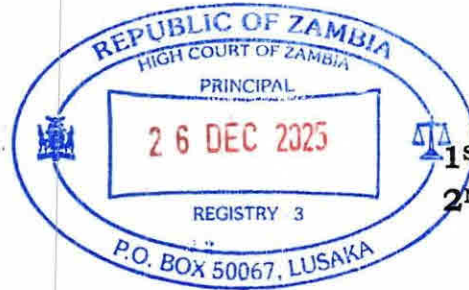


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
(CIVIL JURISDICTION)**

**2019/HP/0582**

**BETWEEN:**

**FITALIANO MWILA  
DICKSON CHITAMBO MWILA**



**1<sup>ST</sup> PLAINTIFF  
2<sup>ND</sup> PLAINTIFF**

**AND**

**INDENI PETROLEUM REFINERY  
COMPANY LIMITED**

**DEFENDANT**

**Before the Hon. Mrs. Justice R. Chibbabbuka on the 26<sup>th</sup> day of December, 2025.**

For the Plaintiffs: Mr. M Chiteba & Mrs. P. M Likande, Messrs Mulenga Mundashi Legal Practitioners

For the Defendant: Mrs. E. Bupe, In- house Counsel

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**JUDGMENT**

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**Cases referred to:**

1. *Reveille Independent LCC vs Anotech International (UK) Limited* [2016] EWCA Civ 443
2. *Zambia Breweries PLC vs Betternow Family Limited Selected Judgment No. 48 of 2016*
3. *Richard H. Chama and 213 Others Vs NAPSA and Others Appeal No. 001 of 2018*

**Legislation referred to:**

*The Pension Regulations Act No. 28 of 1996*

**Other works referred to:**

*Halsbury's Laws of England Edition at para 263, page 141*

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## **1.0 Introduction**

The plaintiffs took out a writ of summons and statement of claim on 11<sup>th</sup> April, 2019 for the following reliefs;

1. Damages for delay in payments of the correct benefits due to the plaintiffs;
2. Interest accrued on the benefits between the initial payment and the final payment;
3. Interest at the current commercial bank lending rate.
4. Costs of and occasioned by this action; and
5. Further or other relief that the court may deem fit.

## **2.0 The Statement of Claim**

The plaintiffs' case, according to the statement of claim, is that they are former employees of the defendant. During their employment with the defendant, they were, in accordance with their individual conditions of service, all members of the Indeni Petroleum Refinery Company Limited Pension Scheme established and regulated under the *Pension Regulations Act No. 28 of 1996* (hereinafter referred to as the ("*Pension Scheme Regulation Act*") and to that extent, the defendant was the sponsoring employer of the said pension scheme. The pension scheme was managed in accordance with the Trust Deed of 2009 (the "Trust Deed") and the Pension Fund Rules made there under (the "Rules"). The pension scheme had been set up by the defendant as sponsoring employer with the principle objective of accruing retirement benefits for the plaintiffs and other employees of the defendant whose benefits would be paid out in accordance with the rules upon the plaintiffs reaching retirement age.

When the plaintiffs became members of the pension scheme, it was a defined benefit pension in nature. In accordance with principles, custom and usage in the pension industry or as expressly incorporated in the trust deed of the pension scheme and the rules, the pension benefits are treated as "defined" on the basis of amounts calculated and known in advance irrespective of contributions made by the members and its sponsoring employer. Sometime in September, 2013, the

defendant, through its Managing Director Mr. Maybin Noole, in breach of the trust deed and the rules unilaterally migrated the pension scheme from a defined benefit plan to a defined contribution pension plan. The plaintiffs were not given notice of the said migration nor did they consent to it. In accordance with principles, custom and usage in the pension industry, a "defined contribution" entails that benefits are paid on the basis of a formula that refers to actual amounts contributed by the members of the scheme and the sponsoring employer. The following factors are taken into consideration; date of birth, pension service, the date one joins the scheme, basic salary, communication factors, retirement date and monthly contributions.

Upon the plaintiffs retiring from the defendant company on 13<sup>th</sup> April and 25<sup>th</sup> May 2014, they were paid amounts which on further inquiry they came to learn had been paid on the basis of the defined benefit plan and pay slips of September, 2013, while still in service as opposed to a computation of the last pay slip on normal separation from employment. The discrepancy resulted in an underpayment and therefore, the plaintiffs received a lower pension than they were entitled to. More than a year after their retirement, the defendant caused to be paid out of the pension scheme amounts, collectively referred to as the "Initial Payments", on the basis of the defined contribution benefits based on September, 2013 calculated as follows:

- i. In respect of the 1<sup>st</sup> plaintiff the sum of K278,361.04 instead of K441,310.61 thereby leaving a shortfall of K162,949.57; and
- ii. In respect of the 2<sup>nd</sup> plaintiff the sum of K 175,929.40, instead of K274,080.69 thereby leaving a shortfall of K 98,151.29.

In September, 2015 after negotiations between the parties, the defendant caused to be paid to the plaintiffs the difference between the defined benefit and the defined contribution, hereinafter referred to as the final payments. As a result of the initial wrong payment of their benefits on the basis of the defined benefits calculated in September, 2013 as opposed to the defined benefits of the last pay slip which occurred in 2014, April and May respectively and delay in payments

of the correct benefits due to them, the plaintiffs have lost value in respect of the said pension benefits due to them. The defendant remains indebted to the plaintiffs who are entitled to and claim damages and interest at the current commercial bank lending rate from the date when the amounts should have been paid at the correct retirement formula.

### **3.0 The Defence**

The defendant filed a defence on 3<sup>rd</sup> May, 2019 wherein it admits that the plaintiffs were members of the pension scheme administered under the Zambia State Insurance Corporation Pension Trust - Fund. (ZISC - PTF). That the pension scheme was managed under a pool and did not have and still has no approved and executed trust deed and rules, and thus the plaintiffs will be put to strict proof of their claims. The averment under paragraph 5 of the statement of claim that the defendant set up the pension scheme as a sponsoring employer is admitted save for the averment that the benefits would be paid in accordance with the rules upon the plaintiffs reaching retirement age. The correct position is that there were no such rules and the benefits under the pension trust were paid on the basis of a formula that took into consideration inter alia the last salary contributions. The defendant admits the contents of paragraph 6 in so far as it states that the pension trust was a defined benefit pension plan in nature when the plaintiffs became members.

The contents of paragraph 7 of the statement of claim that the pension benefits are treated as "defined" on the basis of amounts calculated and known in advance irrespective of contributions made by the members and its sponsoring employer are denied. The defendant avers instead that the defined benefit scheme was designed in such a way that the benefits payable are defined using a formula that takes into consideration the length of service and final salary (contribution into scheme) plus accrual factor. Further that the benefits are calculated based on the formula known in advance that considers the last salary contributed while under the scheme, which in the plaintiffs' case was 30<sup>th</sup> September, 2013. The averments under paragraph 8 of the statement of claim

that the defendant in breach of the trust deed and rules unilaterally migrated from the defined benefit plan to the defined contribution pension plan are denied. The defendant avers that the Indeni pension scheme, like all schemes, is a separate legal entity managed by Trustees. As such, the employer has no control on the management of the scheme.

Further, it was the Trustees, acting on their own volition, who decided that members should migrate from the defined benefit scheme to a defined contribution scheme. This was achieved through a resolution by the Trustees and affirmed by the Professional Insurance Authority (PIA). There is and was no trust deed and rules duly executed which are operational. The purported alleged breach of the rules is the figment of the plaintiffs' imagination. The defendant admits the contents of paragraph 9 of the statement of claim that a "defined contribution" entails that benefits are paid on the basis of a formula that refers to actual amounts contributed by the members of the scheme and the sponsoring employer. The following factors are taken into consideration; date of birth, pension service, date one joined the scheme, basic salary, communication factor, retirement date and monthly contributions. The averment under paragraph 11 of the statement of claim that the plaintiffs were underpaid is denied and that the defendant avers instead that after the migration from defined benefits to defined contribution, pensions under the defined benefits scheme were paid taking into contemplation the last contribution which in this case was September, 2013. There was no underpayment whatsoever. The plaintiffs were paid their benefits within two weeks of their retirement.

With regards to the contribution under the defined benefits scheme, the purported delay was due to the migration from the defined benefit scheme to the defined contribution scheme, caused by novelty of the matter and the reluctance by ZSIC to transfer the funds from the defined benefit scheme to the defined contributions scheme. This process was run by the Trustees and not the defendant. After deliberation by the Trustees, the correct amounts were duly paid under the defined benefit scheme using the formula as opposed to the



transfer values after actuarial evaluation because the plaintiffs had retired before the transfer was effected. The defendant re-engaged the 2<sup>nd</sup> plaintiff for close to two years to avert any challenges arising from the delay in payments from the defined benefit pension scheme. Any claim to damages is therefore denied.

That the contents of paragraph 13 of the statement of claim that the defendant after negotiations between the parties paid the plaintiffs the difference between the defined benefits and the defined contribution is denied, and the defendant avers alternatively that there were no purported negotiations between the parties herein as the Trustees were fully in-charge of the running of the pension scheme and it was the said Trustees who finally prevailed over ZSIC and paid out the pension. The averment that the plaintiffs lost value in respect of the pension benefits due to them is denied and the defendant insists that there was no underpayment under the defined benefit scheme. That the payments were made in accordance with the formula devised which took into consideration the last contribution. The plaintiffs are in no way entitled to damages or interests as there was neither a breach of the trust deed and rules nor was there any involvement of the company in the management of the pension scheme. Further, whatever was due to the Plaintiffs was duly paid to them by the trustees of the pension scheme. Save in so far as is expressly admitted, the defendant denies each and every allegation in the statement of claim as if the same were traversed seriatim.

#### **4.0 Reply**

The plaintiffs on 3<sup>rd</sup> June, 2020 filed a reply to the defendant's defence in which the plaintiffs joined issue with the defendant.

#### **5.0 The Trial**

##### **5.1 The Plaintiffs' Case**

The plaintiffs called 1 witness.

### 5.1.1 PW's Testimony

PW was Dickson Chitambo Mwila, the 2<sup>nd</sup> plaintiff herein. His testimony was that he joined the defendant company in 1991 as a Clinical Officer, upon conditions of service which contained a condition that he would be under the company's group life insurance of ZSIC under defined benefits until retirement. The defined benefit scheme has a formula which includes the period a person has served, the age and the annual salary in the year the person is separating from the institution which is cardinal. The accrued factor is determined by the fund administrators annually and the age of 55 years is used as a denominator. He only saw the Rules and the Trust Deed at the end of his service.

When he retired in May, 2014, he was given the repatriation thereafter he had to wait for his retirement package. On the 4<sup>th</sup> or 5<sup>th</sup> November, 2014, his bank account was credited and when he inquired from the bank, they referred him to his employer. PW wrote an email to his employer requesting a statement of the money credited, which is the initial payment. He requested for the statement so that he could understand how the credited sum of K175,000.00 plus was arrived at. The Human Resource became hostile and failed to give a convincing reason so that a reconciliation could be done. The fund Administrator, Alexander Forbes, contacted him and informed him that the defendant had received his monies in June 2014, which amount was lower than what he had expected.

PW referred to the document at page 183 of the plaintiffs' bundle of documents as the document that shows payments of pension. The amount indicated is K 548,161.38 and he was supposed to receive 50% of that amount which is K 274,080,69.00 but he did not. In November, 2014 he received only K 175,000.00 which is what prompted him to inquire. It took over a year for him to be paid the balance, which was paid in September, 2015. The sum of K 274,080.69 is not the total amount he was entitled to because defined benefit under ZSIC took the view that calculations needed to be made based on the last pay slip, which was not the case. In the plaintiffs' case, calculations were based on the September, 2013 pay slips. He retired on the 31<sup>st</sup> May, 2014. The September, 2013 pay slip

was used because the defendant stopped contributing to the Indeni Pension Scheme in September, 2013 without his knowledge or consent. There was an increment to his salary in January, 2014, although he could not remember the percentage. In the year 2013, he was getting paid K9,000.00 while in 2014 he started getting K10,000.00. The input on the last pay slip he received was different. Alexander Forbes relied on the 2013 pay slip. The document on page 175 is his pay slip for September, 2013 which has a basic pay of K 9,583.20. On page 181 is his last pay slip under the permanent pension agreement of 2014 with a basic pay of K10,926.02.

The defendant's Human Resource was informed of the discrepancy but nothing was done about it. He arrived at a different amount as his package because he used the defined benefits formula which uses the annual basic pay by 12 months then the number of years served, the contribution to the pension scheme on a monthly basis, the accrual factor and denomination age of 55 years. The document on page 184 of the plaintiffs' bundle of documents reflects the calculation he used to compute how much he was worth based on the last salary of May, 2014. He was eventually paid the sum of K274,080.69. He was expecting to be paid the sum of K315,407.22 as 50%. He and the 1<sup>st</sup> plaintiff were each underpaid in the sum of K82,619.69.

The defendant's averment that it had no control over the management of the Pension Scheme is not true. The defendant as sponsor took charge as evidenced by the documents submitted before this court in the plaintiffs' bundle of documents. The funds from the Fund Administrator were transferred to the defendant's account. It was the defendant's Human Resource who was instructing finance to pay. The Trustees comprised of three people from management and three people from the Union. The Chairman of the defined benefits wrote a letter dated 15<sup>th</sup> July, 2015 to the defendant's CEO to complain about the winding up of the defined benefit scheme and that it had been hijacked by the defendant's management. He also wrote to the PIA in September, 2014 complaining that the process had been hijacked by the defendant's management.

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There was a unilateral change from the defined benefit scheme to defined contribution in September, 2013, as no information was given to them of the change. The principal of defined benefit, Mr. Spencer Mwape, also wrote a report around the same time in December, 2015. The process of winding up of the defined benefit was approved by PIA in July, 2014 after he had left. PW1 prayed for damages for the wrong calculation of the plaintiffs' pension, and interest.

**Cross examination of PW**

In cross examination, PW replied as follows: The Trust Deed and Rules produced in this matter are not signed by the parties but were followed by the defendant's management. Although not signed, the Trust Deed and Rules were agreed to in principle. The employee and trustees were also following the Rules and Trust Deed. The Trustees were ideally supposed to be in charge of the Pension Scheme. The Trustees have not been sued but the sponsor. The Board of Trustees is an independent entity only on paper. His pension was calculated by Alexander Forbes as the Fund Administrator, whom he engaged when he realised his pension was not to his expectation. His pension problem did not arise as a result of the calculations by Alexander Forbes but the defendant who stopped remitting contributions whilst he was still in service as per the 2013 pay slip and a bank statement showing the refund of K14,000.00 he received in January, 2013. The bank statement is not exhibited in this matter. He was re-engaged on contract by the defendant for close to two years and was receiving an increased salary compared to the one he had been receiving before.

There was an annual increment in salaries every year. Based on the September, 2013 defined benefit package, he was paid the sum of K175,929.40 instead of K274,080.69, thereby leaving a shortfall of K98,151.29. The foregoing shortfall was based only on the September, 2013 calculations but there is another calculation under paragraph 11 of the statement of claim. The calculation referred to under paragraph 11 is the basis of his claim for underpayment or miscalculation of his pension package. The initial sum of K175,929.40 paid to him was calculated on the defined benefits package as per the September, 2013

pay slip. The sum of K98,151.29 was the balance of the defined benefit package calculated based on the September, 2013 pay slip. The mistake was only on the pay slip used to calculate his benefits. It is not true to say that he was never underpaid. At no point was he ever paid under the defined contribution scheme. He was paid under the defined benefit scheme. It is not correct to say that the migration from the defined benefit scheme to the defined contribution scheme never affected him because even though the sponsor stopped remitting his contribution, deductions were being made as per his pay slip. That in itself contributed to the fund manager and Administrator to give their calculations at the time at which the defendant stopped contributing which was in September, 2013 which resulted in the miscalculation of his retirement package. He was not paid all that was due to him despite him only claiming damages and interest as the May, 2014 pay slip was not considered when his package was calculated. While there is no relief relating to the May, 2014 pay slip made, the court should not rely on the amounts outlined under paragraph 12 (iii) of the statement of claim as the amounts in issue in this case, as he was not paid all his dues.

#### **Re-examination of PW**

In re-examination, PW explained as follows: the basis of his claim is clearly set out under paragraph 11 of his statement of claim which states that in September 2013, he was still working and paying to the pension contribution. He does not understand how his retirement package was contributed 7-8 months before. It was a condition of service that an employee was to retire upon attainment of 55 years. His last pay slip is impactful because it determines the package an employee gets. The difference between the September and May salaries was slightly over a K1,000.00. The defined benefits package has a formula which has to be applied. Failure to use the last pay slip in calculating his package resulted in a difference. This scheme is run by the Trustees on paper. Ideally the Trustees were supposed to manage the scheme but, on the ground, it was the sponsor who was running the offices as the Trustees did not have the accounts. The input for payment of packages was being generated from the Human Resource

Management to Accounts. Paragraph 11 of the statement of claim indicates that he was supposed to have his pension package calculated based on the May, 2014 pay slip.

That was the plaintiffs' case.

## **5.2 The Defendant's Case**

The defence called 1 witness.

### **5.2.1 DW's Testimony**

DW was Chama Peros, the payroll officer in the defendant company. His testimony was that he joined the defendant company in the year 2005, and that the plaintiffs are former employees of the defendant. There were two pension schemes, the defined benefits and the defined contributions. Employees who joined the defendant company from 2006 belong to the defined contribution scheme while those who joined the company before 2006 belong to the defined benefit scheme, which scheme came to an end in September 2008. Effective October 2008, the contributions that were received from employees were being paid to the defined contribution scheme. The plaintiffs belonged to the defined benefit pension scheme. The Administrator of the scheme was Alexander Forbes while the Managers are ZSIC. Upon confirmation of employment, the employee must belong to a pension scheme where such an employee will contribute 5%. The total contributions from all the employees is made to the Administrator of the pension who are the custodians. The defendant recovers from the employee and remits to the Administrator. How the remitted monies are used or interest it attracts are monitored by the Trustees.

He knows nothing of the trust deed or its contents. The defendant's role ends at remitting the employees contribution to the Administrator. When an employee is retiring, the Administrator informs the defendant through the Human Resource, who will in turn write to the Finance department to make the payments.

From September, 2008 when the defined benefit scheme ended, employees started contributing to one pension scheme which was being managed by AON

pension. When the time came for the payment of the plaintiffs' pension benefits, the defendant received the money on the 22<sup>nd</sup> October, 2014 and the first payment was made on the 5<sup>th</sup> November, 2014. The balance was paid on 1<sup>st</sup> September 2015. It was a period of two weeks between the time the money was received and the first payment made to the retirees. The defendant never stopped receiving contributions from employees but continued to do so and remitting them to a different pension scheme, as the defined benefit scheme closed in September 2008. The defined benefit scheme was closed because it used to be a liability for the defendant. Valuation would reveal pension deficits which was not sustainable for the defendant and so it changed to the defined contribution scheme.

All contributions from October, 2008 up to the time the plaintiffs were retiring were paid to the plaintiffs as a pension refund. The pension is not calculated by the defendant but by the Administrator according to the last contribution made. The defined benefit closed in 2008 but the defendant continued sending contributions until September, 2013 because the Trustees and Management were supposed to come up with a date for the agreement that the employees should shift to the other pension scheme. The agreement was to be on the time the defendant was to stop paying Alexander Forbes. The defendant stopped contributing to Alexander Forbes in 2013 and started remitting to AON for the employees still in employment. Whatever was contributed by the plaintiffs from October 2013 up to the time they were retiring was paid to AON under the new scheme. Those contributions were paid to the plaintiffs as refunds by AON when the plaintiffs retired. He does not know what was provided in the contract of service at the time regarding the pension scheme. Employees would contribute 5% and the defendant would contribute 15%, and the total remitted to the Administrator to manage the money to be paid to an employee on retirement. Half of the money is paid by annuities and the other half as a lump sum.

There was no loss of the value of the pension paid to the plaintiffs because the money from the Administrator was received on 22<sup>nd</sup> October, 2014 with

instructions on how it was to be distributed through the H.R department. Payment was made to the individuals on 5<sup>th</sup> November, 2014. The payment made on 1<sup>st</sup> September, 2015 was the last instalment. The instructions as to how the monies were to be paid were issued by the Administrator, Alexander Forbes, through Human Resource. The deceased was given an advance while waiting for the money. The 2<sup>nd</sup> plaintiff was given another contract which entitled him to a salary and access to the hospital. His conditions were similar to that of a permanent employee except he was not contributing towards a pension fund. The first payment only took two weeks but the last payment took almost 8 months from the date of the first payment. The value may have gone down but it was not the defendant's fault as it was because of the instructions given by the Administrator. The defendant did not calculate the plaintiffs' pension. His role at the time of the plaintiffs' retirement was preparation of the payment vouchers in accordance with instructions from Human Resource. The payment voucher would go through the approval process by the Finance Manager then the Cashier would make the payment to the respective accounts.

#### **Cross examination of DW**

In cross examination, DW stated that any of the defendant's employees can join the pension scheme upon confirmation as it was a condition of service. According to their pay slips, the plaintiffs joined the defendant company in the 1980s and so they were members of the defined benefit scheme. The defendant is not party to the calculation method for the defined benefit scheme as it is usually the Administrator who does the calculations. Paragraph 6 of the defence outlines how the defined benefit scheme is worked out. The length of service and final salary are key to this scheme. The defendant appointed Alexander Forbes as Administrator of the scheme. He was seeing the trust deed for the first time when it was shown to him in court. He cannot confirm or deny that there was a trust deed or rules governing the defined benefit scheme as he is at the end of the payment process and may not be privy to the information. To the best of his knowledge, the trustees are elected by the members from the defendant's



employees. When the Administrator is about to send the money, he informs the Human Resource. Once the money is received by the defendant, the Finance department confirms receipt. The defined benefit scheme did not have a separate account, the money was deposited in the defendant's account.

The plaintiffs retired in April and May, 2014 respectively. The first payment to them was paid on 5<sup>th</sup> November, 2014 which was about 6 months after they retired. The second instalment was paid to them in September, 2015. There was a refund of their pension scheme from the time the scheme was changed to the time they retired. It had some compound interest based on how much they had contributed to the scheme. There was a salary increment in January, 2014 which also benefitted the plaintiffs as their salaries in 2014 were higher than in September, 2013. Mr. Spencer Mwape is a former employee of the defendant and was the defined benefit scheme Principal Officer. He was the custodian of the scheme. The amount of the salary is a huge factor in determining how much someone receives on retirement; the higher the salary, the higher the pension benefit. If the April and May, 2014 salaries would have been applied, the two would have received a higher pension as their salaries were higher in September, 2014.

He did not know whether the employees consented to being moved from the defined benefit to the defined contributions scheme before the change was made. The document exhibited from pages 9 to 12 of the plaintiff's bundle of documents was signed by Spencer Mwape, the custodian of the defined benefit scheme. According to the document exhibited on page 11 of the plaintiffs' bundle of documents, the employees were not consulted before the move was made from the defined benefit scheme to the defined benefit contribution. Someone who was not consulted on the change would be shocked to find that his pension is lower when such a one was expecting that the pension was to be calculated on the last salary. The approval to change the scheme was obtained after the plaintiffs had left. The plaintiffs retired in April and May, 2014 respectively, and the salary used in calculating the formula was a lower 2013 salary which represents a

reduction in value. The first payment was made in November, 2014, 6 months after the plaintiffs retired. He is an Accountant so he knows about the time value of money. The loss in the value of money attracts interest. The instalments were paid about ten months apart, from November, 2014 to 1<sup>st</sup> September, 2015. The delay by 6 months was not the fault of the defendant but the Administrator appointed by the defendant. The 2<sup>nd</sup> plaintiff was given a contract after retirement which was a separate employment and hence unrelated to his pensionable employment service.

### **6.0 The Submissions**

The parties filed written submissions which I will not reproduce. I have however taken them into consideration in arriving at my decision.

### **7.0 The Decision of the Court**

I am indebted to counsel for the submissions and arguments which I have taken into consideration.

#### Undisputed facts

1. The plaintiffs were employees of the defendant and members of the Indeni Pensions Scheme
2. The plaintiffs' retirement packages were calculated on the September, 2013 payslip
3. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs retired on 13<sup>th</sup> April, 2014 and 25<sup>th</sup> May, 2014 respectively.

#### Disputed facts

1. Whether the defendant administered the pension scheme
2. Whether the Indeni Pensions Scheme had governing Rules and a Trust Deed
3. Whether or not the defendant unilaterally varied the pension scheme
4. Whether the plaintiffs are entitled to an award of damages

### **Whether the defendant administered the pension scheme**

The defendant contends in its defence that it should not have been sued, on the basis that it never administered the Indeni Pension Scheme. According to the defendant, the scheme is a separate legal entity, under the administration of its trustees, not under the defendant's control. It is important to address this argument at the outset, because if it is found that the defendant is indeed not the proper party to the suit, the entire action risks dismissal as no further adjudication on the merits can proceed. To answer the question of whether or not the defendant is the proper party to be sued, it is important to look at the claim.

The plaintiffs main claim is the payment of damages for delay in payments of the correct benefits due to them on retirement. It is not disputed in *casu* that the Indeni Pension Scheme was set up by the defendant and that the plaintiffs were beneficiaries of the said scheme. What is in contention at this juncture is whether or not the defendant administered the scheme in question to be liable to the plaintiffs. It is trite law that private pensions schemes, such as the one in question herein, are created as trusts. *Section 8 (2) of the Pension Scheme Regulation Act No.28 of 1996* as amended by the *Pension Scheme Regulation (Amendment) Act No. 27 of 2005* provides that:

*“Every pension scheme, other than a scheme established by a written law, shall be established under an irrevocable trust.”*

*Section 3* of the said Act as amended defines a trust as:

*“the legal entity, separate from the employer, in which the pension scheme funds are accumulated and includes a multi-employer trust or a single-employer trust.”*

The law clearly provides that pension funds are to be held in a trust. As regards the management of the trust, *Section 8 (3) (a) to (e)* of the same Act as amended provides that the rules of the scheme or fund shall make provision for:

*“ (a) the manner of appointment or election of trustees and their term*

- of office;
- (b) *the functions, powers and duties of the trustees which shall include the general supervision and administration of the scheme or fund;*
  - (c) *the number of trustees of whom one-half shall be appointed or elected by the members and the remainder shall be appointed by the sponsoring employer;*
  - (d) *the methods of, and ground for, removal from office of trustees;*
  - (e) *the election and appointment of a chairperson of the Board of trustees and the functions, powers and duties of such chairperson:*  
*Provided that the chief executive officer of the sponsoring company shall not be chairperson of the Board of trustees;"*

The preceding provisions clearly establish that trusts are managed and controlled by an appointed board of trustees. In *casu*, both parties admit that the scheme in question had a board of trustees. The plaintiffs however contend that the mere fact that some of the defendant's employees were trustees to the scheme, the defendant was managing and controlling the scheme through the said employees.

*Section 8 (3) (c) of the Pension Scheme Regulations Act No. 28 of 1996 as amended by the Pension Scheme Regulations (Amendment) Act No. 27 of 2005 provides that the sponsoring employer shall appoint the remainder of the trustees as one-half shall be appointed or elected by the members, as outlined above. The said provision clearly shows that the employer has the legal power to appoint trustees. Section 8 (4) of the said Act as amended provides for persons who cannot be appointed as trustees of the scheme, and employees of the sponsoring employer are not mentioned on the said list of persons barred from appointment as a trustee. What the foregoing means is that trustees may be appointed from among the employees, provided that the said trustees act independently and in*

the best interest of the members. The mere fact that some of the trustees were employees of the defendant in and of itself, does not substantiate the plaintiff's allegations that the defendant was administering the scheme through its employees. The court is cognizant of the fact that this pension scheme for the defendant was run by trustees and managers who can sue and be sued and ideally the said trustees should have been joined as parties to this suit.

Notwithstanding this position, the plaintiffs' main claim is for damages for delay in payments of the correct benefits due to them on retirement. There is evidence on record from the defendant's witness, DW, that the plaintiffs were paid through the defendant company. DW also testified further that the delay in payment to the plaintiffs was not the fault of the defendant, but the Administrator appointed by the defendant. This court has the task of determining at what point, in the payment procedure, the alleged delay occurred. Since the defendant was involved in the payment procedure, it cannot be held to be an improper party to this action. In addition, the plaintiffs' evidence has brought out allegations that the defendant unilaterally varied the plaintiffs' conditions of service. Consequently, the defendant cannot extricate itself from this matter and it cannot be held to be an improper party to this action.

**Whether the Indeni Pensions Scheme had governing Rules and a Trust Deed**

The plaintiffs have referred and exhibited rules and a trust deed which the defendant alleges is inapplicable as the same are unsigned. The defendant in fact alleges that the Indeni Pension Scheme has no rules or trust deed.

It is trite law that pensions schemes are required to have governing rules on registration. *Section 18(1) (b) of the Pensions Scheme Regulations part IV of the Principal Act No. 27 of 2005* provides that>

*"Subject to sub-section (2) the rules of the scheme or fund shall make provision for" Underling for court's emphasis.*

The above shows that it is mandatory for a pension scheme to have governing rules. In *casu*, there are rules and a trust deed that the plaintiffs seek to rely on



but the defendant contends is inapplicable as they are unsigned. It is trite law that unsigned documents can be given legal effect where the parties' conduct shows that they treated the document as binding by acceptance or implied use. In the English case of **Reville Independent LCC vs Anotech International (UK) Limited**<sup>1</sup> the Court of Appeal upheld a decision of the Commercial Court which found that a party had accepted the terms of an unsigned agreement by its conduct even though that party had not signed the agreement. In the case of **Zambia Breweries PLC vs Betternow Family Limited**<sup>2</sup>, the Supreme Court upheld the holding of the High Court that the conduct of the parties showed that a contract existed between the parties despite one of the parties not having signed the contract. While signing a document is the most common way to demonstrate agreement, unsigned documents can be valid and enforceable depending on the intention of the parties to be bound by the terms of the said documents, and performance. The authors of the **Halsbury's Laws of England Edition at para 263, page 141** state the following:

*"Where there is an informal agreement which expressly requires or envisages the subsequent execution of a formal contract, the legal effect of that prior informal agreement depends on the intention of the parties; they may have entered into a binding provisional agreement whilst envisaging its subsequent replacement by a more formal one, or they may evince an intention only to be bound on the execution of the formal contract, the prior informal agreement being of no legal effect."*

The same authors state the following, at para 285, page 163:

*"Even where the assent of the parties to an agreement is signified in some manner other than a document containing or referring to its terms, it is still possible for the terms contained in a document to become part of the agreement between those parties. That document may even be the terms of another contract between the parties, or of a draft agreement between them .....All that is required is a clear intention on the part of all parties to the*

*agreement that the terms contained in that one document be incorporated in their agreement.”*

From the above, it is clear that even draft documents may be binding on the parties if it is established that the parties intended to be bound by the draft.

In *casu*, a report prepared by Spencer Mwape, appearing at pages 9 to 12 of the plaintiffs' bundle of documents reveals, at page 10 paragraph 2, that the rules and trust deed though unsigned were being used as a basis for payment of pension benefits to the members and they formed part of the basis for actuarial valuations done. It is further revealed that the said rules and trust deed in fact formed part of the conditions of service for the defendant's employees. In the premises, I find that the exhibited rules and trust deed were used in the administration of the pension scheme and hence binding on all stakeholders involved, the defendant included.

**Whether or not the defendant unilaterally varied the pension scheme**

It is undisputed that when the plaintiffs were employed by the defendant, they joined the Indeni Pension Scheme which at the time was a defined pension scheme in nature. It was in fact a condition of service for employees of the defendant to be part of the pensions scheme as per clause 18.1 of the Indeni Petroleum Refinery Company Limited 2003 conditions of service which provide that:

*“All Zambians employees will wherever possible be members of the INDENI Pension Scheme...”*

When the plaintiffs joined the defendant company, the Indeni Pension Scheme was a defined benefit scheme plan as conceded by the defendant under paragraph 5 of its defence, and by DW in his testimony. The Indeni Pension Scheme Rules exhibited at page 13 of the plaintiffs' bundle of documents define “Scheme” as to mean:

*“the Indeni -Defined Benefits Staff Pensions Scheme or Fund.”*

Clearly the pension plan was a defined pension plan in nature which, according to DW, changed to the defined contributions plan in 2008. DW further conceded

that the employees, more particularly the plaintiffs herein, were not informed of the impending change and hence their consent was not obtained. In fact, the report by Spencer Mwape exhibited at page 11 of the plaintiffs' bundle of documents states at 3.3.1 that the members of the Indeni Pension Scheme were not informed of the conversion of the scheme plan. It is clear from the preceding that the plaintiffs had no knowledge of the conversion and hence did not consent to it. The defendant however argues that the conversion was made by the trustees who are charged with administration of the pension trust and hence it cannot be held liable. I have carefully examined the Indeni Pension Scheme Rules. Clause 13 of the said rules provides for amendment. The clause reads as follows:

*"The Employer in agreement with the Trustees may from time to time by means of resolution properly passed at a meeting of its Board amend all or any of the rules, provided that no such amendment shall authorize the application of any of the moneys held or to be held by the employer for any purpose other than the benefit of the member's pension or their dependents, or affect adversely the right or interests already secured by any member or pensioner (save in so far as may be entailed in securing the approval or continued approval of the scheme as an approved scheme under the Income Tax Act ,Cap 323 of 1966 by the Commissioner of Taxes, to whom all members shall be notified) and provided further that no amendment shall be made so as to alter the object of the scheme as described in Rule 2." [Underling for Court's Emphasis]*

While the administration of the pension scheme is in the reserve of the trustees, the rules of the pension scheme cannot be changed except in agreement with the employer, the defendant herein. I would like to believe that the reason for this is because the pension scheme forms part of the employees' conditions of service as espoused earlier in this judgment, and hence the employer would need consent of its employees to vary their conditions of service. Accordingly, I find that the rules of the Indeni Pensions Scheme could not be changed without the

consent of the defendant. The trustees are mandated to operate in accordance with the scheme rules and hence they could not change the scheme benefit plan without the consent of the defendant and PIA. For the scheme plan to change, the defendant must have agreed with the trustees, which change as testified by DW, was done without the consent of the plaintiffs. In the premises, I find that the defendant did vary the pension scheme plan from a defined benefit to a defined contribution unilaterally, that is, without the consent of the plaintiffs.

**Whether the plaintiffs are entitled to an award of damages**

It is trite law that he who alleges must prove his or her claims. To be entitled to general damages, the plaintiffs must prove that the defendant's actions caused them to suffer loss. The plaintiffs allege that as a result of the change in the scheme benefit plan, there was a delay in receiving the correct pensions due to them which action resulted in loss of value of the pensions due to them. According to DW's testimony, the plaintiffs retired in April and May, 2014. The defendant received the plaintiffs' monies on 22<sup>nd</sup> October, 2014 but only made the first payment to the plaintiffs' accounts on 5<sup>th</sup> November, 2014. The second payment was made in September, 2015. Clearly the plaintiffs were not paid their pensions immediately after they retired but had to wait for 6 months after retirement for the first payment and over a year for the second payment.

It is also not disputed that the plaintiffs' retirement packages were calculated on the September, 2013 pay slips as opposed to the April and May, 2014 pay slips. DW also conceded that the plaintiffs' salaries in 2014 were higher than what they were receiving in 2013 as their salaries had been increased in January, 2014. He conceded that the amount of one's salary is a huge factor in determining the pension benefit. While the calculations were done by the Administrator of the trust, the delay in aligning the same to two distinct benefit schemes was as a result of the unilateral migration of the plaintiffs' contributions from the defined benefit pension scheme to the defined contributory pension



scheme. In the case of **Richard H. Chama and 213 Others Vs NAPSA and Others**<sup>3</sup> cited by counsel for the plaintiff, the Supreme Court held that:

*“Our understanding is that there is a marked distinction between a defined benefit scheme and defined contribution scheme. It is the appreciation of this distinction that should help determine the issues in dispute in this case....*

*We understand a defined pension scheme or plan to be a type of pension scheme in which an employer promises a specified pension payment, lump sum or combination thereof, on retirement. That pension payment is predetermined by a formula based on the employer’s earnings history, tenure of service and age, as opposed to being based directly on individual investment returns.....*

*Put differently, in a defined benefit plan, the benefit the employee is to receive, is determined ahead of the employer’s retirement time. It is ‘defined’ in the sense that the benefit formula is set out and known in advance. This kind of scheme thus provides eligible employees a guaranteed income for life when they retire. That guaranteed retirement benefit amounts for each participant is based on factors such as the employee’s tenure and salary.*

*.....on the other hand, the contribution scheme is a scheme under which no promise for a specific retirement income is made. It is a pension scheme that builds up a pool or pot of money that can be used to provide an income in retirement. The pension pot builds up through the employee and (where applicable) the employer’s contribution plus investment returns and tax relief....*



*.....what emerges from this is that the two pension schemes are of a totally different character and the benefit payment from them should logically be differently computed.”*

From the foregoing case, the Supreme Court succinctly explained the difference between the two pension schemes and it is clear that in relation to the defined benefit plan, calculating the same would not have been an issue as the formula is set out and known in advance. In relation to the defined contributory scheme however, the calculation is not so straight forward as lot of factors as elucidated above need to be taken into consideration. To bring this into context, to the case in *casu*, if the plaintiffs had been consulted by the defendant about the migration of their pension benefits from one scheme to the other and their consent obtained, the problem of the delay would not have arisen as the plaintiffs would have been well aware of the implication of having their pension benefits moved from the defined benefit plan to the defined contributory plan. It has been established that based on the evidence before this court, the plaintiffs had no idea about this migration until they received their initial instalment. This position as such falls squarely in the lap of the defendant as their unilateral action manifestly triggered a course of action in relation to the calculation of the pension benefits due post September 2013 that resulted in a delay. The defendant cannot escape blame, and the plaintiffs are entitled to damages for the said delay.

Further, the defendant's feeble argument that the 1<sup>st</sup> plaintiff had been re-engaged on contract for close to two years to avert challenges arising from the delay in payment of his pension and hence he is not entitled to damages is unacceptable. This is because DW testified that the 2<sup>nd</sup> plaintiff was given a contract which was unrelated to his pensionable employment service. There is no evidence from the defence that when re-engaging the 2<sup>nd</sup> plaintiff, they notified him that his re-engagement was to mitigate any loss from the delay in the payment of his pension.

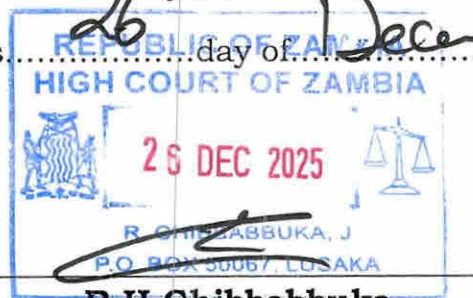
That being said, I agree with counsel for the defendant's argument that the plaintiffs cannot claim that the pension benefits due to the plaintiffs based on their respective final salaries on retirement as prescribed under the defined benefit scheme (less payments already made) and accrued interest up to date of final payment be awarded. This is because the same was not formally pleaded as a claim in the writ of summons and statement of claim.

The net result of this action is:

1. The plaintiffs are awarded damages for delay in payments of the correct benefits due to the plaintiffs which damages are to be assessed by the Deputy Registrar.
2. Interest accrued on the benefits between the initial payment in September 2013 and April, 2014 and May, 2014 for the plaintiffs at the short-term deposit rate from date of commencement of this cause of action to date of judgment and thereafter at the current Bank of Zambia lending rate until full payment.
3. Costs are for the plaintiffs to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Lusaka this 26<sup>th</sup> day of December 2025



**R.H Chibbabbuka**  
**HIGH COURT JUDGE**