IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 189/2016
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

BETWEEN:

BP ZAMBIA PLC **APPELLANT**

AND

EXPENDITO CHIPASHA AND 235 OTHERS **RESPONDENTS**

CORAM: MAMBILIMA, CJ; MUSONDA AND KABUKA, JJS
On 4th December, 2018 and 10th December, 2018

For the Appellant: **No appearance**
For the Respondent: **Mr. H. H. Ndhlovu of Messrs. H. H. Ndhlovu and Company**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. **UNION BANK ZAMBIA LIMITED V. SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED (1997) S.J 30;**
2. **HARBUTT'S PLASTINE LIMITED V. WAYNE TANK AND PUMP COMPANY LIMITED (1970) 2 WLR 198;**
3. **LONDON, CHATHAM AND DOVER RAILWAY COMPANY V. SOUTH EASTERN RAILWAY (1893) AC 429;**
4. **JEFFORD AND ANOTHER V. GEE (1970) 1 ALL ER 1202;**
5. **ZAMBIA REVENUE AUTHORITY V. HITECH TRADING COMPANY LIMITED SCZ JUDGMENT NO. 40 of 2000;**

6. **INDENI PETROLEUM REFINERY COMPANY LIMITED V. VG LIMITED (2007) 197;**
7. **YONNAH SHIMONDE AND FREIGHT AND LINERS V. MERIDIAN BIAO BANK (ZAMBIA) LIMITED SCZ JUDGMENT NO. 7 OF 1999; AND**
8. **RICHARD NDASHE CHIPANAMA V. ZAMBIA RAILWAYS LIMITED, APPEAL NO. 151/2011.**

LEGISLATION REFERRED TO:

a. **LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, CHAPTER 74 OF THE LAWS OF ZAMBIA;**
b. **RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK);**
c. **SHERIFFS ACT CHAPTER 37 OF THE LAWS OF ZAMBIA;**
d. **PENSION SCHEME REGULATIONS ACT, 1996; AND**
e. **HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA[e].**

1.0 INTRODUCTION

1.1 This appeal is against the Judgment on Assessment delivered by the learned Deputy Registrar on 28th April, 2016. The Deputy Registrar's Judgment followed the Judgment of the High Court given on 18th October, 2010, which was upheld on appeal to this Court on one of three grounds of appeal.

1.2 The Respondents have also filed a cross-appeal against the said Judgment of the learned Deputy Registrar.

2.0 BACKGROUND

2.1 The brief history to this matter is that the Respondents are former employees of the Appellant. The Appellant is the predecessor in title to the Company now known as Puma Energy Zambia Plc. The Respondents were retrenched by the Appellant between the years 1993 and 1999. The Appellant had a Pension Scheme Fund for its employees, which was initially administered through the Zambia State Insurance Corporation (hereinafter called "ZSIC") and later through Sartunia Regna Limited. However, at the time of the retrenchment exercise, the Appellant did not have a retrenchment policy. That notwithstanding, the Appellant later devised a retrenchment package for the Respondents.

2.2 The Respondents were not happy with the quantum of the benefits that were awarded to them by the Appellant following their retrenchment. Consequently, they commenced an action in the High Court by way of a Writ

of Summons and Statement of Claim. In that action, they claimed for, among others, the sum of K18,215,314,116.00 (unrebased), being the accrued value of pension from their membership of the BP Zambia Pension Scheme; damages or equitable compensation for negligence leading to the loss of the Respondents' pension benefits; an account of the sum of K720,056,600.43 (unrebased) paid out of the Pension Scheme Fund to the Appellant by ZSIC on or about 31st January, 1995 and interest.

2.3 In its Judgment, the High Court found, among other things, that the Appellant treated the Respondents' retrenchment/redundancy packages as being connected to the Pension Scheme.

2.4 The learned trial Judge found that the Appellant was in error when it linked the retrenchment packages to the Respondents' pensions. The Judge was of the view that the Respondents' entitlements were not calculated in

accordance with the Pension Scheme Rules. That each of the Respondents was entitled to be paid a pension under Rule 11(ii) of the **BP ZAMBIA LIMITED STAFF PENSION SCHEME RULES**.

2.5 Accordingly, the learned trial Judge ordered that any redundancy packages refunded to the Appellant must be paid back to those of the Respondents affected, with penal interest. Further, that the total figure arrived at for each Respondent should attract, in addition to the interest prescribed by the Pension Rules, a penal rate of interest at the current average Bank lending rate from the date of the Writ until judgment and, thereafter, at 8% until settlement. The summary of the holdings of the learned trial Judge were as follows:

1. **That an account of the true values of the pension contributions from both employee and employer be rendered to each Plaintiff;**
2. **That the values realized should bear a penal interest rate on the current average Bank lending rate per annum from the date of separation to the date of the Writ;**
3. **An account of the Treasury Value of the sum of K720,056,600.00 paid to the Defendant by ZSIC as in No. 1 above.**

2.6 The learned trial Judge went on to hold that the Respondents had failed to prove the following:

1. **That the sum of K18,215,314,116.00 was due to them;**
2. **That the Respondents were entitled to damages or equitable compensation for negligence on the ground that this is adequately addressed in the award of penal interest at the current average Bank lending rate; and**
3. **That compound interest was due to them.**

2.7 Dissatisfied with the Judgment of the learned trial Judge, the Appellant appealed to this Court on three grounds of appeal. The gist of the first ground of appeal was that the learned trial Judge erred in law and in fact, when he held that the Appellant should submit an account of the true values of the pension contributions for both the employee and the employer in respect of each Respondent. On the second ground of appeal, the Appellant contended that the learned trial Judge erred in law and in fact, when he held that the values realized should bear a penal interest rate based on the current average bank lending rate per annum from the date of separation to the date of the Writ. Lastly, on the third ground of appeal, the Appellant

faulted the learned trial Judge for having held that all the Respondents were entitled to judgment.

2.8 This Court found no merit in the first and third grounds of appeal. With regard to the second ground of appeal, we reversed the learned trial Judge's award of penal interest. We, instead, awarded the Respondents interest at the rate of 40% from the date of separation up to the date of the Judgment of the High Court and thereafter, 25% up to the date of payment.

3. PROCEEDINGS BEFORE THE DEPUTY REGISTRAR

3.1. Following the decision of this Court, the matter went to the learned Deputy Registrar for assessment of the amounts due to the Respondents, as decided by the High Court, with the variation made by this Court on the rates of interest. In the assessment of proceedings, the Respondents called two witnesses, one of whom was Mr. Expendito Chipasha, who testified as PW1.

The main thrust of his evidence was that the benefits that the Respondents were claiming from the Appellant were the transfer values at the date of departure. He told the Deputy Registrar that although none of the Respondents had attained the retirement age, the Pension Scheme Rules provided that they were entitled to receive their pension as long as they had served for a period of not less than five years.

3.2. The Respondents' second witness was Jean Mashikashi (PW2), a retired Director- Life and Pensions for ZSIC. In brief, his testimony was that at the material time, the Appellant maintained a pension scheme called Deposit Administration Final Salary Scheme which involved contributions by both the employer and the employee. This witness alleged that the Appellant did not always transmit its employer's contributions component to the pension scheme.

3.3. According to DW2, the formula for calculating pension was the final salary; pension factor, and, the number of years served. He stated that the Appellant's pension factor was 1/45.

3.4. The Appellant, on its part, also called two witnesses. DW1 was Mulenga Mpundu Malata, who told the Court that he joined Puma Energy on 8th August, 2013 as Human Resource Manager. The kernel of his testimony was that a person was only entitled to an additional pension, paid according to a set formula, if one retired normally. He told the Court that the Appellant did not use the K720,056,600.00 transferred to it by ZSIC for the Appellant's own purposes but that it transferred that amount to Sartunia Regna, who were the new pension fund managers.

3.5. DW2 was Collina Beene Halwampa. This witness told the Deputy Registrar that she was a Benefits Consulting

Services and Business Development Manager. She testified that as a pension consultant, the role she played in the matter was to look at the Judgment and come up with an assessment of the Appellant's liability to the Respondents. She explained the method which she used to compute the said liability as being that she gathered contributions from the time a Respondent begun work to the time of retrenchment. That she collected the individual employee contributions and employer contributions and checked for benefits paid to each member. That she netted off any payment made in favour of any member and then applied to the balance, interest rates awarded by the Court. She disclosed that as at June, 2014, when she did the computations, the amount due was K1,629,288.27.

3.6. It was DW2's further testimony that the K720,056,600.00, which the Court ordered to be

accounted for was the asset value of the Scheme at the time.

3.7. After considering the evidence that was before him and the submissions of Counsel, the learned Deputy Registrar held that the full context of the Judgment of the learned trial Judge was that the Respondents were entitled to a pension under Rule 11(ii) of the Pension Scheme Rules.

3.8. With regard to the K720,054,600.00, the learned Deputy Registrar expressed the opinion that the direction by the learned trial Judge, for the Appellant to account for this money, was not a duty to just explain away what had happened to the money. That the direction of the learned trial Judge was that the Respondents were entitled to the said amount of money.

3.9. On the issue of interest, the Deputy Registrar identified three issues as being in contention, namely-

1. **Whether or not compound interest is applicable as factored in the computations of the claim by the Respondents;**

2. **Whether or not interest is applicable to the sums already paid to the Respondents;**
3. **Whether or not interest is applicable to sums paid into Court.**

3.10. With regard to the first issue, the Deputy Registrar held that the practice of charging compound interest is specifically proscribed by Section 4 of **THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT**[a] unless there is an agreement allowing compound interest to be charged. He buttressed that position by referring to the frequently cited case of **UNION BANK ZAMBIA LIMITED V. SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED**[1]. He came to the conclusion that there was no evidence to show that the parties agreed or contemplated that compound interest would be charged on the obligations flowing from the Pension Fund. Further, that there was no evidence to show that the Appellant's Pension Scheme adopted the practice of charging compound interest. The Court also found that the Respondents specifically pleaded

compound interest before the learned trial Judge but the Judge held that they had failed to prove that they were entitled to such interest.

3.11. On the second issue, of whether interest could be applied on monies that had already been paid to the Respondent, the learned Deputy Registrar accepted the position of the law enunciated in the case of **HARBUTT'S PLASTINE LIMITED V. WAYNE TANK AND PUMP COMPANY LIMITED**[2], namely, that-

> **"The basis of an award of interest is that the Defendant has kept the Plaintiff out of his money; and the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly."**

3.12. The learned Deputy Registrar, however, expressed the opinion that there were special circumstances in this case which called for a departure from the settled position of the law as pronounced in the **HARBUTT'S PLASTINE LIMITED**[2] case. He pointed out that the Respondents were paid off what the Appellant determined to be their pension contributions when the

entitlement of the Respondents was to an accrued pension. He expressed the opinion that the Respondents should enjoy the full compliment of their pension which should not be reduced on account of the erroneous payment. He, accordingly, ordered that interest should apply on the accrued pension found due up to date of payment, on which date what had earlier been paid to the Respondents should be netted off.

3.13. With regard to interest on the money paid into Court by the Appellant, the learned Deputy Registrar found that the money that was paid into Court was paid pursuant to a wrong premise that the Respondents were entitled only to pension contributions refund. He, therefore, stated that it would occasion injustice to the Respondents if monies erroneously paid into Court by the Appellant were to be deducted from the monies assessed as pension. In his view, the position would have been different if the Appellant had succeeded on the premise pursuant to

which it had paid the money into Court. He, therefore, held that the monies paid to the Respondents would be netted off from the assessed amounts purely on the basis of monies had and received by the Respondents.

3.14. On the issue of the execution that had been done on the property of the Appellant by the Sheriff of Zambia at the instance of the Respondent, the learned Deputy Registrar held that since the Respondents had the right to enforce the Judgment of the High Court given in their favour, all the costs related to the enforcement of the said Judgment were to be borne by the Appellant. He, accordingly, ordered the Appellant to settle the Sheriff's fees as demanded by the Sheriff based on the Writ of *Fieri Facias* she executed. That the said fees were payable immediately as they had been due from the time of the execution which had been stayed. Further, that in default of payment, the Sheriff would be at liberty to execute on the Appellant.

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4.0. GROUNDS OF APPEAL AND SUBMISSIONS OF THE PARTIES

4.1. It is against the above Judgment on Assessment by the learned Deputy Registrar that the Appellant has now appealed to this Court advancing seven grounds of appeal, namely, that-

1. **the learned Deputy Registrar erred in law and in fact when he held that the Respondents are entitled to interest on amounts that had already been paid to them by the Appellant at the time of retrenchment, contrary to the position of the law that interest cannot accrue on money already paid;**
2. **the learned Deputy Registrar erred in law and in fact when he held that the Respondents are entitled to interest on amounts that had been paid into court contrary to the position of the law that no interest accrues on an amount paid into court;**
3. **the learned Deputy Registrar erred in law and in fact when he held that the Respondents are entitled to be paid the sum of ZMK720,056,600.00 (unrebased) when there was no such order made in the substantive Judgment by the High Court;**
4. **the learned Deputy Registrar erred in law and in fact when he failed to address the issue as to whether the Writ of *Fieri Facias* that had been issued by the Respondents for the sum of ZMK433, 366,064.70 (rebased) was irregular on account of the Respondents having issued it prior to assessment and without any basis;**
5. **the learned Deputy Registrar erred in law and in fact when he held that the Appellant should pay execution fees with respect to the Writ of *Fieri Facias* that had clearly been irregularly issued by the Respondents as evidenced by the final amount which was stated to be due to the Respondents by the Deputy Registrar after assessment;**

6. **the learned Deputy Registrar erred in law and in fact when he held that the Appellant should pay execution fees to the Sheriff of Zambia based on the Judgment of the High Court in Cause No. 2014/HP/1185, and disregarding the fact that the Appellant had appealed against the said Judgment on 20th October, 2015; and**
7. **the learned Deputy Registrar erred in law and in fact when he held that the Sheriff of Zambia should execute on the Appellant to recover execution fees in total disregard to the**
8. **order for stay of execution that had been granted to the Appellant against the Sheriff of Zambia by the Supreme Court under Cause No. SCZ/8/313/2015on 30th October, 2015 and confirmed on 13th November, 2015.**

4.2. In support of the above grounds of appeal, the learned Counsel for the Appellant filed written heads of argument. When the matter came up before us for hearing, Counsel did not appear and did not file any notice of non-appearance. We have, however, taken into account Counsel's filed heads of argument.

4.3. The gist of Counsel's submissions on the first ground of appeal was that the learned Deputy Registrar should have deducted the amounts that had already been paid to the Respondents before adding interest on the accrued pension. He emphasized that the lower Court should have first calculated the accrued pension due to each

Respondent, deducted what had already been paid by the Appellant, and then applied interest on the sum outstanding. He maintained that it was a misdirection for the Court below to order that the amounts paid to the Respondents should only be deducted after the addition of interest. To buttress the foregoing submissions, Counsel cited a number of English cases, including the case of **LONDON, CHATHAM AND DOVER RAILWAY CO V. SOUTH EASTERN RAILWAY**[3], where Lord Herschell, LC, said the following:

> **"... I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events."**

4.4. Counsel also referred us to a portion of our decision in the case of **UNION BANK ZAMBIA LIMITED**[1], where we stated-

> **"On the issue, we would like to recall that the general rule where there has been non-payment of money by due date- in breach of agreement- is to compensate the party owed with an award of interest which serves the same purpose as general damages."**

4.5. Counsel contended that by awarding interest on sums that had already been paid to the Respondents, the learned Deputy Registrar exceeded his jurisdiction in so far as assessment was concerned. According to Counsel, the Judgment of the learned trial Judge, and the Judgment of this Court on appeal, did not award the Respondents interest on moneys that had already been paid to them.

4.6. Coming to the second ground of appeal, Counsel asserted that the learned Deputy Registrar misdirected himself when he ordered that interest must be paid on the money that had already been paid by the Appellant into Court. In Counsel's opinion, the learned Deputy Registrar should have instead computed interest from the date of the Writ of Summons to the date the money was paid into

Court. To reinforce his submissions, Counsel referred us to a number of authorities including the case of **JEFFORD AND ANOTHER V. GEE**[4], where the Court of Appeal had the following to say:

> **"We must mention, however, one significant thing about money paid into the High Court. It carries no interest unless the Court orders it to be placed to a deposit account or to a short term investment account."**

4.7. Counsel also relied on two other authorities; our decision in the case of **ZAMBIA REVENUE AUTHORITY V. HITECH TRADING COMPANY LIMITED**[5], where we said that **"the money paid into Court does not earn interest",** and Order 22/1/8 of the **RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK),** which provides that **"Any interest that may be awarded on the debt or damages recovered should be calculated up to the date of payment into Court."**

4.8. On the third ground of appeal, the kernel of Counsel's contention was that the learned Deputy Registrar misdirected himself when he held that the Appellant

should pay the Respondents the sum of K720,056.600.00 (unrebased) in addition to their pension benefits. According to Counsel, the learned trial Judge in his judgment did not hold that the Respondents were entitled to the sum of K720,056.600.00 but that the Respondents were entitled to an account of that money. Counsel submitted that the Appellant established, through its witnesses at the assessment hearing, that the K720,056.600.00 was remitted to Saturnia Regna Pension Fund who were the new Pension Scheme Fund Managers for the Appellant.

4.9. As for the fourth ground of appeal, Counsel faulted the learned Deputy Registrar for not addressing the issue of the regularity of the Writ of *Fifa* that was issued by the Respondents for the recovery of K433,366,064.70 (rebased). Counsel submitted that the Appellant had made an application before the learned Deputy Registrar for the determination of the legality of the said Writ of

Fifa but that the learned Deputy Registrar did not deliver his ruling on that application. That in his Judgment on Assessment, the Deputy Registrar, nevertheless, ordered the Appellant to pay the execution fees for that Writ.

4.10. Counsel argued that the Court should have taken into account the fact that the Writ of Fifa was issued before the commencement of assessment proceedings. That the fact that the Writ of Fifa was irregularly issued could be seen from the disparity between the amount that was endorsed on the Writ and the amount that the Deputy Registrar found to be due after assessment. According to Counsel, while the Writ of *Fifa* was endorsed with K433,366,064.70, the total assessment amount due to the Respondents was less than K30,000,000.00. Counsel, therefore, urged us to decide on the legality of the Writ of Fifa, set it aside and order the Respondents to pay the execution fees arising from the stayed execution of that Writ.

4.11. With regard to the fifth ground of appeal, Counsel argued that the learned Deputy Registrar misdirected himself when he held that the Appellant should pay the execution fees to the Sheriff of Zambia for the Writ of *Fifa*. He submitted that the Respondents did not have the right to enforce the Judgment of the High Court before the assessment which had been ordered by the learned trial Judge. According to Counsel, the learned trial Judge did not award the Respondent any liquidated sum. He explained that the Writ of *Fifa* in dispute was issued by the Respondents on 30th April, 2014 but the Respondents only made the application for assessment of pension benefits on 5th May, 2014; meaning that the Writ of *Fifa* was issued on the basis of an amount that was unilaterally calculated by the Respondents. Counsel maintained that the Writ of *Fifa* was irregularly issued and that the Appellant cannot, therefore, be made to pay for the cost of the said Writ.

4.12. Counsel argued the sixth and the seventh grounds of appeal together. He contended that the learned Deputy Registrar erred when he held that the Appellant should pay execution fees to the Sheriff of Zambia based on the Judgment of Siavwapa, J (as he then was) in Cause No. 2014/HP/1185. That in coming to that conclusion the Deputy Registrar overlooked the fact that the Appellant had lodged an appeal to this Court against the Judgment of Siavwapa, J.

4.13. Counsel further submitted that it was a serious misdirection by the Deputy Registrar to order the Appellant to pay execution fees based on the Judgment of Siavwapa, J, when the execution of that Judgment had been stayed by this Court on 30th October, 2015 and the stay was confirmed on 13th November, 2015.

4.14. In response to the grounds of appeal and the Appellant's heads of argument, the learned Counsel for the Respondents, Mr. Mr. H. H. Ndhlovu, SC, filed written

heads of argument which he augmented with brief oral submissions when he appeared before us. The crux of State Counsel's submissions was that the issues in this appeal revolved around the question of interest on the pension benefits due to the Respondents. According to him, the Appellant had no business dealing with the money or instructing the Pension Scheme Managers to pay it into Court.

4.15. Mr. Ndhlovu, therefore, contended that the learned Deputy Registrar properly directed himself when he held that the money paid to the Respondents at the time of retrenchment should not be deducted before adding interest to the pension due. In his view, that holding was well founded because the Appellant did not have a right to determine what should happen to the money which solely belongs to the Respondents.

4.16. Mr. Ndhlovu, SC, went on to submit that the Respondents were awarded benefits that are clearly

defined by the **PENSION SCHEME REGULATION ACT, 1996 AS AMENDED BY ACT NO. 27 OF 2005**[d]. That, therefore, to deduct the amounts paid to the Respondents at the time of retrenchment, before adding interest, would constitute an interference with the defined transfer value. That all payments made at the date of retrenchment should only be deducted after addition of interest.

4.17. It was State Counsel's further submission that the money paid into Court cannot be deducted from the transfer value awarded by the Court because deduction of that amount would alter the true value of the defined benefits that the Court had awarded to the Respondents. That in addition, the said money was paid into Court by a party not related to this matter, that is, Saturnia Regna Pension trust Fund, which in fact owed a fiduciary responsibility to the Respondents.

4.18. Mr. Ndhlovu, SC, further argued that the payments in Court should not be deducted before applying interest because the said payments were made in contravention of the Pension Scheme Rules. That, therefore, if this Court allows the said payments to be deducted before applying interest, the Court would set a bad precedent by endorsing an illegality.

4.19. It was State Counsel's further argument that the learned Deputy Registrar properly directed himself when he did not address the issue as to whether the Writ of *Fifa* issued by the Respondents in the sum of K433,366,064.70 was regular. That this was because that issue had been dealt with by another Court and there was no order for the Deputy Registrar to also deal with it. He further submitted that the Respondents based the execution of the Writ of *Fifa* on the amount of K720,056,600.00 which, in his view, was determined by

the learned trial Judge as a liquidated amount to be recovered with interest.

5.0. CONSIDERATION OF THE APPEAL BY THIS COURT

5.1. We have carefully considered the evidence on record, the judgment appealed against and the submissions of Counsel. We will deal with the grounds of appeal in the order in which they have been presented and argued by Counsel for the Appellant.

5.2. The crux of the contention by Counsel for the Appellant on the first ground of appeal is that the learned Deputy Registrar should not have awarded interest on the money that the Appellant had already paid to the Respondents. Conversely, Mr. Ndhlovu, SC, has submitted that the learned Deputy Registrar rightly awarded interest on that money.

5.3. The law on the award of interest on an amount already paid to a Defendant by a Plaintiff is well settled. It appears from the Judgment of the learned Deputy

Registrar that he too was alive to the position of the law in this regard, which is that money stops attracting interest once it is paid by a defendant to a plaintiff. He, however, held the opinion that there were special circumstances in this case which warranted departure from the settled position of the law. According to him, the circumstances of this case were special because the payments that the Appellant made to the Respondents were erroneous. He stated that this is because the Respondents were paid off what the Appellant determined to have been the Respondents' pension contributions when the Respondents' entitlement was to an accrued pension. He reasoned that the accrued pension could not be tied to moneys which the Appellant had erroneously paid to the Respondents.

5.4. Our understanding of the law on the award of interest is that it is designed to compensate a Plaintiff for the period he has been kept out of the use of his money by a

Defendant. The assumption is that the Defendant has been using that money, or at least is reasonably expected to have been doing so, and deriving some benefit out of it while denying the Plaintiff the use of that money. It follows that once the money has been paid to the Plaintiff there can be no basis for requiring the Defendant to pay interest on that money from the date it is paid to the Plaintiff. In the **HARBUTT'S "PLASTICINE" LTD**[2] case, DENNING, M.R. had the following to say:

> **"The plaintiff received considerable sums from their insurance company soon after the fire: £50,000 within eight weeks, and so forth. Are those to be taken into account in awarding interest? The plaintiffs say that the court should ignore the fact that they were insured, or have received insurance moneys, and should give them full interest as if they had paid the cost of replacement out of their own pocket or borrowed money for the purpose. I think this goes too far. In assessing damages, we ignore, of course, the fact that the plaintiffs are insured. But, in awarding interest, it is different. An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.**
>
> **The reasoning does not apply when the plaintiff has not been kept out of his money but has in fact been indemnified by an insurance company. I do not think the plaintiff should recover interest for himself on the**

> **money when he has not been kept out of it."** (Emphasis by underlining is ours)

5.5. Taking a leaf from Lord Denning's pronouncements, in the **HARBUTT'S "PLASTICINE" LTD**[2] case, we hold that the learned Deputy Registrar misdirected himself when he awarded interest on moneys that the Appellant had already paid to the Respondents. We do not agree with the reasoning of the Deputy Registrar that the money should attract interest because it was erroneously paid to the Respondents as refunds of pension contributions instead of accrued pension. In our view, the description assigned to the payments made by the Appellant to the Respondents is immaterial. The germane consideration should be whether the Respondents were kept out of the use of that money by the Appellant. We see no proper basis upon which the Appellant can be ordered to pay interest to the Respondents for the period after the money had been paid to them (Respondents).

5.6. We, therefore hold that the correct position should be that the moneys already paid to each of the Respondents should be deducted from the amount found due before interest is applied to that amount.

5.7. Coming to the second ground of appeal, Counsel for the Appellant has contested the award of interest on the amounts of money that the Appellant had already paid into Court. Counsel has submitted that if any interest is to be payable on that amount, it could only be computed from the date of the Writ of Summons to the date of payment into Court.

5.8. It is trite law that once money is paid into Court, it stops attracting interest. It follows that in the event that the money paid into Court is less than the amount that is subsequently found by the Court to be due, the Defendant would only be liable to pay interest on the difference, being the amount the Defendant had continued keeping away from the Plaintiff. We do not,

therefore, agree with the holding by the learned Deputy Registrar that if the amount deposited with the Court is paid on a wrong premise or is less than the amount finally found by the Court to be due, the Defendant must pay interest on the whole amount including on what was already paid into Court.

5.9. It is incontestable that payments into Court are invariably made before the actual amount due is ascertained by the Court. Once that money is paid into Court, the person entitled to it is at liberty to get it and use it as they please. The payment into Court is intended to not only promote settlement of the matter, if the plaintiff accepts the payment as full settlement of the amount due, but to also protect the Defendant from incurring interest on that money. It would be fallacious, therefore, to hold that whenever the amount paid into Court is found to be less than the amount finally awarded by the Court, the amount paid into Court

should also attract interest. That would contradict the settled principles of the law on the award of interest. In the case of **INDENI PETROLEUM REFINERY COMPANY LIMITED V. VG LIMITED**[6], we pronounced ourselves on the rationale behind the award of interest, when we said the following:

> **"We wish to add that the underlying principle and the basis for an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly."**

5.10. Further, Order 22/1/8 of the **RULES OF THE SUPREME COURT, 1999 EDITION**[a], provides that **"Any interest that may be awarded on the debt or damages recovered should be calculated up to the date of payment into Court."** Similarly, in the case of **ZAMBIA REVENUE AUTHORITY V. HITECH TRADING COMPANY LIMITED**[5], we stated that-

> **"In any event, the money paid into court does not earn interest, which is a point in favour of the appellant in the event they were unsuccessful in their appeal".** (Emphasis by underlining is ours)

5.11. On the basis of what we have said above, we reverse the decision of the learned trial Judge contested by the second ground of appeal. We instead hold that the money that the Appellant paid into Court should only attract interest from the date of the Writ of Summons to the date of payment into Court.

5.12. Coming to the third ground of appeal, Counsel for the Appellant has submitted that the learned trial Judge did not order the Appellant to pay the Respondents the sum of K720,056,600.00 in addition to the pension benefits which the trial Court ordered to be paid in accordance with Rule 11 (ii) of the Pension Scheme Rules. It is not in dispute that the K720,056,600.00 was transferred from the Appellant's Pension Scheme Fund managed by ZSIC to the Appellant's new Pension Scheme Managers, Saturnia Regna Pension Scheme. The learned trial Judge expressed the view that the aforesaid money did not belong to the Appellant but belonged to the Members who

were contributing to the Pension Fund. The Judgment of the learned trial Judge, as we understand it, was that the Appellant should account for the K720,056,600.00 because it belonged to its employees who were contributing to the pension scheme. We do not understand the Judge as holding that the Appellant should pay the Respondents pension benefits under Rule 11(ii) of the Pension Scheme Rules in addition to the K720,056,600.00. That would undoubtedly amount to unjust enrichment.

5.13. We, accordingly, hold that the learned Deputy Registrar misdirected himself when he held that the Respondents are entitled to be paid the K720,056,600.00 in addition to the pension benefits ordered by the learned trial Judge to be paid under Rule 11(ii) of the Pension Scheme Rules. The third ground of appeal, therefore, succeeds.

5.14. With regard to the fourth ground of appeal, Counsel for the Appellant has contended that the learned Deputy

Registrar did not address the issue of the legality of the Writ of *Fifa* issued at the instance of the Respondents for the recovery of K433,366,064.70. Counsel has urged us to decide on the legality of that Writ of *Fifa*, set it aside and order the Respondents to pay the execution fees arising from the aborted execution of the said Writ of *Fifa*.

5.15. Counsel for the Respondents on the other hand has submitted that the K433,366,064.70 was a liquidated amount because it was arrived at by calculating interest on the sum of K720,056,600.00, which according to Counsel, was awarded to the Respondents in the Judgment of the learned trial Judge.

5.16. We have given due consideration to the arguments of Counsel on the fourth ground of appeal. A cursory study of the record of appeal establishes that indeed the subject Writ of *Fifa* was issued by the Respondents before the commencement of the assessment proceedings before

the Deputy Registrar. The Writ of *Fifa* was issued on 30th April, 2014 but the Respondents only made the application for assessment on 5th May, 2014. The Judgment on Assessment was delivered on 28th April, 2016.

5.17. It is evident, therefore, that the Respondents issued the Writ of *Fifa* before the amount due to them was assessed by the Deputy Registrar. Counsel for the Respondents has, however, maintained that the Respondents issued the Writ of *Fifa* on the basis of the liquidated amount of K720,056,600.00 which, according to Counsel, was awarded to them by the learned trial Judge. That the Respondents only added interest to that amount to arrive at K433,366,064.70, which was indicated in the Writ of *Fifa*. As we have already held on the third ground of appeal, the learned trial Judge did not award K720,056,600.00 to the Respondents. The Respondents could not, therefore, have rightly based the issuance of

the Writ of *Fifa* on that amount. The Judgment of the learned trial Judge did not ascertain the exact amounts that were due to the Respondents. The learned trial Judge simply ordered that the Respondents were entitled to pension benefits to be determined under Rule 11(ii) of the Pension Scheme Rules. This clearly meant that the Respondent could not execute on the basis of the Judgment of the learned trial Judge because that Judgment did not award ascertained amounts to the Respondents.

5.18. We, accordingly, hold that the Respondents irregularly issued the Writ of *Fifa* for the sum of K433,366,064.70. The Respondents should have waited for the assessment of the amounts due to them by the learned Deputy Registrar, before issuing the Writ of *Fifa*. The fourth ground of appeal, therefore, has merit.

5.19. We will deal with the fifth, sixth and seventh grounds of appeal together because they are related. In our view, the

three grounds of appeal have raised only one broad issue, namely, **"whether the learned Deputy Registrar properly directed himself when he ordered the Appellant to pay the Sheriff of Zambia execution fees for the irregularly issued Writ of *Fifa*"**. Counsel for the Appellant has approached this issue from three different angles in the context of the three grounds. However, in our view, Counsel's contentions under the three grounds of appeal revolve around the question as to whether it was right for the learned Deputy Registrar to order the Appellant to pay execution fees for a Writ of *Fifa* which had clearly been irregularly issued by the Respondents.

5.20. It is not in dispute that the execution fees due to the Sheriff of Zambia are payable regardless of whether the execution of the Writ of *Fifa* is aborted, stayed or in any other way unsuccessful. Further, if the Writ of *Fifa* has been issued regularly, the party against whom the Writ has been issued must pay the execution fees. The

question, however, still remains- **"who pays the execution fees where, like in the instant case, the Writ of *Fifa* is issued irregularly?"** The answer to this question, in our view, is found in Section 14 of the **SHERIFFS ACT**[b], which indemnifies the Sheriff against claims arising from an irregular execution. For the sake of clarity, we will reproduce the said Section 14, which is couched in the following terms:

> **"14(1) The Sheriff shall not be liable to be sued for any act or omission of any Sheriff's officer, police officer or other person in the service of any writ or the execution of any process which shall have been done, or omitted to have been done, or which may have occurred either through disobedience to or neglect of the orders or instructions given by the Sheriff.**
>
> **(2) In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance."** (Emphasis by underlining is ours)

5.21. It is clear from Section 14(2) that the Sheriff must not be affected by any irregularity in the issuance of a Writ of *Fifa*. Further, it is plain from Section 14(2) of the Act that the consequences of an irregularly issued Writ of *Fifa*

must be borne by the party at whose instance that Writ was issued. In this case, we have already held, in the fourth ground of appeal, that the Writ of *Fifa* wasirregularly issued by the Respondents. It, therefore, follows that the Respondents must pay the execution fees to the Sheriff of Zambia for the contested irregular Writ of *Fifa*. For the above reasons, we find merit in the fifth, sixth and seventh grounds of appeal.

5.22. The Respondents have cross-appealed against the Judgment of the learned Deputy Registrar on one ground of appeal, namely that **"the Hon. Deputy Registrar erred both in law and fact by failing to calculate the interest on the pension benefits in line with the Pension Scheme formula and attendant Rules in his assessment."**

5.23. In support of the Respondents' lone ground of appeal, Counsel for the Respondents filed written heads of argument. The kernel of Counsel's submissions was that

the learned Deputy Registrar did not properly work out the transfer values of the Respondents' accrued benefits. According to Counsel, the learned trial Judge ordered that the total figures due to the Respondents should attract interest determined by the Court in addition to the interest prescribed by the Pension Scheme Rules. Counsel contended that despite that order by the learned trial Judge, the Deputy Registrar did not apply the interest prescribed in the Pension Scheme Rules.

5.24. Counsel argued that it was clear from the Judgment of the learned trial Judge that the interest awarded by the Court was effective from the date of Writ while the interest prescribed in the Pension Scheme Rules remains effective from the date each member clocked the first year in the pension scheme to the date when the full correct benefits would be paid.

5.25. Counsel further submitted that contrary the holding by the learned Deputy Registrar, there was evidence before

him to show that the parties contemplated compound interest to be applicable to the pension benefits.

5.26. Counsel contended that the learned Deputy Registrar should have been sufficiently assisted with the necessary knowledge and skill by an expert assessor. Counsel has, therefore, asked this Court to send this matter back to the Deputy Registrar for assessment and to order that the Deputy Registrar should sit with an Actuary as an assessor. Alternatively, that the matter should be referred to an Official Referee in accordance with Order XXIII (1) of the **HIGH COURT RULES**[e].

5.27. The learned Counsel for the Appellant did not file any heads of argument in response to the cross-appeal and did not appear at the hearing.

5.28. We have carefully considered the cross-appeal, the portion of the learned Deputy Registrar's Judgment contested by the cross-appeal and the submissions of Counsel for the Respondents.

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5.29. The gist of the submissions of Counsel for the Respondents, in support of the cross-appeal, is that the learned Deputy Registrar erred when he did not add the interest prescribed by the Pension Scheme Rules. We have carefully studied the Judgment of the learned trial Judge. It is indeed clear from that Judgment that the learned trial Judge ordered that the amounts found due to the Respondents should, in addition to the interest awarded by the Court, attract interest prescribed by the Pension Scheme Rules. Counsel for the Respondents referred us to computations of pension benefits that were done by, among others, ZSIC and Channel Africa.

5.30. In the circumstances, we will refer the computation of interest prescribed by the Pension Scheme Rules to the learned Registrar of the High Court, who should invoke Order XXIII of the **HIGH COURT RULES**[e] in accordance with our directive in Paragraph 3.1 of this Judgment.

5.31. However, the issue we must settle is with regard to the period for which the interest prescribed by the Pension Scheme Rules must apply. Counsel for the Respondents has submitted that the said interest must apply from the date each member clocked the first year in the scheme until the date of full payment of the pension benefits. This position is certainly not tenable at law. It is trite law that once a judgment of the Court is passed, the amount awarded by the Court becomes a judgment debt and the only interest rates applicable are those awarded by the Court in the judgment. Any interest rates that could have been applicable before the judgment was passed cease to apply. That was the position we established in the case of **YONNAH SHIMONDE AND FREIGHT AND LINERS V. MERIDIAN BIAO BANK (ZAMBIA) LIMITED**[7] when we held that-

> **"However, when a judgment of the court is given, any principal and interest merge into the judgment debt and the relationship of banker and customer is clearly at an end. It follows from the foregoing that the indebtedness has to be computed as indicated in this judgment. There**

> **can be no question of continuing with commercial interest or compounding it after the judgment below."**

5.32. We came to a similar conclusion in the case of **RICHARD NDASHE CHIPANAMA V. ZAMBIA RAILWAYS LIMITED**[8], when we held as follows:

> **"Clearly, once judgment is passed the interest that becomes applicable is the interest awarded by the Court. We, therefore, are of the view that the 15% internal interest cannot be applied after the date of the Industrial Relations Court's Judgment of 10th December, 2001."**

5.33. We, therefore, hold that any interest payable pursuant to the Pension Scheme Rules should only be computed from the date a Respondent joined the Pension Scheme to the date of separation from the Appellant. After the date of the Writ of Summons, the only interest that should become applicable is the interest awarded by the Court.

5.34. With regard to the contention by Counsel for the Respondents that the Respondents are entitled to compound interest, we have failed to comprehend why Counsel is still insisting on the Respondents' entitlement to compound interest. The learned trial Judge held, in

very clear terms, that the Respondents had failed to prove that compound interest was due to them. The Respondents did not appeal against that portion of the learned trial Judge's decision and they cannot be heard to raise it now before this Court.

5.35. Arising from the foregoing, the cross-appeal, therefore, partially succeeds.

6.0. CONCLUSION

6.1. In the circumstances of this case, we will refer this matter back to the learned Registrar of the High Court for assessment of the moneys due to the Respondents. In view of the complexity of the computations required to be done, we direct that the Registrar should invoke Order XXIII of the **HIGH COURT RULES**[e] to appoint a Referee to do the said computations. The Referee must be a qualified Actuary. We order that both parties must share the cost of the Actuary equally.

6.2. The main appeal having succeeded and the cross-appeal having succeeded, in part, we make no order for costs both in this Court and before the learned Deputy Registrar.

I.C. Mambilima
CHIEF JUSTICE

M. Musonda
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE