

IN THE SUPREME COURT FOR ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

Appeal No. 70/2009

SCZ/8/5/2009

BETWEEN:

BARCLAYS BANK ZAMBIA PLC STAFF PENSION FUND	1st APPELLANT
BARCLAYS BANK ZAMBIA PLC	2nd APPELLANT
AND	
AUGUSTINE MWANAMUWILA AND 58 OTHERS	1st RESPONDENTS
HECTOR CYPRIAN PHIRI AND 63 OTHERS	2nd RESPONDENTS

CORAM: Chibesakunda Ag CJ, Hamaundu and Malila JJS
On 13th November, 2014 and 23rd January, 2015

For the Appellant	:	Mr. M. Sakala of Messrs Corpus Legal Practitioners
For the Respondents	:	Mrs. N. Mutti and Mr. M. Chitambala of Messrs Lukona Chambers

JUDGMENT

Chibesakunda, Ag CJ delivered the Judgment of the Court.

Cases referred to:

1. *Ronex Properties v John Laing Construction Limited and others (Clarke, Nicholls and Marcel (a firm) third parties [1983] 3 All ER 961*
2. *William David Carlisle Wise v E. F. Hervey Limited (1993) ZR 179*
3. *Attorney General v Peter Mvaka Ndhlovu (1986) ZR 12*

4. *Standard Chartered Bank Zambia Plc v Willard Solomon Nthanga and 420 Others* SCZ Judgment No. 13 of 2008
5. *Hilton v Sutton Steam Laundry* [1946] KB 65
6. *Stella Upton v William Derek Walker* (1971) ZR 192
7. *National Milling Company Limited v Grace Simataa and others* (2000) ZR 91
8. *Bainbridge v Stoner* 16 Cal.2d 423 1940
9. *Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprises* (1999) ZR 27
10. *Zambia Revenue Authority v Nansando Isikando and 3525 Others* Appeal No. 21/2012 Unreported

Legislation referred to:

- a. *Pension Scheme Regulation Act, No 28 of 1996* Sections 10, 18 (1) (a), and 24
- b. *Supreme Court Rules Chapter 25, SI No. 26 of 2012* Rule 19(1)
- c. *Limitations Act 1939, Sections 2(1) (a) and (d), 19 (1) and (2)*
- d. *English Law (Extent of Application) Act, Chapter 10*
- e. *Income Tax Act Chapter 323 4th Schedule, Section 37*

Work referred to:

- i. *Rules of the Supreme Court (Whitebook) 1999 Edition* Order 18/8, 33/4/6/, 18/15/7
- ii. *Ogders on Civil Court Actions 24th Edition*
- iii. *Limitation Periods, 3rd Edition*
- iv. *Halsbury's Laws of England 4th Edition Reissue Volume 28 Lord Hailsham of St Marylebone Butterworths London 1997*
- v. *Halsbury's Laws of England 4th Edition Reissue Volume 36 (1) Lord Mackay of Clashfern Butterworths London 1999*
- vi. *Chitty on Contracts Volume 1 General Principles 30th Edition H. G Beale Sweet and Maxwell Thomson Reuters 2008*

This is an Appeal against the Judgment of the High Court, dated 7th January, 2009, declaring that the 1st Respondents (Plaintiffs in the Court below) were entitled to be paid pension upon termination of their employment with the 2nd Appellant (2nd Defendant in the Court below).

The history of this matter is that the 1st Respondents were employees of the 2nd Appellant Bank for various lengths of service. As an incidence of employment, the 1st Respondents were members of a non-contributory pension scheme operated by the 1st Appellant (1st Defendant in the Court below). The scheme entitled employees to pension upon completion of 10 years continuous service with the 2nd Appellant. Alternatively, the employees were entitled to deferred pension when an employee left employment before attaining the required retirement age.

On 25th June, 1997, the 2nd Appellant issued Executive Circular No. 6 offering employees two options to exit from employment. One option was Voluntary Redundancy; the other was on Early Leaving. The Circular gave no details or terms of offer other than that reduction in staff numbers was necessary for the

2nd Appellant's re-organisation. Employees, including the 1st Respondents, applied for the respective schemes. Those that were successful were handed termination letters on diverse dates containing a breakdown of their severance packages. Employees who opted for Voluntary Redundancy were, additionally, asked to sign Deeds of Disclaimer. All the 1st Respondents, save for one, signed the Deeds.

On 27th May, 2004, some among the 1st Respondents, who had attained the required age, submitted a joint claim for deferred pension. But the Appellants rejected the claim on grounds that the 1st Respondents had signed Deeds of Disclaimer forfeiting their pension. Aggrieved, the 1st Respondents sued the 1st and 2nd Appellants by way of Writ of Summons dated 11th July, 2005.

The 1st Respondents' contention in their amended Statement of Claim was that the Deeds of Disclaimer were illegal and unconstitutional. That the Deeds were executed under duress and mistake because the signing was made a condition precedent to receiving the terminal benefits. Further, that the 1st Respondents were under the mistaken belief that pension was included in the

Redundancy Package. In the alternative, that the 1st Respondents had assumed the pension had been deferred until such time the 1st Respondents had reached the eligible age. The 1st Respondents further pleaded *non est factum* on grounds that the disclaimer was not supported by an accord and satisfaction. The 1st Respondents were seeking the following reliefs:

“

- (i) **A declaration that the Plaintiffs and each one of them are entitled to be paid their accrued pension benefits;**
- (ii) **An Order that the Defendants do pay the Plaintiffs a sum of K4,503,941,528.00 being money due to the Plaintiffs as accrued deferred pension;**
- (iii) **Damages for mental distress, anguish and inconvenience arising from the Defendants refusal to pay the Plaintiffs' accrued pension benefits;**
- (iv) **Interest;**
- (v) **Any other or further relief; and**
- (vi) **Costs.”**

The Appellants, on the other hand, denied that they made the 1st Respondents sign Deeds of Disclaimer; that the 1st Respondents were of sound mind and body at the time of exiting from employment; that the 1st Respondents freely affixed their signatures on the Deeds on their own. That they could not rely on a plea of *non est factum*. Further, that the 1st Respondents were estopped from refusing the effect of the Deeds of Disclaimer. According to the

Appellants, the 1st Respondents were not owed anything as they were all paid in accordance with the terms of the Voluntary Redundancy. The Appellants, further, averred that since the 1st Respondents left the 2nd Appellant's employment between 1997 and 2000, their claim was statute barred.

In his Judgment, the learned trial Judge held that the Deeds of Disclaimer were null and void. That Section 18(1) (a) of the **Pension Scheme Regulation Act No 28 of 1996** barred deferred payments; that the Appellants were obligated to pay full accrued benefits at the time the 1st Respondents were leaving employment. The learned trial Judge observed that the scheme for voluntary separation was extraordinarily oppressive in that the Appellants had not disclosed the mode of calculating the separation package to the affected employees; that the 2nd Appellant had long made up its mind not to pay the pension. The learned trial Judge concluded his Judgment as follows:

“The Plaintiffs are deemed to have been entitled to pension upon their exit as deferred pension had been outlawed which pension arrears will attract interest at Bank of Zambia determined short term deposit rate from the issuance of the writ until Judgment and long term

deposit rate from Judgment until payment. The matter is sent to the Deputy Registrar for an expeditious assessment. That way we will give value to judicial time. Costs will follow the event, to be taxed in default of agreement."

Hence this appeal. The Appellants raised seven grounds of appeal in the amended Memorandum of Appeal. These are:

1. That the learned trial Judge erred both in law and fact when in rendering his Judgment he totally failed to consider the fact that the Respondents were paid their full benefits under the voluntary early leavers scheme and thereby the 2nd Appellant fulfilling its pension obligation towards them.
2. That the learned trial Judge erred both in law and fact when he ordered that the pension due to the Respondents be assessed by the Deputy Registrar when the Respondents in their pleadings had claimed a liquidated sum of four billion, five hundred and three million, nine hundred and forty one thousand and five hundred and twenty eight Kwacha (K4,503,941,528.00) as the alleged total value of the accrued pensions due to them.
3. That the learned trial Judge erred both in law and fact when he held that the Deeds of Disclaimer signed by the Respondents were contrary to the 4th Schedule of the Income Tax Act Cap 323 of the Laws of Zambia (the "Act") and therefore null and void as the application of the said Act is for tax benefits and not for the regulation of pension schemes.
4. That the learned trial Judge erred both in law and fact in finding that the early leavers scheme was extraordinarily

oppressive by failing to consider the fact that the said deeds of disclaimer were signed without any duress and the Respondents were paid benefits over and above what they were entitled to under the pension scheme.

5. That the learned trial Judge erred in law and fact in finding that the deferred pensions are illegal.
6. That the learned trial Judge erred in law and fact in failing to distinguish between separate and distinct legal personalities of the 1st and 2nd Appellants in making his Judgment.
7. That the learned trial Judge erred both in law and fact when he totally failed to take into account the plea by the Appellants that the matter was statute barred.

At this stage it must be pointed out that after the Appeal was filed, an application for Joinder of parties was made before a single Judge of the Supreme Court. There appears to be no copy of the Affidavit in Support or Order of Joinder on the Record. Suffice to say, that this application was granted to join the 2nd Respondents who were also employees of the 2nd Appellant and whose employment was similarly terminated by voluntary redundancy.

At the hearing of this Appeal, Counsel for the 1st and 2nd Respondents raised a Preliminary Objection pursuant to Rule 19 (1) of **Statutory Instrument No. 26 of 2012** as read together with

Supreme Court Rules Chapter 25. The three grounds in relation to Ground seven were as follows:

- 1. That neither the Limitation of Actions Act 1939 nor any statute providing any period of limitation within which to commence these proceedings was pleaded by the Appellants in their respective defence before the trial Court.**
- 2. That at no time in the proceedings before the trial Court did the Appellants raise any issue of statute of limitation.**
- 3. That the Appellants in their Heads of Argument under Ground seven have raised section 2 of the Limitation of Actions Act 1939 when the said defence was neither specifically pleaded nor raised in the Court below.**

Counsel for the Respondents had filed written arguments which were augmented by oral submissions. Counsel contended that the issue of statute of limitation had never been raised nor specifically pleaded in the Court below. That neither had the Appellants stated any specific statute they were relying on. Counsel

submitted that a party intending to rely on the statute of limitation as a defence had three options: firstly, to plead the statute of limitation and adduce evidence in support at trial; or secondly, to apply before the trial Court to strike out the Writ of Summons and Statement of Claim as not disclosing a reasonable cause of action; or thirdly, to raise a preliminary issue in relation to the statute of limitation at any stage of trial.

For the preceding propositions, Counsel relied on Order 18 Rule 8 of the Rules of the Supreme Court (RSC) 1999 Edition, the opinions of the learned authors of *Odgers on Civil Actions and the Limitations Period*, as well as the principles expounded in the English case of ***Ronex Properties v John Laing Construction Limited***¹.

The Respondents' written submissions were more or less the same. We were urged to dismiss the entire appeal for being incompetent before this Court. Counsel submitted that, in the event this Court found for the Appellants, the Respondents would, in the alternative, rely on arguments in their filed written Heads in Opposition for Ground seven.

In opposing the preliminary issue, Counsel the Appellants submitted orally that the defence of limitation was clearly and sufficiently pleaded. That the Appellants' averment in paragraph 7 of the Defence (at page 37 of the Record) contained enough facts to show that the Respondents' action was statute barred. It was Counsel's contention that it was sufficient to plead the defence of statute bar without necessarily indicating the law being relied on. For this principle, he referred us to our decision in **William David Carlisle Wise v E. F. Hervey Limited**². Counsel urged this Court to dismiss the Preliminary Objection as incompetent, unnecessary and academic for attacking only one of the seven grounds of Appeal. The same arguments were advanced in the Appellants' written response in opposition.

After examining the submissions and authorities, we take the same view as Counsel for the Appellants. The points raised are, essentially, an extension of the arguments in the main Appeal. In this respect, Order 33/4/6 of the RSC provides us with ample guidance to take great care when dealing with preliminary issues:

“As it may well happen that what appears attractive as a trial (or hearing) of such a preliminary issue will not differ much from the plenary trial itself.”

We have, therefore, decided to defer the Preliminary Issues and deal with them, as part of the submissions when considering Ground seven.

In the main appeal, both Counsel filed written Heads of Argument on which they relied entirely. On Ground one, Counsel for the Appellants submitted that the Appellants had discharged their obligation as the Respondents had been paid their benefits in full through the voluntary early leavers' scheme. He further submitted that the lower Court's finding that the Respondents were intimidated, was mere speculation, not supported by facts. We were urged to reverse the finding in line with the Supreme Court decision in ***Attorney General v Peter Mvaka Ndhlovu***³.

On Ground two, Counsel argued that the learned trial Judge erred in ordering assessment of the accrued pension when the Respondents' claim was for a liquidated sum; a sum which was certain and capable of being ascertained by computation.

It was submitted on Ground three that the lower Court fell into error by relying on provisions in the 4th Schedule of the **Income Tax Act Chapter 323** to declare the Deeds of Disclaimer null and void when the same provisions did not cover persons separated from employment by redundancy.

On Ground four, it was submitted that the signing of the disclaimers was not actuated by any form of duress, and that any finding of threat or coercion was not supported by evidence adduced before Court.

On Ground five, Counsel argued that the holding that deferred pensions had been abolished and thus illegal, was a misinterpretation of the meaning of Section 18 (1) of the **Pension Scheme Regulations Act**. Counsel submitted that the decision in **Standard Chartered Bank Zambia Plc v Willard Solomon Nthanga and 420 Others**⁴, on which the learned trial Judge relied, had created an absurdity which this Court ought to correct. Otherwise it would mean that pension would become payable every time a member left the scheme before attaining retirement age.

On Ground six, Counsel submitted that in the event that the Court found the Respondents were entitled to pension, the Appellants would contend that being a separate legal entity, it was the 1st Appellant, and not the 2nd Appellant, that ought to be held liable.

On Ground seven, the Appellants submitted that the learned trial Judge erred when he failed to consider the Appellant's defence and proceeded to adjudicate over a matter that was statute-barred. It was the Appellants' contention that since the last Respondents' contract of employment was terminated in 2000, their causes of action were already statute barred by the time the action was commencing in July 2006. He submitted that their action was barred under Section 2(1) (a) and (d) of the English **Limitations Act of 1939**. The English Act having been extended to our jurisdiction by virtue of the **English Law (Extent of Application) Act Chapter 10**. The Appellants argued that in accordance with the principle in **Hilton v Sutton Steam Laundry**⁵ and adopted in **Stella Upton v William Derek Walker**⁶, the lower Court ought not to have entertained any action, regardless of its merits. The Appellants

submitted further that as the Respondents were seeking to enforce their rights under the pension scheme rules and contract of employment, their action ought to have been commenced within 6 years.

The Appellants repeated the same argument for the second set of Respondents who joined the proceedings after this Appeal had been filed. It was argued that even if the action was a trust claim, it was not excluded from limitation by virtue of Section 19 (2) of the **Limitations Act**.

In response, Counsel for the Respondents submitted on Ground one that the Respondents claim was for accrued pension, which was due and payable by the 1st Appellant. Counsel submitted that what the Respondents received were redundancy benefits, being compensation for termination of employment from the 2nd Appellant under the Voluntary Redundancy Scheme.

On ground two, Counsel for the Respondents submitted that the learned trial Judge was on firm ground when he ordered assessment for the accrued pension. Counsel submitted that the accrued pension could not be established because the Appellants

had not furnished the Respondents with financial statements. Further, that the Court had rightly exercised its discretion to grant general or other relief in accordance with Order 18/15/7 of the RSC.

On ground three, Counsel for the Respondents submitted that contrary to the Appellants' assertion, the 4th Schedule to the **Income Tax Act** was applicable in this matter. Further that the 4th Schedule, which derived its authority from Section 37, was binding on both the 1st and 2nd Appellants. He contended here, as in the Court below, that the Deeds of Disclaimer sought to extinguish the Respondents' accrued rights. That this was in contravention to Sections 10, 18 and 24 of the **Pension Scheme Regulations Act**.

On Ground four, Counsel for the Respondents submitted that the Deeds of Disclaimer were executed under duress and therefore null and void. We were invited to look at the case of **National Milling Company Limited v Grace Simataa and Others**⁷ to support this argument. Counsel submitted that there was sufficient evidence on Record showing that the Respondents were specifically required to execute the Deeds of Disclaimer before they could

access their redundancy package. Further, that there was also evidence that the Respondents only became aware of their redundancy package after their contracts of employment were terminated.

On Ground five, Counsel for the Respondents submitted that the enactment of the **Pension Scheme Regulations Act** operated to abolish deferred pension. It was argued that under Section 18 of the **Pension Scheme Regulations Act**, payment of portable benefits on a member leaving the pension fund was mandatory.

On Ground six, Counsel submitted, on behalf of the Respondents, that there was no dispute as to the separate legal personality between the 1st and 2nd Appellants. Counsel submitted that it was the Appellants who through their conduct and evidence attempted to blur their distinct personalities. It was submitted that all letters accepting the Respondents' applications to leave employment and Deeds of Disclaimer were either signed by or prepared for or on behalf of the 2nd Appellant. Counsel argued that by conduct the 2nd Appellant constituted itself as a constructive trustee, and was therefore jointly liable with the 1st Appellant.

Counsel for the Respondents argued Ground seven in the alternative. Counsel submitted that since the Respondents' claim before the lower Court was for recovery of trust property against the 1st Appellant, provisions of Section 2 of the **Limitations Act**, did not apply. That actions for recovery of trust property were not amenable to the limitation prescribed under the Act.

Counsel further submitted that the claim was not, as the Appellants suggested, for enforcement of rights under a simple contract. He argued that even assuming the Respondents' claim arose under contract, the limitation period still did not apply by virtue of Section 19 (1) of the **Limitations Act**. It was Counsel's submission that the provisions in Section 19 were available only for non-trustees and certain categories of constructive trustees, and not express trustees such as the 1st Appellant. Counsel prayed that the whole appeal be dismissed for lack of merit and being an abuse of court process.

This was the gist of the lengthy submissions from Counsel. We have considered the Judgment, the evidence on Record and the authorities. We are grateful to both Counsel for their industry. It is

common ground that the Respondents left employment from the 2nd Appellant by way of voluntary redundancy on divers dates between 1997 and 2000. It is common ground that some payment of benefits was made out to the Respondents on exit. It is also common ground that a number of the Respondents executed Deeds of Disclaimers forfeiting claims for pension, retirement or other benefits.

The question left to be determined is whether the Appellants successfully pleaded the special defence of limitation so as to render the Respondents' claim for accrued pension not maintainable.

Earlier on, we deferred the preliminary objection to the main appeal. In light of this and because of the novelty of some of the issues, we propose to deal with Ground seven first together with the arguments in the preliminary issues. Thereafter we shall deal with Grounds one, three, four, five and six together as one, and Ground two separately.

Counsel for the Appellants argued with force that the defence of limitation of action was specially pleaded in the Court below

albeit that the statute relied on was not mentioned. His argument was that it was sufficient to just state the facts. On the other hand, Counsel for the Respondents argued spiritedly that the Appellants ought to have prosecuted the plea of limitation by adducing evidence at trial, or applying to have the matter struck out or raising a preliminary issue at any stage of the proceedings.

This Court has, in a plethora of cases, pronounced itself on the function and purpose of pleadings in civil actions. Namely, not to take the other side by surprise and to enable the other party to know the case he is to meet. As a general rule, all pleadings must be brief avoiding unnecessary material such as citations from statutes or propositions of law; failure to state the statute relied on, however, is treated only as an irregularity and will not nullify the proceedings, document, judgment or order (See paragraph 12 of Halsbury's Laws of England Volume 36 (1)). Hence our position in **William David Carlisle Wise v E. F. Hervey Limited**² referred to us by Counsel that:

“Whenever a party seeks to rely on any right or remedy conferred by a statute, and though it is not necessary to mention in the pleading the statutes in question, the

pleading must nevertheless set out all the material facts which, if proved, establish his right or remedy under the particular statute.”

In the present case, the Appellants submitted that they relied on a special plea of limitation. The rules for special pleadings are well-known; special defences have to be expressly pleaded (Order 18/8/1 RSC 1999 Edition). According to the learned authors of Halsburys Laws of England Volume 28 at paragraph 846:

“the limitation period will normally operate to bar an action only if successfully raised by way of defence.”
(Emphasis ours)

As to what constitutes a successfully raised defence under the limitation period, has not been defined in our Courts. However, we are persuaded to adopt the principle established in **Ronex Properties Limited v John Laing Construction Limited and others**¹ cited to us by Counsel for the Respondents which states:

“Where it is thought to be clear that there is a defence under the Limitation Act, the Defendant can either plead that defence and seek the trial of a preliminary issue or in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the Court and support his application with evidence.”

In that case, Donaldson LJ stated at page 965 as follows:

“There are so many cases in which the expiry of limited period makes it a waste of time and money to let the Plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is, therefore, for a Defendant to apply to strike out his claim as frivolous and vexatious and an abuse of the process of the Court, on the ground that it is statute barred. Then the Plaintiff and Court know that the statute of limitation will be pleaded, the Defendant can, if necessary, file evidence to that effect, the Plaintiff can file evidence of an acknowledgement or concealed fraud or any matter which may show the Court that his claim is not vexatious or an abuse of process and the Court will be able to in, I suspect, most cases what was done in R v DPP [1973] 2 All ER 935, strike out the claim and dismiss the action.”(Our emphasis)

From the authorities cited above it is clear that to succeed in a plea of limitation a Defendant has to expressly apply to the Court to strike out a matter as frivolous, vexatious and an abuse of court process. It is not enough to simply state that the action is statute-barred. The learned authors of Halsbury's Laws of England state that where the Defendant successfully pleads that the action is time-barred, the burden is on the Plaintiff to prove that the relevant limitation period has not expired (See the editorial note of paragraph 847 Volume 28).

But in the case before us, the Appellants did not expressly apply to the Court to dismiss the action in the manner prescribed

above. Neither did they mention, in their Defence in paragraph 7 at page 37 of the Record, any statute or provision either under the **Limitations Act** or any Act of Parliament that they were placing reliance on.

In the 1940 case of **Bainbridge v Stoner 16 Cal.2d 423**, the Supreme Court of California had occasion to discuss the sufficiency of merely stating the facts as opposed to specifying the actual provision relied on in a pleading for statute bar (or demurrer challenging a complaint). The majority decision was that it was sufficient to just state the facts generally. But Carter J, in a dissenting Opinion (with Curtis J and Houser J concurring), took a view, which we are inclined to take ourselves, that it was not sufficient. He stated as follows:

“The opposing party is entitled to know the precise defence which he has to meet and this essential information can be assured him only by requiring that the sub-division number as well as the number of the code section be specified.”

Our considered view is that in the absence of a precise statute in a plea of limitation, it is unfair to expect the opposing party to know what defence they have to meet. More so if the matter on

which a party relies, makes a claim or defence not maintainable or which if not specifically pleaded may take the opposite party by surprise or raises issues of fact not arising out of the preceding pleading: Order 18/8/1 RSC.

We, therefore, agree with Counsel for the Respondents that the Appellants did not sufficiently plead the defence of limitation. What we have seen instead is Counsel attempting to give evidence from the Bar by referring to provisions of the Limitation Act. This is what they ought to have done in the Court below but clearly they did not do so. In our view, the learned trial Judge was perfectly right not to address the defence of statute bar. Further, it is a well-settled principle that if a matter is not pleaded in the Court below, it is not competent for any party to raise it before this Court (**Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprise**⁹). For the reason aforementioned Ground seven of the Appeal fails.

We now move to Ground one, three, four, five and six which turn mainly on the unpaid or deferred pension and the Deeds of Disclaimer. The Appellants' in their submissions challenged our

decision in the case of **Standard Chartered Bank Zambia Plc v Willard Solomon Nthanga and 420 Others**⁴ where we held that Section 18 (1) of the **Pension Scheme Regulation of Act** had abolished deferred pension. We have examined Section 18 (1), the relevant parts which we have reproduced. It states among others:

A pension scheme shall-

- a. Make adequate arrangements for the preservation of pension right so as to protect the interests of its members
- b. ...
- c. Each year give every member or benefit member statement showing the members' actual benefits and the member's accrued portable benefits.
- d. ...
- e. ...
- f. Grant to members leaving the scheme before a benefit has become payable full portability of the accrued retirement benefit at the time the member leaves the scheme

(2) Portable benefit means the total of the retirement contributions paid by the employee and the employer on the leaving member's account, plus interest during his participation under the plan.

The provision is couched in mandatory terms. Section 18 (1) (f) is instructive. Members leaving the scheme before pension becomes payable are to be granted full portability of the accrued retirement benefit at the time of leaving the scheme. The meaning of

Portability has been explained in Section 18 (2); it simply means that accrued benefits can be transferred to a Member on retirement or to a new employer at the time of leaving. So in our view the decision in **Standard Chartered Bank Zambia Plc v Willard Solomon Nthanga and 420 Others**⁴ is still good law. We, therefore, cannot fault the learned trial Judge's finding that the Respondents were entitled to be paid pension upon exit from the Appellant bank.

Still on the same thread, we find, with due respect, astonishing submissions that the 4th Schedule of the **Income Tax Act**, is inapplicable. Yet the Appellant's Trust Deed of Variation at page 180 of the Record evidently shows that the Staff Pension Fund was an Approved Pension Fund under the Income Tax Act.

This pension benefit under the Staff Pension Scheme was an entitlement as part of the Respondents' conditions of service; and quite apart from Redundancy benefits. Therefore, and as rightly observed by the learned trial Judge, the decision to require the Respondents to sign Deeds of Disclaimer was a unilateral variation to the conditions of service. It is trite law that unilateral changes to the terms of employment are adverse and unacceptable to the

employee who becomes entitled to treat the breach by the employer as terminating the contract and warranting payment of redundancy or other terminal benefits as appropriate (**National Milling Company Limited v Grace Simataa and Others**⁸). This does not mean that there cannot be any variation of contracts but that such variation ought to be consensual.

Counsel for the Appellant submits that Deeds were executed freely. We respectfully disagree. From the evidence on record, it is apparent that the Appellants were not sincere right from the beginning. The testimony of PW1 Augustine Mwanamuwila at page 556 and the letter instructing that he first signs the Deeds before receiving the terminal benefits at page 134 demonstrate that undue pressure was brought to bear on the Respondents. We agree with the learned trial Judge; the Early leavers scheme was quite oppressive, to say the least. And where a document is executed in a way that it leaves a party under a fundamental apprehension as to the nature of the document, as here, entitles that party to plead *non est factum* and such contract is voidable. (Chitty on Contracts Volume 1 General Principle paragraph 5-101).

We make no comment on the issue of legal and corporate personality as there is no dispute; except to point out, by virtue of operating the pension fund under a trust, both the 1st and 2nd Appellant are jointly liable.

On the basis of the aforementioned, we find that the Deeds of Disclaimer were void and that the Respondents were entitled to be paid their pension. Ground one, three, four, five and six, therefore must fail.

We now turn to Ground two. The position of the law is that assessment is the domain of the Court (See the unreported case of **Zambia Revenue Authority v Nansando Isikando and 3525 Others**¹⁰). At any rate, while the Respondents' claim is a liquidated demand, the Court has discretionary power to order assessment by the Deputy Registrar if the ascertainment of a sum of money, even though specific or named as a definite figure, requires investigation beyond mere calculation: Order 6/2/4 RSC. This matter being a group action, and in the interests of justice will require that the pension sums due to each Respondent be assessed. Ground two also fails.

For the reasons stated above this whole appeal is dismissed for lack of merit. The Order for assessment by the Deputy Registrar is upheld. The award for interest and the Order for costs in the Court below remain unchanged. But given the novelty of some of the issues raised we make no order for costs in this Court.



L. P. Chibesakunda
ACTING CHIEF JUSTICE



E. Hamaundu
SUPREME COURT JUDGE



M. Malila
SUPREME COURT JUDGE