IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 1/2020
SCZ/8/10/2016

(CIVIL JURISDICTION)

BETWEEN:

NATIONAL SAVINGS AND CREDIT BANK **1ST APPELLANT**

JAMES CHIBALETONDO KALOKONI **2ND APPELLANT**

AND

FELIX MUYEMBI **RESPONDENT**
(Suing on behalf of and representing former employees and estates of former employees of the National Savings and Credit Bank Limited who until 12th October, 2000 were members of the Private Pension Scheme administered by Professional Insurance)

Coram: **Mambilima, CJ, Malila and Kajimanga, JJS**
on 1st September, 2020 and 19th November, 2020

For the Appellants: Mr. A. M. Musukwa, Messrs Andrew Musukwa & Co.

For the Respondent: Mr. L. Mwamba of Messrs Simeza Sangwa & Associates

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JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Shilling Bob Zinka v. Attorney-General (1991) SJ (SC).*
2. *R v. Chancellor of the University of Cambridge (1723) 1 Str 557.*
3. *Gitrine N. Sakala, Lewis Ncube v. Fert Seed, Grain (Pvt) Ltd v. Synergy Commodities Zambia Ltd (SCZ Appeal No. 85 of 2015).*

4. *National Pension Scheme Authority v. Phillip Stuart Wood (SCZ Appeal No. 203/2015).*
5. *Anderson Mazoka & Others v. Levy Mwanawasa & Others (2005) ZR 138.*
6. *William David Calisle Wise v. E. F. Hervey (1985) ZR 179.*
7. *Maxwell Mwamba & Stora Mbuzi v. Attorney-General (SCZ Judgment No. 10 of 1993).*
8. *Isaac Tantameni Chali v. Liseli Mwala (1995-97) ZR 199.*
9. *Codeco Ltd v. Elias Kangwa & Others (Appeal No. 199/2012).*
10. *Kenny Sililo v. Mend-A-Bath Zambia Limited & another (Appeal No. 168/2014).*

Legislation referred to:

1. *Pensions Scheme Regulation Act, chapter 255 of the Laws of Zambia.*
2. *High Court Act, chapter 27 of the Laws of Zambia.*

Other works referred to:

1. *Francis Benion, Statutory Interpretation 3rd ed. pages 194 – 195*

1.0 INTRODUCTION AND BACKGROUND FACTS

1.1 Although the respondents are in fact a group of former employees, represented by Felix Muyembi, we shall in this judgment collectively refer to them as 'the respondent.'

1.2 The respondent commenced proceedings in the High Court against the appellants in October, 2000.

1.3 The amended writ of summons and statement of claim indicated the claim to be for money and value realized or realizable from monies had and received by the first appellant for the use and or benefit of the respondents. Those monies

include K860,426,729.28, being the difference between the sum of K2,071,000,000 declared as the value of the Pension Fund and the amount of K2,931,710,231 certified as its value by an audit.

1.4 Additionally, the respondent alleged that in October 2000, the second appellant transferred the sum of K200,000,000 to the first appellant for disbursement to the respondent on the understanding that the respondent and their employer would henceforth be contributing to the National Pension Scheme Authority (NAPSA).

1.5 The respondent furthermore alleged that the first appellant failed to disburse the entire amount to the respondent, leaving an outstanding balance of K17,464,071.91, which sum the respondents claimed should be paid to him, including interest thereon.

1.6 The respondent premised his claim on a Pension and Insurance Authority Directive of 12 December, 2000 (PIA Directive 18/35) according to which the first appellant was declared liable to pay all the benefits due to the respondent in the event that the second appellant failed to pay.

1.7 In its defence, the first appellant claimed that the PIA Directive 18/35 was *ultra vires* the Pension Scheme Regulation Act, chapter 255 of the Laws of Zambia, in that a claim could not rightly be made against the first appellant as it was the second appellant that carried the burden of managing the pension fund on behalf of the respondent. The first appellant further denied having been paid the sum of K17,464,077.91 by the second appellant.

2.0 THE HIGH COURT DECIDES

2.1 The matter was heard by the High Court (Mweemba J) whose judgment is now being assailed.

2.2 The learned judge held that following the dissolution of the second appellant, the first appellant, as former employer and sponsor of the National Savings and Credit Bank (NATSAVE) pension scheme, was liable to pay the respondent any deficit owed to the respondent in terms of the scheme.

2.3 The court ordered that, pursuant to PIA Directive 18/35, the first appellant, at its own expense, was to engage an actuary who was to produce an actuarial report, tabulating all monies accrued to the respondent's credit at the dissolution of the

pension scheme. The amounts tabulated were then to be paid to the respondent from the assets of the NATSAVE Pension Scheme. Further, that where such assets were inadequate to pay the amount in full, any deficit was to be paid by the first appellant as former employer of the respondent and sponsor of the pension scheme.

3.0 APPEAL TO THIS COURT AND THE GROUNDS OF APPEAL

3.1 The High Court judgment so riled the first appellant that the present appeal was launched on two grounds formulated as follows:

1. **That the learned High Court judge erred in law and fact by deciding that the first appellant was liable to pay for the deficit incurred by the pension fund.**

2. **That the learned High Court judge erred in law and in fact by deciding that the first appellant appoint and pays for the actuary who values the pension fund.**

3.2 Heads of argument were filed in support of the respective positions of the parties. At the hearing of the appeal the learned counsel for both parties relied on those heads of argument which they each supplemented orally.

4.0 THE APPELLANT'S CASE ON APPEAL

4.1 On behalf of the first appellant, it was submitted, in respect of ground one, that it was an error of law and fact on the part of the learned High Court judge to have held that the first appellant was liable to pay for the deficit incurred by the pension fund.

4.2 In developing the argument under this ground of appeal, counsel for the first appellant submitted that in its statement of claim, the respondent relied on the provisions of the PIA Directive 18/35 titled 'Guidelines on Treatment of Assets on Dissolution/Winding up of Pension Funds, issued pursuant to a power vested in the Registrar by section 38 of the Pensions Scheme Regulation Act. Those particular guidelines notably contained a proviso.

4.3 The learned counsel specifically drew our attention to paragraph 2(ii) of the guideline which reads as follows:

> 2. **Upon approval to dissolve the scheme by the Authority, the Trustees shall commence the dissolution process and shall within thirty days from the date of approval deposit with the authority preliminary schedules signed and certified by the chairperson of the Board as a correct record reflecting the assets and liabilities of the scheme**

at the commencement of the dissolution process, and the manner in which it is proposed to realize the assets and to discharge the liabilities to or in respect of members provided that:

(i) If the scheme was discontinued before 1 April 2004 and members were not paid part or all the benefit the trustees shall provide the Authority with a list of members under the scheme two years to the discontinuance giving full details of the members.

(ii) Where the scheme design is defined benefit, the trustees shall immediately engage an actuary to ascertain members' accrued benefits at dissolution and if a deficit arises when compared to existing assets of the scheme, the sponsoring employers shall be compelled to pay the deficit before any disbursements are made. Payment in this case shall not be paid pro-rota unless it is proven that the sponsor is insolvent or no longer exists and ...

4.4 Having reproduced the portion of the Registrar's guidelines as above, the learned counsel stressed what he regarded as the significant components of the proviso, namely first, the scheme being a defined benefit scheme, second, the trustees being obliged to engage an actuary to ascertain members' accrued benefit at dissolution and third, the employer being compelled to pay the deficit if any at the time of dissolution, before disbursements are made.

4.5 The learned counsel contended that the first appellant does not deny that the scheme design was a defined benefit scheme but contends, as more fully argued under ground two, that the first appellant should never have been held responsible for the appointment of and the payment for the actuary. More grievously, counsel submitted that in so far as the third requirement (in the proviso as set out in paragraph 4.3 above) attempts to render the sponsoring employer responsible for the payment of a deficit in a pension fund, the guidelines were *ultra vires* the Pension Scheme Regulation Act.

4.6 It was further contended that it is the trustees and the manager of a pension fund who should be held liable for any deficit occurring in the management of a pension fund. Counsel quoted section 27 of the Pension Scheme Regulation Act which reads as follows:

> **A contributor may institute legal proceedings against any trustee contravening this Act, pension plan rules or regulations so as to protect his contribution under a pension scheme.**

4.7 The logic of counsel's argument is that where there is a deficit in a pension fund, and assuming that the sponsoring employer has remitted all the contributions and timely too, such deficit can only be attributed to mismanagement by the trustees and/or the fund managers. What the third component of the proviso does, according to counsel, is to transfer liability which properly rests on two separate legal entities, on to a third party that plays no role in creating such liability.

4.8 The learned counsel for the first appellant reproduced section 5(1) of the Pension Scheme Regulation Act, setting out the functions of the Pensions and Insurance Authority before submitting that the Authority regulates and supervises the establishment and management of pension schemes. This it does by setting and enforcing standards as per section 5(1)(o) of the Act. PIA Directive 18/35 thus merely constituted instructions or rules that could not supersede written law.

4.9 Alluding to section 3 of the Pension Scheme Regulation Act on the definition of a 'trustee', counsel submitted that a 'trustee' is separate from a sponsoring employer, meaning in effect that their liability is equally separate and distinct. He went on to

quote section 30 of the Pension Scheme Regulation Act on the obligations of the trustees, administrator and managers of pension funds. The purpose for so ding, as we understand it, was for the learned counsel to demonstrate that a manager or administrator is appointed by the trustees and not the sponsoring employer. The manager is thus not in any way under the supervision of the sponsoring employer.

4.10 Arising from what counsel contended as captured in the foregoing paragraphs, he concluded with the fervid submission that it is not the duty of the sponsoring employer to manage a pension fund.

4.11 Counsel also submitted that as the evidence on record clearly shows, the first appellant was up-to-date with all its contributions to the Pension Fund and, therefore, that its responsibility as an entity with regard to the management of the Pension Fund ended there.

4.12 According to the learned counsel for the first appellant, the first appellant cannot be responsible for any shortfall in the Pension Fund owing to any mismanagement of that fund by the trustees and managers. These were the correct entities to

which aggrieved members of the Pension Scheme should have directed their venom.

4.13 It was also submitted that PIA Directive 18/35, being of the nature of delegated legislation, cannot be *ultra vires* the enabling statute, namely the Pension Scheme Regulation Act.

4.14 Quoting from **Francis Bennion on Statutory Interpretation** (3rd ed. pages 194 – 195), the learned counsel posited that a by-law, which is a product of delegated legislation, is void if it is unreasonable. It is furthermore ineffective if its provisions go beyond the legislative power conferred by the enabling Act. In the present circumstances, PIA Directive 18/35 is *ultra vires* section 27 of the Pensions Scheme Authority Act in importing liability on a sponsoring employer for the payment of any shortfall in a pension fund after an actuarial valuation.

4.15 The final point made by counsel for the first appellant related to compulsion to pay the deficit as set out in the Registrar's guidelines. He contended, in this regard, that even if it were to be established that PIA Directive 18/35 is not *ultra vires* the Act, the first appellant is not liable to pay the deficit, nor can it be compelled to do so.

4.16 According to the learned counsel, a perusal of the Pension Scheme Regulation Act reveals that there is no reference to the sponsoring employer's liability. This, however, does not stop a contributing member from seeking any relief against an erring sponsoring employer through the courts of law and not through mere compulsion by way of an administrative directive.

4.17 Counsel argued that compulsion to pay suggests absence of due process. To force the first appellant to pay the deficit would go against the tenets of natural justice as explained by this court in **Shilling Bob Zinka v. Attorney-General**[1] and more importantly, the right to be heard as explained by Fortescue J in **R v. Chancellor of the University of Cambridge**[2] where he stated that:

> **[e]ven God himself did not pass sentence on Adam before he was called upon to make his defence.**

4.18 The learned counsel urged us to uphold ground one of the appeal.

4.19 In regard to ground two of the appeal, the learned lower court judge was faulted for holding that the first appellant should appoint and pay for the actuary who was to value the Pension Fund.

4.20 The learned counsel pointed out that the judge in the court below clearly contradicted himself in his judgment when [at page 45] he stated that:

> **I have further noted that since the nature of the Pension Scheme that the 2nd defendant established to which the plaintiffs belonged was 'defined benefit' which is regulated by the Pension and Insurance Authority Directive 18/35, it follows that the Trustees were required to engage an actuary to ascertain the members' accrued benefit at dissolution.**

At page 46, on the other hand, the judge stated that:

> **For the avoidance of doubt, I order that the 2nd Defendant is to engage an actuary who must ascertain members' accrued benefits at dissolution of the NATSAVE Pension Fund and establish whether or not the existing assets of NATSAVE Pension Scheme were sufficient to meet members' accrued benefit for purposes of PIA Directive 18/35 dated 12th November, 2006. The 2nd Defendant is to meet the cost of having an actuarial report done.**

4.21 The learned counsel also quoted section 18(1)(d) and section 19 of the Pension Scheme Regulation Act as amended. The two sections define a defined benefit scheme and provide for the appointment of an actuary by the board of trustees respectively.

4.22 According to counsel, a combined reading of section 18(1)(d) and section 19 of the Pension Scheme Regulation Act shows that an actuary must be appointed by the trustees to carry out actuarial valuation so as to review and determine the funding position of a pension scheme within a stated period. Section 19, being couched in mandatory terms through the use of the word 'shall' means, according to counsel, there is no option or discretion in observing that provision as we explained the import of the word 'shall' in **Gitrine N. Sakala, Lewis Ncube v. Fert Seed, Grain (Pvt) Ltd v. Synergy Commodities Zambia Ltd**[3] and in **National Pension Scheme Authority v. Phillip Stuart Wood**[4].

4.23 The short point that counsel was making was simply that the Act prescribes the qualifications and appointment of a trustee, defines his role in the valuation process of a pension fund and therefore that the lower court judge was wrong to have suggested that the appointment of the trustee could be done

otherwise than is set out in mandatory terms in the Pension Scheme Regulation Act.

4.24 At the hearing of the appeal, Mr. Musukwa, learned counsel for the first appellant, augmented the written heads of argument orally. The first point he made was that in their amended statement of claim, the respondent's prayer in the lower court was on a liquidated claim. He did not claim for the appointment of an actuary. The lower court, therefore, overreached itself in directing the appointment of an actuary.

4.25 Counsel referred us to the cases of **Anderson Mazoka & Others v. Levy Mwanawasa & Others**[5] as well as **William David Calisle Wise v. E. F. Hervey**[6] on the purpose of pleadings. In the present case, he contended, there was no claim in the pleadings justifying the court's holding regarding the appointment of an actuary by the sponsoring employer.

4.26 It was also submitted that even if this court were to agree with the lower court that an actuary could be appointed by the first appellant, there is a letter in the record of appeal to the effect that the appointment of an actuary would be otiose. We were in this regard referred to the letter dated 22nd October, 2013

from AON Hewitt wherein it was stated that they were unable to access information required to calculate the investment growth in the NATSAVE pension Scheme

4.27 We were urged to dismiss the appeal.

5.0 THE RESPONDENT'S CASE ON APPEAL

5.1 On behalf of the respondent, heads of argument were filed. It is upon those heads of argument that Mr. Mwamba, learned counsel for the respondent, placed reliance. He, however, orally responded to the issues raised by Mr. Musukwa at the hearing.

5.2 In opposing ground one of the appeal, it was submitted that PIA Directive 18/35 was promulgated pursuant to section 38 of the Pension Scheme Regulation Act to provide guidelines on the treatment of assets on dissolution of pension funds. As subsidiary legislation, a PIA Directive cannot, according to counsel, be casually challenged through pleadings in an action which does not involve the promulgator of the subsidiary legislation in question.

5.3 Counsel argued that if the first appellant's intent was to challenge PIA Directive 18/35, it ought to have taken out an action for that purpose, or at the very least, ought to have joined the promulgator of the Directive and filed a counter-claim containing a specific prayer to declare the Directive *ultra vires* the principal Act. The pleadings as they stand, contained no such prayer.

5.4 Counsel submitted that if the court accepted what the first appellant is urging it to do, i.e. to declare PIA Directive 18/35 to be *ultra vires* the Act, the court would, in effect, be making an order affecting a person (the promulgator) who has not been heard. This would go against the basic tenet of due process explained by the Supreme Court in **Maxwell Mwamba & Stora Mbuzi v. Attorney-General**[7] in the following words:

> **No court of justice can be called upon to make a declaration, which is always a discretionary remedy, when obviously injustice would be visited upon persons who had not been heard but who would be directly affected by a declaratory order in proceedings to which they have not been made parties.**

5.5 The learned counsel also cited the case of **Isaac Tantameni Chali v. Liseli Mwala**[8] in which we guided that a trial court is precluded from considering issues to do with non-parties to an action and cannot make orders affecting such non-parties in the absence of joinder to the proceedings of those parties.

5.6 Turning to section 27 of the Pension Scheme Regulation Act allowing a contributor to institute legal proceedings against any trustee contravening the Act, the learned counsel contended that there is nothing in that provision which suggests that a sponsoring employer cannot be liable for deficits in a pension scheme.

5.7 Counsel then moved to a slightly different argument, namely that there is no provision in the Act that specifically deals with management of assets upon dissolution of a scheme. This was the motivation for the issuance of PIA Directive 18/35 by the Registrar under a power given to him by the Pension Scheme Regulation Act. It follows, therefore, that the Directive cannot be *ultra vires* when it is not inconsistent with any existing provision of the Act.

5.8 The argument by the first appellant that the wording of PIA Directive 18/35, which spoke in terms of compulsion to pay for any deficit of the funds of a pension scheme, and thus undermining due process, was discounted by counsel for the respondent. He contended that, that argument was not raised in the court below. He cited our judgments in the case of **Codeco Ltd v. Elias Kangwa & Others**[9] and **Kenny Sililo v. Mend-A-Bath Zambia Limited & Another**[10] in both of which we held that an issue not canvased in the lower court cannot be raise in an appellate court, as authority for his submission.

5.9 We were urged to dismiss ground one of the appeal.

5.10 Turning to ground two of the appeal regarding who was legally obliged to appoint an actuary, it was submitted that this was a non-issue as far as the respondent is concerned because even if this court were to agree with the first appellant that it should not be the one to appoint an actuary, there would be nothing to stop the court from appointing an actuary to determine whether at all there were defects in the pension fund.

5.11 Counsel once against submitted that the Pension Scheme Regulation Act contains no provision on dissolution but contains provisions, notably in section 19, which regulate the appointment of an actuary when a pension scheme is a going concern. The provisions cited by counsel for the first appellant are thus inapplicable where a pension scheme is, as was the case here, dissolved.

5.12 By way of the elucidation, it was explained that the pension scheme in issue ceased to operate sometime in 2000 when the first appellant and the respondent stopped making contributions to the private pension scheme as they were to start contributing to the NAPSA. The pension scheme was dissolved in 2006. This means that at the time of the judgment of the lower court in 2015 there was no board of trustees in existence. The lower court, according to counsel, thus made the most justifiable and viable order in the circumstances.

5.13 Counsel also contended that given the rationale behind paragraph 2(ii) of the PIA Directive 18/35, namely to ensure that all benefits are paid to the pension scheme members after determining whether or not there are deficits via an actuarial

evaluation, it is immaterial who appoints an actuary. There was thus, according to the learned counsel for the respondent, nothing wrong with the holding of the lower court.

5.14 In other words, the order the lower court made in its judgment was, in counsel's submission, reasonable granted that there was no board of trustees in existence and given also that the court was imbued with jurisdiction under section 13 of the High Court Act to administer law and equity concurrently.

5.15 Turning to the argument regarding the failure by the respondent to plead the relief which the court nonetheless granted, counsel contended that the argument was flawed because it was based on a misconception of the pleadings and the issues before the court.

5.16 According to counsel for the respondent, the issue of deficits of money due under the Pension Scheme and the effect of PIA Directive 18/35 was pleaded before the lower court. He, to this end, reproduced paragraphs 3, 4 and 5 of the Statement of Claim as well as the substantive claims (a), (b) and (c) as set out in the Statement of Claim.

5.17 What the reproduced portions of the Statement of Claim show, according to counsel, is that the respondent claimed payment of the deficit or difference between the money declared as the purported value of the fund and the actual value of the fund. Additionally, the respondent claimed the deficit arising from the K200 million omitted from calculations and equally pleaded and relied upon PIA directive 18/35. The relief given by the lower court was thus borne out for the pleadings in the lower court.

5.18 Counsel equated the lower court's order for appointment of an actuary to an order of assessment of sorts and submitted that a court that orders assessment of a sum of money when not satisfied with the evidence presented to support a quantified claim cannot be said to have awarded a relief not prayed for.

5.19 It was thus solemnly submitted on behalf of the respondent that the order of the lower court for appointment of an actuary was meant to give effect to PIA Directive 18/35 for purposes of determining whether there are deficits under the pension scheme. Both those issues were pleaded and argued by the

parties. The first appellant's argument was thus unsustainable.

5.20 In his oral supplementation of the heads of argument, Mr. Mwamba maintained that the lower court judge was right in his holding. He rehashed the arguments already made in the heads of argument. We were thus urged to dismiss ground two of the appeal as well, and consequently the whole appeal for lacking merit.

6.0 ISSUES FOR DETERMINATION

6.1 The broad issue that present itself as being determinative of this appeal relates to the efficacy of PIA Directive 18/35. In its formulation and effect, is the Directive legally binding on the first appellant?

6.2 From the broad issue as we have identified it in the preceding paragraph, comes subsidiary ones: was the PIA Directive 18/35 *ultra vires* the Pension Scheme Regulation Act in the manner alleged by the appellant or at all? On a proper construction of the pleadings, was the issue of the PIA directive 18/35 pleaded?

6.3 Addressing the key issue regarding PIA Directive 18/35 will naturally take full account of the two grounds of appeal namely, whether or not it was a correct holding by the lower court that based on PIA Directive 18/35 the first appellant was bound to pay for the deficit incurred by the pension fund, and whether or not the court was right to direct appointment by the first appellant of an actuary at its cost.

7.0 OUR ANALYSIS AND DECISION

7.1 It is common ground that the Pension Scheme Regulation Act does, in section 38, empower the Registrars to:

> **Prescribe and publish guidelines or other regulatory statement as he, in consultation with the actuaries and the auditors, may consider necessary or desirable for the administration of this Act.**

7.2 The essential theory of the Registrar's power under section 38 is that the Registrar will attend to matters of administration and detail. In making such guidelines and directives as are allowed under section 38, it is for the Registrar to declare within allowable limits what Parliament itself would have laid down had its mind been directed to the precise circumstances.

It is, however, not for the Registrar to assume the legislative role of Parliament.

7.3 Mr. Mwamba has made fairly decent arguments whose thrust is to dissuade us from engaging in anything resembling testing the validity of the PIA Directive 18/35 against the law under which it was made.

7.4 The argument by Mr. Mwamba against the court taking that course are principally the following three. First, that a challenge of the validity of delegated legislation cannot casually be made by way of a defence in an action brought for a different purpose. Second, that a substantive challenge was necessary, either by way of fresh action, or a counterclaim. Third, and in any case, the promulgator of the said guidelines or directive ought to be joined to any challenge contemplated so that he/she has the opportunity to be heard.

7.5 We agree with Mr. Mwamba that in a typical instance of challenging the efficacy of delegated legislation, the focus is specific and interested parties, who may include the Attorney-General, would ideally require to be put on notice and be afforded a chance to be heard.

7.6 We are also acutely aware of Parliamentary control of delegated legislation through the Parliamentary Committee on Delegated Legislation as a window used to preserve the principle of Parliamentary control of law making.

7.7 The situation before us, however, does not require us to go further than examining the Directive in issue and how it injures the first appellant's pecuniary interests by imposing obligations that are neither desired nor warranted.

7.8 What has in truth occasioned the first appellant's grievance is an administrative guidance note by the Registrar which the first appellant alleges flies in the teeth of the enabling legislation. In other words, there is here a claim that onerous obligations which may not after all be lawful, have been created for the first appellant.

7.9 We are in no doubt whatsoever that when section 38 of the Pensions Scheme Regulation Act reposes, as it does, authority in the Registrar to prescribe and publish guidelines for the administration of the Act, it does not thereby give the Registrar a blank cheque. Rather, the Registrar's power in that behalf is circumscribed as it is intended for the furtherance of the

overall objectives of the legislation pursuant to which it is given.

7.10 An administrative guideline or directive made pursuant to the Pension Scheme Regulation Act cannot, in our view, be contrary to or beyond the contemplation of the enabling statute in substance or in spirit, nor can it trespass unduly on the powers and duties of offices created under the enabling statute. Being administrative guidelines, the Registrar's directives cannot create any substantive obligations nor can it prescribe matters which are more appropriate for Parliamentary enactment.

7.11 Having set the necessary stoid tone, we revert to the issue whether the PIA Directive 18/35 was in any way in violation of the Pension Scheme Regulation Act. Mr. Musukwa, learned counsel for the first appellant, argues that it was, and this is what founded the first ground of appeal, namely that the lower court judge fell into error in holding that the first appellant was, on the basis of the contents of the Registrar's directive liable to pay for the deficit in the pension fund.

7.12 Mr. Mwamba on the hand maintains that it was not for reasons which he articulated and, therefore, that the first appellant's claims are unfounded.

7.13 Mr. Musukwa's argument is that the PIA Directive 18/35 was *ultra vires* the Pension Scheme Regulation Act in several respects, namely first, that by making a sponsoring employer liable to appoint an actuary and by directing such employer to make good any deficit that may have occurred in the funding position of a pension scheme, they contravened the Act in multiple respects.

7.14 We believe that Mr. Musukwa's impeachment of the effect of PIA Directive 18/35 is not unjustified. The observations he makes on the Pension Scheme Regulation Act, which we have earlier in this judgment summarized, are not idle.

7.15 The Act is very clear as to the roles it assigns to the trustees, managers/administrators and other stakeholders in the management of pension schemes. Mr. Musukwa called our attention to sections 18 and 19 of the Act on the appointment of an actuary by a board of trustees.

7.16 We agree with the first appellant's counsel that the manner of appointment of actuaries, as well as the role of trustees and managers, are matters for which the Act has provided or should appropriately provide for. While we take full note of Mr. Mwamba's submission that the Pension Scheme Regulation Act contains no provision on dissolution of pension funds and that at the time of the lower court judgment there was no board of trustees in existence, we do not accept the submission that the judgment of the lower court could be justified on this basis.

7.17 We think that there are two points or assumptions that require to be put in perspective. First, it is that the lower court judgment was premised, in part at least, on the directive given in PIA Directive 18/35 on the appointment of an actuary and on the payment of the deficit into the pension scheme by the first appellant. Second, that the Directive fell squarely within the intendment of the Pension Scheme Regulation Act, in particular section 38.

7.18 The lower court judge was evidently of the inclination that provided the Registrar had a statutory power to make guidelines and he made those guidelines, the issue ended

there. He saw his role as transactional, confined to giving effect to the guidelines which he clearly considered constituted part of the corpus of applicable law. This is evident from the extract from the judgment of the lower court reproduced by counsel for the first appellant which we have in turn reproduced at paragraph 4.20.

7.19 At a purely superficial level, it is difficult to fault the judge if all he did was to apply the law as it related to the situation before him. Yet, as we understand the applicant's position, the judge's misdirection lay in his failure to deliberately address the efficacy of the law he was applying. Did PIA Directive 18/35 constitute good applicable law?

7.20 We agree that the judge should have gone further to qualitatively evaluate PIA Directive 18/35 as a source of applicable law to the situation that faced the parties.

7.21 Our view is that by directing that the appellant, as sponsoring employer, should appoint an actuary for the pension fund, and should pay any deficit in the funds of the scheme, PIA Directive 18/35 created substantive obligations for the first appellant which went way beyond the contemplation of the Act. What PIA

Directive 18/35 did, was to purport to fill in a lacuna in the Act as regards pension schemes facing winding up. This, in our view, is a matter properly for legislation. It does not belong in the province of directives and guidelines by the Registrar.

7.22 We also view the provisions of PIA Directive 18/35 as not only going beyond what the Act provides, but in some cases contradicting the Act itself. The issue, for example, of appointing an actuary is one properly reserved for trustees. What should happen where there are no trustees, is an issue for the Act to provide for. It is not for the Registrar to prescribe.

7.23 Likewise, management of the funds of a pension scheme is the responsibility of fund managers as superintended by trustees. It follows that where there is a deficit in funding arising from mismanagement, liability should lie between the managers and the trustees for such mismanagement of the scheme. We think it is inherently unjust for the Registrar, without any justifiable legal basis. to create financial obligations for a compliant sponsoring employer.

7.24 In its reach, PIA Directive 18/35 exceeded the purpose for which the Act designed it to serve and almost assumed a life of its own, creating in the process unlimited potential for contradiction between its provisions and those of the enabling Act.

7.25 We are also sympathetic to the argument by Mr. Musukwa that the formulation of the Act in the language of compulsion of a sponsoring employer to pay for any deficit in a pension scheme, has no statutory basis. Additionally, it negates any due process, particularly in circumstances where the blame for mismanagement of a pension fund lies elsewhere.

7.26 It is for the reasons we have articulated that we find merit in both grounds of appeal. We uphold them accordingly. This means in effect that we shall not consider the surplus arguments made by counsel regarding whether or not the issue upon which the lower court granted relief were specifically pleaded, nor is necessary to consider the arguments centred on natural justice.

7.27 In the result this appeal has merit and we uphold it. We order costs against the respondent to be taxed if not agreed.

I.C. MAMBILIMA
CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE