SELECTED JUDGMENT NO.45/2018

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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 203/2015**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: Sections 18 and 21 of the National Pension Scheme Act No. 40 of 1996.

AND

IN THE MATTER OF: Regulation 3 of the National Pension Scheme (Benefits and Eligibility) Regulations, 2000 (Statutory Instruments No. 71 of 2000).

BETWEEN:

NATIONAL PENSION SCHEME AUTHORITY **APPELLANT**

AND

PHILLIP STUART WOOD **RESPONDENT**

CORAM: Malila, Kajimanga and Kabuka, JJS.
On 10th July, 2018 and 25th October, 2018.

FOR THE APPELLANT: Mr. E. Mwansa, Messrs. Mwansa, Phiri & Partners.

FOR THE RESPONDENT: Mr. M. Z. Mwandenga, Messrs. Mwandenga & Co.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

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Cases referred to:

1. General Nursing Council of Zambia v Mbangweta (2008) ZR Vol.2 105 (SC).
2. Attorney General, Movement for Multiparty Democracy v Akashambatwa Mbikusita Lewanika and Others (1994) 164 (SC).
3. Stock v Frank Tomes (Tipton Limited) [1978] 1 W.L.R. 220.
4. Jason Yumba and 22 Others v Luanshya Municipal Council, Appeal No. 5/2015.
5. Indo- Zambia Bank v Mushaukwa Muhanga (2009) ZR 266.
6. Trevor Limpic v Mawere and Others, Appeal No. 121 of 2006.
7. Michael Mabenga v Sikota Wina and Others SCZ Judgement No. 15/2003.
8. Edge and Others v Pensions Ombudsman & Another [1998] 2 All E.R. 547.
9. Mususu Kalenga Building Limited and Another v Richman Money Lenders Enterprises (1999) ZR 27 (SC).

Legislation and Other Works referred to:

1. National Pensions Scheme Act No.40 of 1996, SS. 9, 18-21, 26, 33, 34, 36, 39, 44,45,53.
2. Statutory Instrument No. 71 of 2000, regulations 9, 21,40.
3. The Interpretation and General Provisions Act, Cap. 2, S. 20 (4).
4. The Supreme Court Practice (White Book) 1999, Ed., Order 20.
5. The Supreme Court Rules Cap. 28 rules 58 (3), 68 (1).
6. Halsbury's Laws of England, Vol. 50A, 2016, parag. 1027; Vol.96, 2012 parag. 694.

By a judgment delivered on 22nd May, 2015 the High Court found that payment of a lump sum pension benefit under **section 21** of the **National Pension Scheme Act No. 40 of 1996,** Chapter 256 of the Laws of Zambia ("the Act"), is mandatory. On the facts of the case, the court further found, that the respondent is entitled to receive such a payment from the appellant. These are the findings against which the appellant has now appealed to this Court.

According to the record of appeal, the history of the case is that the respondent had worked for various employers. By virtue of such employment, he was a member of the appellant's pension scheme known as the National Pension Scheme Authority (NAPSA) for 13 years, from 1st February, 2000 until 20th April, 2013 when he attained the then, statutory retirement age of 55 years. It was not in dispute that over that period of time the respondent had made a total of 137 contributions to NAPSA. In terms of **section 18** of the Act, however, for a member to qualify for payment of normal pension benefits at 55 years, such member should have made a minimum of 180 contributions. For members who had attained pensionable age but made less than 180 contributions, **section 21** provides for payment of a lump sum benefit, only.

Having only made 137 contributions, on 13th May, 2013 the respondent lodged a Benefits Claim Form with the appellant, claiming pension benefits for the period worked, and was issued with a Claim Submission Slip.

A month later, on 18th June, 2013 the respondent wrote the appellant a letter requesting that he be paid his lump sum pension benefit. In his said letter, the respondent also intimated to the appellant, that he was aware of regulation **3 (1) of the National Pension Scheme (Benefits and Eligibility) Regulations 2000, Statutory Instrument No. 71 of 2000**, ("the regulations") which appears to entitle a member to a pension, notwithstanding that he has not satisfied the requirements of **section 18**. In that regard, the respondent expressed the view that, *the Act* took precedence over mere *regulations* and he was entitled to a lump sum payment, as both **sections 18** and **21** of the Act use the mandatory word **'shall'**.

Thereafter, the respondent wrote some more letters to the appellant to which he did not receive any response. On 30th October, 2013 the respondent proceeded to seek redress from the High Court by issuing originating summons, substantially asking for:

(a) a declaration that regulation 3 of the National Pension Scheme (Benefits and Eligibility) Regulations 2000 (Statutory Instrument No. 71 of 2000) is void to the extent that it is inconsistent with the provisions of section 18 of the National Pensions Scheme Act, No. 40 of 1996;

(b) a declaration that regulation 3 of the National Pension Scheme (Benefits and Eligibility) Regulations 2000 (Statutory Instrument No. 71 of 2000), is void to the extent that it purports to amend section 18 of the National Pensions Scheme Act No. 40 of 1996;

(c) a declaration and order that he is entitled to be paid a lump sum of his benefits under section 21 of the National Pensions Scheme Act, No. 40 of 1996;

The judge considered affidavit evidence both in support and in opposition to the claims, which were filed by the parties in the court below together with submissions from their respective counsel. Her findings were that, the respondent was disqualified from payment of a retirement pension under **section 18** of the Act as he had not made the requisite number of 180 contributions required under **sub-section (b).**

The judge also considered other sections which were in contention being sections **9, 18, 21, 39 and 40** of the Act in light of

regulation 3. She further considered the cases of **General Nursing Council v Ing'untu Milambo Mbangweta**[1]; **Attorney General and Others v Akashambatwa Mbukusita Lewanika and Others**[2]; and **Stock Frank Tomes (Tipton Limited)**[3] and found that the words of **section 21** are plain, unambiguous, and are a mandatory provision requiring that a lump sum must be paid to a member who is disqualified from payment of pension benefits under **section 18.**

In the event, the judge came to the conclusion that, even with the consideration of **sections 9** and **39** of the Act the appellant had no discretion in the matter. According to the trial judge, discretion in those sections only applies when prescribing the mode of payment. Her finding was that, to place the respondent on a pension rather than a lump sum payment, was only in the best interest of social security and actuarial considerations and not of the respondent.

The learned judge also made a general observation to the effect that, in such matters, the intention of Parliament was to first pay a pensioner a lump sum and thereafter monthly payments, so as to avoid pensioners being left destitute. She opined that a lump sum payment as contained in **Article 124 of the Constitution** before amendment, guaranteed protection of pensions for employees.

It was her further considered view that **regulation 3** is meant to cater for those employees who go on early retirement and is not ultra vires the Act, nor does it amend **section 18.** The judge concluded by finding that, the respondent was entitled to a lump sum payment of his benefits under **section 21** and that the appellant should pay him in accordance with the said section, with interest at the short-term bank deposit rate.

Dissatisfied with the findings of the learned judge, the appellant filed an appeal on 19th June, 2015 advancing 9 grounds, supported by heads of argument which were filed on16th December, 2015.

The gist of the arguments was that, contrary to the trial judge's findings, pension funds are ordinarily not intended to be sources of lump sum payments to members but rather, sources of regular income to them, up to their time of death. That lump sum payments are generally, a stop gap measure, to pay those members who are unable to qualify to receive their monthly payments for reasons that are specifically stated or due to actuarial considerations, to avoid undermining the long-term viability of a pension scheme. It was argued in this regard that, **section 40** of the Act, specifically states that the Authority shall prudently manage the scheme so as to ensure that it is in a state of actuarial correctness, financially sustainable, fair in its benefit distribution and is affordable.

In reaction to the appeal, counsel for the respondent filed a notice of intention to raise preliminary objection on the ground that, it was not proper or competent for the appellant to amend grounds 1, 6, 7 and 9 as they appear in the memorandum of appeal filed on 19th June, 2015 using the heads of argument filed on 16th December, 2015 without first obtaining leave of the court. It was his further argument that, grounds 4,5,6,7 and 9 of the memorandum of appeal filed on 19th June, 2015 do not meet the requirements of **rule 58 (2) of the Supreme Court Rules.**

When the matter came up for hearing of the appeal, we considered the arguments made in support and in opposition to the preliminary objection. In resolving the issue, we maintained the position we took in **Jason Yumba and 22 Others v Luanshya Municipal Council**[4]. We there re-iterated that, rules of the court are intended to assist in the proper and orderly administration of justice and as such, must be strictly followed, failing which the consequences may be fatal to the appeal for being incompetently before the Court.

In our short ruling on the preliminary objections, we upheld the submission by counsel for the respondent that allowing the purported amended grounds of appeal as contained in the appellant's heads of argument, would effectively be allowing the appellant to sneak in additional grounds of appeal through the backdoor. We further echoed the settled position that, regardless of whether the amendment to be made is a mere typographical error, leave of this Court must first be sought as required by **Rule 58 (3) of the Supreme Court Rules**. We accordingly expunged grounds 1, 4, 5, 6, and 7 from the record and the appellant was confined to arguing grounds 2, 3 and 8 of the appeal, which state as follows:

> **2. "the learned judge in the court below erred in law and fact when she said: 'I opine that the intention of Parliament was to pay the**

lump sum and later monthly payments to avoid pensioners being destitute;'

3. **the learned judge in the court below erred in law and fact when she held that section 39 of the subject Act is irrelevant to the facts of this case;**
8. **the learned trial judge erred in law and fact when she held that the respondent has no discretion to decide whether the lump sum be paid or not."**

Those are the only grounds that remain to be determined on the appellant's appeal.

The respondent also filed a cross-appeal raising one ground, the substance of which is that, to the extent that **regulation 3** purports to amend the provisions of **section 18,** it is ultra vires that section and void.

We will for convenience start with the arguments relating to the appellant's appeal after which we will proceed to deal with those of the cross-appeal.

Grounds two and eight of the appeal raise the same issue and we will consider them together. The gist of the appellant's argument in these grounds is that the learned judge erred in finding that a lump sum payment was meant to cushion a pensioner at the end of their working life. The appellant also argued that the learned judge erred in finding that a member who has attained pensionable age and has retired from employment but does not meet the qualifications for a pension under **section 18,** is to be entitled to a lump sum benefit. It was argued that, the appellant infact has the discretion whether to pay a lump sum or not and the formulae are already determined under the regulations. As such, actuarial considerations cannot be taken into account at that stage, as found by the trial judge, but rather at the time when the appellant is determining whether or not a member should be given a lump sum or paid a monthly pension. The case of **Indo- Zambia Bank v Mushaukwa Muhanga**[5] was cited as authority for the submission that in construing statutes, it is only where there is ambiguity in the natural meaning of words that recourse can be had to the principles of interpretation.

The appellant also argued that **section 9 (3)** clothes it with the power to decide whether or not a member should be eligible for pension. That to deny the appellant such power, as suggested by the finding of the trial judge, is to undermine the very essence of a pension scheme, particularly in respect of members who may be entitled to pension due to changed circumstances in the scheme's financial viability. The submission was that the Authority can decide whether a member should be awarded a pension notwithstanding that he has not paid the requisite number of contributions.

On ground three, the appellant argued that **section 39** of the Act empowers a Minister to prescribe the conditions for entitlement to a pension benefit for various categories of people who may not ordinarily qualify for such pension. It was further argued that, the same section also allows the Minister to convert the amount paid by a member of an existing fund who is above a prescribed age for purposes of entitlement to a retirement pension.

The submission on the point was that, the respondent who had reached retirement age but did not qualify for pension due to the insufficient number of contributions made, fell into the category of pension scheme members to whom **section 39** applies, and that the regulations, also applied to him.

The arguments on **section 40** were that, the said provision is relevant as it allows the appellant to ensure that the scheme is managed in accordance with prudential management principles, specified in the Pensions Scheme Regulation Act.

In answer to those submissions, to the extent that they were relevant to the remaining grounds, the respondent in ground two, referred to the lower court's sentiments complained of, when the trial judge said, "*I opine that the intention of Parliament is to pay the lump sum and later monthly payment to avoid the pensioners being destitute.*" The submission was that, contrary to that statement, the trial judge did not make any order for monthly instalments as alleged by the appellant. That the only order she made was for a lump sum payment and the remarks referred to were simply *obiter* remarks which had no bearing on the decision reached. In the event, that they cannot be the basis for a competent ground of appeal as they do not go to the root of the judgment. Reliance for the submission was placed on the cases of **Trevor Limpic v Rachel Mawere and Others**[6] and **Michael Mabenga v Sikota Wina, Mafiyo Wallace and George Samulela**[7].

In ground three, the respondent's contention was that the lower court was on firm ground in holding that **sections 39** and **40** of the Act were irrelevant to the facts at hand. The respondent argued that, **section 39** is a transitional provision which confers power on the Minister to enact Statutory Instruments prescribing on matters specified in the section. That as his case was premised on **regulation 3** being ultra vires **section 18,** the circumstances envisaged in **section 39**, do not concern the respondent as he was not above the prescribed age of 55 at the time the Act came into force in 1996. He was also not a member of an existing fund which converted his account to the appellant's fund or transferred his pensionable employment covered under another pension legislation.

The respondent contended that, at the time the Act came into force he was aged 38 years, 9 months and **section 39** capturing those members who were 39 and above clearly did not apply to him.

On **section 40**, the respondent argued that, the said provision concerns how the appellant is supposed to manage the National Pension Scheme generally, an issue which was not brought into question by the respondent and thus, was irrelevant to the facts of the case.

Lastly, on ground eight, the respondent maintained that **section 21** is crystal clear and unambiguous as to its meaning, requiring that only the literal interpretation be employed in discerning its said meaning. That the use of the word *'shall'* in the section, calls for a mandatory compliance in so far as the requirement for payment of a lump sum is concerned. This means the appellant has no discretion in whether or not to pay the respondent a lump-sum.

The respondent further argued that, **section 18** of the Act provides for qualification to payment of a pension and refers those members who do not so qualify, to **section 21**, for a lump sum payment under that section. According to the respondent, the only question this Court should concern itself with in determining this appeal, is whether the appellant has prescribed the manner for the payment of lump sums to its members. In response to his own question, the respondent contends that, he is not aware of any Statutory Instrument that has been issued pursuant to **section 21,** prescribing the manner of the payment of lump sums to members who are not eligible to receive a pension under **section 18** of the Act. What the appellant claimed to be aware of, is that **regulation 8** provides the formulae for calculation of the lump sum benefits under the Act.

Those were the arguments on the main appeal.

In relation to the cross-appeal, counsel for the respondent argued that contrary to the finding made by the trial judge, that **regulation 3** applies to members who go on early retirement, the said regulation is infact ultra vires the Act. This is to the extent that it is meant to cater for members who are not eligible to receive a pension under **section 18**, due to their failure to meet the threshold of 180 monthly contributions. Counsel submitted that, the judgment of the trial judge should to that extent, be varied accordingly.

In his response to the cross-appeal, counsel for the appellant argued that Statutory Instruments are made to actualise or put to good use the provisions of the law and not to undermine them. His submission was that, the learned trial judge was correct when she held that there was no undermining of the provisions of the law, as the Statutory Instrument was merely there to ensure that the law provided, works well. Counsel proceeded to highlight that **regulation 3** simply assists in actualising what **section 18** provides by taking into account other provisions in the Act and thereby filling the lacuna that is in the Act.

Counsel went on to argue that **section 39** is intended to give the Minister authority to prescribe the conditions for entitlement to benefits under the Act, in respect of two categories of members: (i) those who do not make the required number of contributions; and (ii) those above the prescribed age. The submission was that, to remove the power from the Minister would mean undermining the authority that the scheme has, in ensuring its viability and providing equitable pension payments to its ageing members in line with **section 9 of**

the Act. We were implored to consider that, technical requirements of actuarial analysis always inform the manner in which payments are made. That, **section 39** is a bridging provision which allows the Minister to convert payments made under the old authority to the new one. On **section 40,** the contention was that, the said provision gives authority to the appellant to prudently manage the scheme and to ensure equitable distribution of pension. That the appellant has discretion, by virtue of **section 9 (2)** as to whether a lump sum should be paid or not, and that for the objectives of the Act to be met, requires a purposive approach and the taking into account of actuarial considerations to ensure that the pension scheme remains viable.

In a brief reply, counsel for the respondent submitted that there was nothing on the record by way of evidence, which could be used to support the assertion that actuarial considerations were taken into account in denying the respondent a lump sum payment. On the argument that the appellant has discretion whether or not to pay a lump sum, the submission by counsel for the respondent was that, the argument was without merit, as the law provides the manner in which pensions must be paid out and it was not for the appellant to exercise any discretion. We were accordingly, urged to dismiss the appellant's appeal and uphold the respondent's cross-appeal.

We have considered the evidence on record, the findings of the lower court, submissions, the law to which we were referred and the cases cited by counsel on both sides.

Starting with grounds 2 and 8 of the main appeal, the gist of which is whether the appellant has discretion to pay a lump sum benefit or a monthly pension to a member who has attained retirement age. It was argued by counsel for the appellant that **section 9** of the Act clearly identifies the categories of members the authority is obliged to pay pension benefits, upon reaching retirement age. That it also identifies the circumstances under which such payment is to be made. We have noted that in so arguing a lot of weight has been placed on the use of the word *'may'* in **section 9 (2)** of the Act as provides that:

> "***The Authority may pay lump sum benefits under such conditions as the Authority may prescribe***."

Counsel argues that, the use of the word *'may'* as quoted above, means that the authority has discretion whether or not they ought to pay a lump sum benefit.

In our view, the fact of the matter is that the discretion given to the appellant in the above section cannot ignore the mandatory tone of **section 21** which requires that a lump sum payment *'shall'* be paid to a member who has not met the requirement of 180 monthly contributions set out under **section 18** of the Act. These sections fall under Part V of the Act which provides for 'Benefits'. **Section 18** in particular deals with conditions for the award of retirement pension and reads as follows:

> **"18. Subject to the other provisions of this Act, a retirement pension shall be paid to a retired member who has-**
>
> **(a) attained pensionable age; and**
>
> **(b) made not less than one hundred and eighty monthly contributions."**

Section 21 on the other hand, addresses the situation of members who fail to satisfy the conditions laid out in the above provision as being entitled to lump sum payment, in the following words:

> **"21.A member who has attained pensionable age and has retired from employment but does not meet the qualifications for a pension under section eighteen, shall be entitled to the payment of a lump sum as may be prescribed by the Authority."**

Evidence on record in this appeal shows that the respondent only made 137 contributions and for that reason, did not qualify for payment of pension benefits under **section 18.** There was no dispute by the parties regarding this fact, both in the court below and at the hearing of the appeal. While **section 18** is clearly made subject to **section 21,** the same cannot be said of **section 9** of the Act, on which the appellant seeks to anchor its argument in this regard, which speaks in general terms. **Sections 18** and **21** are more specific in providing for the category of persons who qualify for payment of monthly pension or are to receive a lump sum benefit, and why.

It was spiritedly canvased by counsel for the appellant, that the learned judge did not take into account actuarial considerations in reaching her findings that the appellant had no discretion in deciding whether or not to pay a lump sum, with the result that, such finding undermined and posed a danger to the viability of the scheme.

We have considered the provision of **section 9 (3)** which requires that, 'in such circumstances as may be described, the authority shall exchange lump sum benefits referred to under **sub section 9 (1)** for a pension, in accordance with actuarial advice'. In answer to a question from the Court at the hearing of the appeal, learned counsel for the appellant magnanimously conceded that, there was no evidence placed before the trial court, of any actuarial advice relating to the respondent. In the absence of such evidence, it is clear to us that there is no basis for applying **regulation 3** which seemingly, prescribes payment of a pension benefit to persons not entitled to such payment under **section 18.** This brings us to the real issue to be determined in this appeal namely, which provision takes precedence over the other, **regulation 3** or **section 21** of the principal Act?

The Act of course grants the Minister power to make regulations pursuant to **sections 19, 26, 33, 34, 36** and **39** while **section 53** provides for the Minister to make regulations by statutory instrument, for the *better carrying out of the provisions of the Act.* A reading of those provisions shows that, the intended regulations ought to allow for the better carrying out of provisions of the Act which is the general objective of regulations, and not to undermine or conflict with them.

We say so, as regulations are made to support provisions of the Act and not the other way around. We are fortified in this regard by **section 20 (4) of the Interpretation and General Provisions Act, Cap. 2 of the Laws of Zambia,** which provides that a statutory instrument which is inconsistent with any provision of an Act, is void to the extent of the inconsistency. **Sections 44** and **45** of the Act provide for an appointed actuary to evaluate the scheme and submit a report, following which the appellant, can implement the recommendations made therein.

Granted the foregoing, we find it inconceivable, that it can be seriously canvassed by counsel for the appellant, that Ministerial *discretion* granted in **regulation 3** which is a subsidiary legislation, can override clear statutory provision in **section 21** directing in *mandatory* terms, payment of a lumpsum to a member who has made less than 180 contributions. Similarly, in our view, considerations suggesting imprudent management of the pension funds should not be allowed to be used as an excuse to adversely affect a pensioner who falls in the category of members, captured under **section 21,** with the result of depriving such member from entitlement to payment of a lump sum benefit.

The learned authors of **Halsbury's Laws of England, Volume 50A (2016)** in paragraph **1027** write that, an actuary is under obligation to communicate to a Regulator or Authority, any matter as prescribed by the regulations. Although such an arrangement is one that is purely internal, proceeding that way could have enabled the appellant to gather the requisite information and prove its assertions at trial, if necessary, in "camera," that its decision was well informed, as it was based on the prior benefit of actuarial advice. This observation is made in consideration of the appellant's main argument, that actuarial considerations were taken into account in not paying a lump sum benefit to the respondent. Evidence on record however, shows nothing was placed before the trial court to prove that assertion.

The actuary can make detailed recommendations and also give a picture of whether the pension fund is in surplus or deficit. The English case of **Edge and Others v Pensions Ombudsman and another**[8] is an illustration of the great assistance a detailed actuarial report can be to the relevant Authority and indeed a court of law, in coming to its findings.

If the appellant had started encountering difficulties in effecting **section 21,** the solution lay in revisiting this section, to take into account such difficulties. In its current form, the section is clear and unambiguous in its meaning and in the absence of relevant evidence, there was absolutely no basis for the trial court to have entertained any fear, that upholding **section 21,** may undermine the very existence and financial viability of the Pension Scheme, as intimated by counsel in his submissions from the bar.

In our view, there cannot be any serious debate as to whether or not the authority has discretion to pay a lump sum benefit when the mandatory use of the word *'shall'* has been employed in the relevant provision. We do sympathise with the appellant's position that if 'actuarial considerations' had been taken into account, the trial court would, probably, have been better placed to consider such evidence in reaching its decision. In the absence of such relevant evidence, the court's hands were tied to the evidence actually before it.

Accordingly, we have no difficulty in finding that the appellant cannot rely on subsidiary law in **regulation 3 of SI No. 71 of 2000** in an attempt to escape the unambiguous and mandatory provision of a parliamentary enactment as contained in **section 21 of Chapter 256 of the Laws of Zambia,** requiring that a lump sum payment be made to a member who does not qualify for a pension benefit under **section 18**. In the premises, we accept the submissions by learned counsel for the respondent that the views of the trial judge complained of in ground two of the appeal, were indeed mere *obiter dictum* with no bearing whatsoever on the final decision made, which was for payment of a lump sum, only. Grounds two and eight of the appeal fail for those reasons.

Coming to ground 3, which challenges the findings of the trial court that **sections 39 and 40** are irrelevant to the facts of the case. We have noted that **section 39** falls under what are known as transitional provisions. It relates to various categories of people who may not ordinarily qualify for pension for reasons which include early retirement or discharge on medical grounds, whilst **section 40** relates to prudent management of the scheme. The appellant argues that **section 39** empowers the Minister to prescribe conditions for entitlement to payment of benefits as well as to convert the amount that a member of a prescribed age has in an existing fund in their account, with the result that, such member then, becomes entitled to a retirement pension. The appellant argued that, it was wrong for the trial court to disregard **section 39** without first establishing if the respondent falls under the targeted category of persons. Counsel for the appellant contended that, the respondent did fall into the category of persons envisaged in **section 39** on the ground that he did not manage to make the requisite number of contributions to the scheme to qualify him for pension benefits because he was above the prescribed age on the date the Act came into force.

In addressing those arguments, we do so noting that evidence on record shows the respondent was only 38 years and 9 months, at the time the Act came into force in 1996 and thus under the 39 years targeted by section 39. There was no evidence led suggesting he was in the category of members of an existing fund whose contributions were transferred to the appellant for **section 39** to apply to his situation. Even assuming it did apply, the issue was not raised in the court below. As we have variously maintained previously, the appellant is precluded from raising an issue on appeal, for the very first time: **Mususu Kalenga Building Limited and Another v Richman Money Lenders Enterprises**[9]refers.

In our view and as was correctly found by the learned judge, as a transitional provision, **section 39** is irrelevant to determining the real issue in this appeal. We are fortified in holding that view by the learned authors of **Halsbury's Laws of England, Volume 96, (2012) paragraph 694** on transitional provisions where they state that, 'transitional provisions' regulate the coming into operation of an enactment and where necessary, modify its effect '*during*' the period of *transition.* A prominent feature of such provision is that '*it is expected to be a* ***temporary*** *arrangement'* which becomes spent once all the past circumstances with which it is designed to deal with have come to pass. The issues we are dealing with here go back to 1996 which is a period of over two decades ago. Further, evidence on record confined the respondent's claim to the period between the date the respondent joined NAPSA on 1st February, 2000 to 30th April, 2013 when he reached his retirement age.

On arguments relating to **section 40** which deals with the manner in which the appellant ought to manage the scheme, prudentially and ensuring that it is at all times in a state of actuarial correctness and financially sustainable. We have already dealt with this issue in our findings, that the appellant did not lead any evidence in the court below pointing to an actuarial report or assessment which had influenced the decision not to pay the respondent a lump sum benefit as prescribed in mandatory terms by **section 21** of the Act. We accordingly find ground three of the appeal equally unsustainable.

It is for the reasons given that we find that the appeal has no merit and we dismiss it.

Coming to the cross-appeal, the respondent contends that the real issue here is, whether **regulation 3** is ultra vires the Act or amends **section 18** of the Act. The respondent's simple argument is that **regulation 3** as it stands, is ultra vires the Act, as it is inconsistent with the provisions of **section 18** or in so far as it purports to amend the said section.

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For convenience we will again, reproduce **section 18** in issue, which provides as follows:

> **Subject to the other provisions of this Act, a retirement pension shall be paid to a retired member who has-**
>
> **(a) attained pensionable age; <u>and</u>**
>
> **(b) made not less than one hundred and eighty monthly contributions.** (underlining supplied)

And, the relevant portion of **regulation 3 (1)** states that:

> **(1) A member who is not eligible for a retirement pension under section eighteen may be entitled to that pension if:**
>
> **(a) the member has attained the age of thirty-nine by 1st February, 2000 and has months of pensionable employment equal to not less than the number of months elapsing between the 1st February, 2000 and the day on which the member attains the age of fifty-three, subject to a minimum of sixty completed months of pensionable employment; or**
>
> **(b) the member is below the age of thirty-nine and has made one hundred and eighty monthly contributions in terms of sub-regulations (3) and (4).**

Section 18 as reproduced above is clearly limiting in that there is only one category of members that qualify to be paid retirement pension, on two conditions; (i) that they have attained the pensionable age of 55 years and (ii) managed to make a hundred and eighty contributions.

Regulation 3 on the other hand widens the scope by reducing the pensionable age from 55, at the material time, thereby creating two more categories of qualifying members. In terms of **regulation 3** a member who was thirty-nine years old by 1st February, 2000 and at the age of fifty-three had contributed a minimum of 60 months' pensionable employment, qualifies. Alternatively, where the member was below the age of thirty-nine, but has made 180 contributions, that member too, would qualify for pension.

From this analysis, **regulation 3** widens the scope of persons who qualify beyond what is provided for in **section 18**. It is to the extent of that inconsistency that the said regulation is ultra vires and void. Further, in so providing, **regulation 3** takes away the mandatory qualification in **section 21,** which directs a lump sum payment to a person who does not qualify for pension under **section 18**. Those are the reasons that we find merit in the cross-appeal and we allow it.

We uphold the trial court below, to the extent that she found the respondent is entitled to a lump sum payment pursuant to **section 21** of the Act. The amount due as judgment sum is to be computed from the respondent's date of retirement on 30th April, 2013 and will attract interest at the average short-term deposit rate, from the date of commencement of the matter, to the date of judgment in the court below. Thereafter interest will accrue at bank lending rate, as determined by the Bank of Zambia, to the date of full payment.

As the respondent has succeeded both on the appeal and cross-appeal, he will have his costs in this court, to be taxed in default of agreement.

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M. MALILA
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE