***Employment Code Act*** which specifically directed employers to ensure existing contracts are amended to the extent of their inconsistency with the new Act.

4.16 The next arguments which counsel addressed related to the Appellants' contention that the High Court was on firm ground when it awarded pension benefits for periods which they did not serve because it was exercising discretion under section 85A of the ***Industrial and Labour Relations Act***. They argued that while the High Court does enjoy such discretion it should be exercised judiciously. The award of pension benefits for a period which the Appellants did not serve in employment amounts to unjust enrichment. In support of this

argument, counsel drew the attention of the court to the case of ***Kitwe City Council v William Nguni***[9] in which we held that it is unlawful to award a salary or pension benefit for a period not served.

4.17 Counsel also drew our attention to our decision in the case of ***GDC Logistics Zambia Limited v Joseph Kanyanta and others***[10] where we said that although the Industrial Relations Court enjoys wide discretion in respect of awards, the court can only make an award a party is entitled to.

4.18 Counsel for the Respondent concluded their arguments by addressing the issue of costs. They set out at great length our decisions on costs which state that costs follow the event. We were urged to dismiss the Appeal.

5 My consideration and decision

5.1 Following consideration of the record of appeal and arguments by counsel and indeed the decision of the majority, the issue for determination as stated in paragraph 1.4 is whether or not the provisions of the Act No. 7 of 2015 in respect of retirement age have

retrospective effect. In agreeing with counsel for the Respondent, the decision of the majority is that they did not have retrospective effect because they did not specifically state so and that the parties were bound by the provisions of the contract. What this decision effectively means is that there is nothing in Act No. 7 of 2015 to suggest that it was applicable to the Appellants and other employees employed prior to its enactment. The decision also means that the parties held themselves as bound to the contracts executed prior to the enactment of Act No. 7 of 2015.

5.2 I have taken a broader view at interpreting the provisions of Act No. 7 of 2015 because the provisions are not clear as to their intent. In doing so, I have looked at the purpose and object of Act No. 7 of 2015 as a whole. This is in line with the Learned authors of ***N.S. Bindra's Interpretation of Statutes***, 9th edition who state at page 368 as follows:

> **"The most fair and rational method for interpretating a statute is by exploring the intention of the legislature through the most natural and probable signs which are**

either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law. ... *But the whole of what is enacted by necessary implication* can hardly be determined without keeping in mind the purpose or object of the statute. A bare mechanical interpretation of the words and application of legislative intent devoid of concept or purpose will reduce most of the remedial and beneficent legislation to futility."

Courts must, therefore, look at the purpose and intent and avoid a *"mechanical"* interpretation of the statute. *"A statute is best interpreted when we know why it was enacted"* (N.S. Bindra, page 305).

5.3 Applying the concepts that I have set out in the preceding paragraph, I have looked at the intention of Parliament at the time the Bill which culminated into Act No. 7 of 2015 was introduced into the House through the appropriate Committee. This information is on the Parliament website. The Bill arose from a policy shift in the country in 2015 prompted by two factors:

5.3.1 The first was following the realization by Government that employees retiring at fifty-five years still appeared energetic and of active mind, such that it was perceived as an injustice to both the retiring employees and the nation to lay off such labour force prematurely;

5.3.2 The second arose from the fact that the National Pension Fund coffers were running low due to these premature retirements. There was, therefore, need to postpone retirements to a further five years in order to assist the National Pension Fund to build up its fund and shorten the life dependency of retirees on the National Pension Fund.

5.4 To effect the foregoing policy, the Parliamentary Committee on Economic Affairs, Energy and Labour on the National Pension Scheme (Amendment) Bill, N.A.B. No. 8 of 2015 prepared a report which it submitted to the Fourth Session of the Eleventh National Assembly in July 2015. The salient features of the report were as follows:

5.4.1 The object of the Amendment Bill was said to be revision of retirement age;

5.4.2 This object was said to be inspired by the fact that the retirement age of fifty-five years *"... presents a challenge for the financial sustainability of the pension scheme from an actuarial perspective in light of the long post-retirement life expectancy. In addition, [the] age is among the lowest in the Southern African Development Community (SADC) region. The National Pension Scheme Act (Amendment) Bill, N.A.B. No. 8 of 2015, therefore, seeks to amend the* ***National Pension Scheme Act*** *so as to revise the retirement age upwards and provide for early and late retirement. This will ensure the sustainability of the pension scheme and in accord with the general trends in SADC region ..."*

5.4.3 Under the heading *"Salient Provisions of the Bill"* clause 2 stated the intention of the Bill to be *"... to revise the meaning of pensionable age. Whereas the*

pensionable age currently means the age of fifty-five years, it is proposed to revise this to sixty years".

5.5 What is apparent from the foregoing is that, the target group of the amendment was those employees already serving because it was they who posed the threat on the depleted coffers of the National Pension Fund. This arose from the fact that retiring at age fifty-five, when they were still physically and mentally healthy, their demand on the pension fund was significantly long due to the long post-retirement life expectancy. It was not directed at only those who were to be employed after the Act came into force.

5.6 To attest to what I have said in the preceding paragraph, the Respondent reacting to the enactment of Act No. 7 of 2015 issued a Management Brief to all staff titled *"Retirement Age"* and dated 22nd August 2016. The Brief is at page 97 of the record of appeal and in paragraph 1.0, informed the members of staff, who included the Appellants, that the normal retirement age at the Respondent was now sixty years from fifty-five years effective 1st August 2016. It explained that this was as a

result of the enactment of Act No. 7 of 2015 and the ***Income Tax (Amendment) Act No. 19 of 2015***.

5.7 The Brief went on to explain the fate of employees, such as the Appellants, who were in employment before the effective date of Act No. 7 of 2015 as follows at paragraph 2 of 2.1 at page 97 of the record of appeal:

> **"Employees who were already members of NAPSA before 14th August 2015, and the Occupational *"Konkola Copper Mines Plc Pension Scheme"* before 1st January 2016, will reach normal retirement age of 60. However, they can elect to retire at age 55 upon giving 12 months' notice to the company prior to their 55th birthday."**

This portion of the Brief is in line with Section 18(1) and (2) of Act No. 7 of 2015 which states as follows:

> **"(1) Subject to the provisions of this Act, a member shall retire upon attaining pensionable age.**
>
> **(2) A member may retire on attaining the age of—**
>
> **(a) fifty-five years if, twelve months before attaining that age, the member notifies the contributing employer of the member's intention to retire at that age; or**

(b) sixty-five years if, twelve months before attaining the pensionable age, the member notifies the contributing employer of the member's intention to retire at the age of sixty-five years and the employer approves the retirement."

5.8 The foregoing provision created three options for retirement. The first was in recognition of the accrued right to retire at fifty-five under the old law, subject to fulfilment of the condition of prior notice. The second was to retire at sixty for all employees, including the old ones, such as the Appellants, who did not exercise their right to retire at fifty-five. The last gave employers discretion to extend the retirement age to sixty-five upon the employee giving such notice.

5.9 At page 99, the Brief went further to pose a hypothetical question as to those employees who were to retire end of August 2016 and have received retirement notices. These employees like the Appellants were employed prior to the enactment of Act No.7 of 2015. It answered the question by giving the employees two options:

5.9.1 either to give notice to the Respondent of their intention to retire at 55 years; or

5.9.2 return the retirement notice letters to their respective heads of department. This effectively meant that they had the option to work up to sixty years.

5.10 The effect I have given to the Brief is that it varied the conditions of service in respect of retirement age from fifty-five years to sixty years. This arose from the appreciation by the Respondent that Act No. 7 of 2015 had retrospective effect. Notwithstanding this fact, the Respondent still gave the Appellants and others the option to retire early at fifty-five years which they did not exercise.

5.11 I agree with the arguments advanced by the Respondent regarding the sanctity and binding effect of contracts. The cases relied upon by the Respondent in relation to these arguments are also good law. However, the cases are relevant only to the unique facts from which they arose. They are not relevant and cannot be applied mechanically to the facts of this case. Further, as counsel for the Respondent quite rightly argued that unlike the

Employment Code Act which specifically compelled employers to align their contracts of service to it after its enactment, Act No. 7 of 2015 made no such specific direction. This fact alone though cannot negate its consequence of becoming operational on the employees it targeted who were already serving and a threat to the depleted National Pension Fund as they were nearing the *"premature retirement age of fifty-five years"*.

5.12 It cannot also negate the fact that the Respondent took steps to give effect to Act No. 7 of 2015 through the Brief, without discrimination and including all employees, which effectively amended the contracts of employment bringing the retirement age to sixty. A point worth noting is that there is no reference to the binding effect of the contractual provision with respect to retirement at age fifty-five years in the Brief. It merely acknowledges the change in the law and takes steps to enforce this new provision of the law.

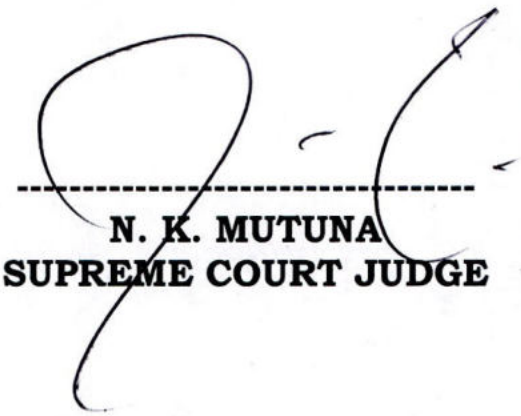
5.13 Counsel for the Respondent argued forcefully that the law has been settled on retrospective effect of statutes and that the case of ***Jacob Nyoni v The Attorney General***[3] is on

all fours with this appeal, therefore, we should adopt the approach taken in that case. The facts in the ***Jacob Nyoni***[3] case are indeed similar to the facts of this appeal except that in that case the amendment Act decreased rather than increased the retirement age. In holding that the amendment Act did not have retrospective effect, we stated that the Appellant in that case made an irrevocable option in 1961 to retire at age 60 years and that it became a condition of service he opted to serve on. We also said that the amending Act did not specifically abrogate this accrued right which became entrenched in the Appellant's conditions of service.

5.14 In making the aforestated finding, we did not consider the intention of the Legislature or background leading up to the amendment of the Act. The facts of that case did not also reveal the steps taken by the employer to enforce the amendment Act immediately as in this appeal. These are the distinguishing factors of this appeal.

6. Conclusion

6.1 In view of what I have stated in the preceding paragraphs, I would allow the appeal and set aside the decision of the Court of Appeal and uphold the decision of the High Court.



N. K. MUTUNA
SUPREME COURT JUDGE