

A LEGAL ANALYSIS OF PAYMENTS OF NATIONAL
PENSION SCHEME AUTHORITY BENEFITS

BY

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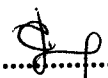
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A LEGAL ANALYSIS OF PAYMENTS OF NATIONAL PENSION SCHEME

AUTHORITY BENEFITS

By

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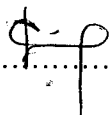
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ABSTRACT

There is a growing realisation in Zambia and most developing countries that there is a clear link between failure of the legal system to give equal social security protection and pensions to the vulnerable and the levels of poverty. Pensions refer to regular income received after retirement and are a part of social security schemes whose fundamental objective is to protect individuals and provide for a decent standard of living for people in retirement, unemployment and death of a wage earners.

The research looks at a comprehensive overview of the legal and regulatory framework for social security and pension provisions in Zambia and the various pieces of legislation that have material bearing on the pension industry in Zambia, their composition, structure as well as their strengths and weaknesses. The focus of the research is to lay out any flaws, irregularities or conflicting provisions in the legal framework that causes delays in payment of pension benefits. This research will be based on both primary and secondary information. The primary information will be gathered through an intensive study of the NPS Act with regard to the law on contributions and benefits as well as interviews from personnel of the National Pension Scheme Authority.

The secondary information will be gathered through desk studies of published materials on the subject from various books and articles. The research recommends for the protection of pensions in the Zambian Constitution and enhancement of various pieces of legislation which should take into account prompt and regular payment of pension benefits. There is also need to harmonise and reform legislation dealing with pensions to ensure prudential regulation and supervision and tightening controls in every area of social security provisions. These controls should also cover NAPSA which is currently not being supervised by any regulatory body despite being the custodian of the basic pension for all employees in the formal sector.

DEDICATION



To my mentor and mum, **Bishop Jennipher Phiri Muchelen'ganga**, without your support and encouragement and prayers, I would never have managed to reach this far in my education. You are my inspiration. I thank you for everything, I love you always and may God continue to exalt you.

To my son **Bwendo Shaba Mulengela**, I know you missed me a lot and it wasn't easy being away from you. I will always love and cherish you.

To my best friends **Ian Mbewe, Inonge Shabeenzu and Thea Chiyonkoma**, thank you for your love and support. I love you all.

To **Nyuma Banda**, thank you for taking care of my son while I was busy with my studies. God bless you.

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To **Ms. Anne M Mbewe**, thank you so much for all the reading materials you provided. I will always be indebted to you.

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LIST OF ACRONYMS

ZNPF	Zambia National Provident Fund
NAPSA	National Pension Scheme Authority
LASF	Local Authorities Superannuation Fund
PIA	Pensions Insurance Authority
ZRA	Zambia Revenue Authority
WCF	Workers Compensation Fund
PSPF	Public Service Pensions Fund
NSSR	National Social Security Reform

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CHAPTER ONE

1.0 INTRODUCTION

Social security schemes in Zambia are designed to provide protection against loss of income due to retirement, disability or survivorship to urban workers and their dependents¹. The main objective of any social security scheme is to guarantee protected persons who have reached a certain specified age, a reasonable means of subsistence for the rest of their lives². Protected persons simply refer to a member of any pension scheme who is eligible to the payment of a pension benefit.³

Most pension schemes are designed to protect a class of persons who, on account of insecurity of employment or savings and the uncertainty of being able to fall back on other members of the family are most exposed to destitution after retirement.⁴ It is important to mention at this point that the subject of the law pertaining to pension benefits in Zambia cannot be discussed without referring to the institution of social security. A thorough examination therefore of social security is a pre-requisite.

Social Security, by definition, refers to interventions undertaken usually by the public and sometimes private Institutions to provide affordable access to healthcare and certain minimum income security and other support in case of old age, sickness or disability and death of a member. Social Security aims at preventing and alleviating existing poverty.⁵

It is also important to note that the world's population is ageing at a rapidly increasing pace. As the number of elderly people rises, so does the need to ensure their social inclusion. For older people, social inclusion means a decent income during retirement and the possibility of

1. Monika Queisser, *Reforming Pensions in Zambia*, (The World bank 1997), 1

2. Ewane j. Ejuba, *Pensions Schemes in Africa: current situation* (International Social Security, ILO, Geneva, 2000), 120

3. Auna Hantuba, *Recent reforms and experiences of pension schemes: Social Security in the African context* (ISSA, Geneva, 2005), 234

4. International Labour Office, *Introduction to Social Security: A workers' Educational Manual*, (La Concorde, Malinges, 1976), 22

5. Zambia, *Social Protection Expenditure and Performance Review Budget*, (ILO, Geneva 2008), 11

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¹ Monika Queisser, *Reforming Pensions in Zambia*, (The World bank 1997), 1
² Ewane j. Ejuba, *Pensions Schemes in Africa: current situation* (International Social Security, ILO, Geneva, 2000), 120
³ Muna Hantuba, *Recent reforms and experiences of pension schemes: Social Security in the African context* (ISSA, ILO, Geneva, 2005), 234
⁴ International Labour Office, *Introduction to Social Security: A workers' Educational Manual*, (La Concorde, Epalinges, 1976), 22
⁵ Zambia, *Social Protection Expenditure and Performance Review Budget*, (ILO, Geneva 2008), 11

participating in the life of the community. Pension schemes thus have a crucial role to play in this respect.⁶

Social Security however is also critical for the provision of medical care for all as it assures the beneficiaries the means necessary for living decently in the event of loss or substantial reduction of their livelihood resulting from circumstances of sickness or accident, maternity, invalidity, old age and unemployment.⁷ The Zambian Constitution, being the supreme law of the land, places great importance in social security protection. This Constitution defines pension benefits to mean

Any pension, compensation, gratuities or other like allowances for persons in the service of public officers, officers in the department of the Clerk of the National Assembly or as members of the armed forces or for the widows, children, dependents or personal representatives of such persons in respect of such service.⁸

This desire to strengthen pension provisions in Zambia culminated in the enactment of legislation to establish and convert the Zambia National Provident Fund (ZNPF) into a national pension scheme to cover all employees in the formal sector.

There is hereby constituted a scheme to be known as the National Pension Scheme into which shall be paid all contributions authorised under this Act and out of which shall be met all payments authorised to be paid under this Act.⁹

NAPSA's mandate therefore is to act as the main vehicle for providing retirement and other social security benefits to workers in the country. The main functions of NAPSA are to collect contributions, invest the contributions not immediately required for payment of benefits and then pay benefits when they fall due.

1.1 DEVELOPMENT OF SOCIAL SECURITY IN ZAMBIA

One point to note is that prior to the social security reforms that led to the establishment of the National Pension Scheme Authority in 2000, the social security system in Zambia was divided in terms of coverage of the working population.

Alejandro Bonilla- Garcia: Public Pension Reform: A basic annotated reference time-line(International Social Security association, Geneva, 2005) 171

ILO Convention 102 (1952), 67 - 69

Chapter one of the Laws of Zambia, Article 124(5)

Chapter 40 of the Laws of Zambia, section 8

The Zambia National Provident Fund (ZNPF), the predecessor to the National Pension Scheme Authority (NAPSA) covered all workers in the private sector, parastatal organisations and non-permanent civil service employees in the public service. Permanent civil servants, teachers, the police and the armed forces were covered by the Civil Service Pensions Board while the Local Authorities Superannuation Fund covered employees in the local authorities.¹⁰

The government realised the inadequacy of the country's formal social security schemes and decided thus to reform them to meet the needs of the people. In 1986 therefore, the National Pensions Scheme Act was passed to repeal the ZNPF Act of 1966.¹¹ The NPS Act sought to make the scheme autonomous from government and to make membership compulsory for all formal sector employees and operate within the framework of prudential management as well as to adjust inflationary fluctuations and to address the aspect of low benefits as well as delayed payments of pension benefits.¹²

In 1991, the first Republican President of Zambia appointed the Kabwe Commission of inquiry to carry out a country wide survey on social security.¹³ Key among the recommendations of the Kabwe commission were that members wanted what they termed as reasonable and timely benefits as well as benefits that would be protected against the monetary value erosion of inflation.

From the recommendations made, it was evident that the level of social security benefits provided and the service delivery was unable to meet the expectations of the members.¹⁴ In 1993, therefore, the government formed a committee called the National Social Security Reform Implementation Committee (NSSRIC). This committee was tripartite in nature and comprised representatives from the Government, the Zambia Federation of Employers, the Mine Workers Union of Zambia and private Pension Providers¹⁵

¹⁰ Musonda Cheta, The experience of the National Pension Scheme Authority, Social Security in the African Context, (ISSA, Geneva, 2005) 256

¹¹ Chapter 513 of the Laws of Zambia

¹² B. Miswalo, Management of Social Security Systems in Zambia (Copperbelt University, Kitwe, 2004), 2

¹³ Miswalo, Management of Social Security Schemes in Zambia, 3

¹⁴ Miswalo, Management of Social Security Schemes in Zambia, 4

¹⁵ Miswalo, Management of Social Security Systems in Zambia, 4

As a component of the National social Sector Rehabilitation and Development programme, the Government of the Republic of Zambia and the United Nations Development Programme signed a project document for the reform of social security systems in 1996. Following consultations of the NSSRIC, recommendations were made to government which formed the basis for the NPS Act.

We note that prior to the enactment of the National Pensions Scheme Act, the Zambia National Provident Fund encountered a lot of challenges in form of structural weaknesses and mismanagement. The main weaknesses of the Z N P F were low benefit amounts and only lump sum payments, poor service delivery, high administrative costs, lack of indexation of contributions and benefits and poor investments returns¹⁶

In addition, ZNPF did not enjoy a complete autonomy status. For instance, the investment policies pursued by ZNPF were dictated by political considerations, and not primarily by the member's interests. The overall basis of investment policy was such as to support the government's views as to the need to invest in properties and for those to be distributed across the country. ZNPF thus ended up investing into real estate in towns that had no companies or institutions with the capacity to pay reasonable rentals. This was done under the interference of the UNIP government and these real estates had to be sold at a loss. The restrictions in what to invest into made the Fund not to invest in other profitable institutions and ventures.¹⁷

Among the factors that NAPSAs has put in place to alleviate problems of ZNPF vis-a-vis Social Security are the computerization of the social insurance scheme, autonomy in decision making, decentralising the processing and payment of benefits, and restructuring of the organisation. The conversion of the provident fund to a pension scheme thus was aimed at improving benefit levels, strengthening the capacity for service delivery and providing for income replacement in retirement through monthly pensions.¹⁸

¹⁶ Miswalo, Management of Social Security Systems in Zambia,5

¹⁷ Mable Ngulube, A Legal Perspective of an overview of the Zambia National Provident Fund and the National Pension Scheme Authority(Zambia Open University, Lusaka,2010), 22

¹⁸ B. Miswalo, Management of Social Security Systems In Zambia(Copperbelt University, Kitwe, 2004), 6

NAPSA is based on the principles of social insurance and the benefits payments at maturity date are indexed to the current national average income.¹⁹ It is assumed that a social insurance rather than a savings scheme will be able to avoid destitution among members after retirement. Basically this stance aimed at addressing the problem of real value of benefits in social security schemes as was the case under the repealed ZNPF Act which had no provision for indexation of benefits. This would entail NAPSA having a very strong financial base through having appropriate investment policies, favourable economic conditions, non-evasion of contributions by members and their employers.

NAPSA was established after parliament passed Act number 40 of 1996. It was established to replace ZNPF, which had existed since 1966. ZNPF was a compulsory savings scheme for private sector employees that provided lump sums to its members based on the cumulated balances of individual member accounts. Contribution rates to ZNPF were very low which, coupled with unfavourable economic conditions, lack of indexation and governance issues, translated into low benefit packages. NAPSA became operational on 1st February 2000.

NAPSA is administered by an independent tripartite Board appointed by the Minister of Labour and Social Security.²⁰ The members of the Board are drawn from government, employees and employers' associations who form a Board of Trustees. It comprises representations from Government at Permanent Secretary level, the labour unions and the private sector through representation from the Zambia Federation of Employers. Certain specialised institutions such as Bank of Zambia, the Zambia Association of Pension Fund Managers and Bankers Association also have representation and these representatives are appointed by the Board Chairperson. The Board is responsible for corporate policy formulation.

The trustees have the fiduciary responsibility to ensure that the institution operates and applies best pension fund management practices in the best interest of the beneficiaries. Further, NAPSA can be said to be a self-regulating institution in that although trustees are answerable to the Minister who in turn is also answerable to parliament, this is only in respect of supervision. Given the fact that it is managing public funds, NAPSA is required to follow the prudential

¹⁹ Chapter 256 of the Laws of Zambia, section 35

²⁰ Government of the Republic of Zambia: Interim Report of the Constitutional Review Commission (2005), 677

management principles as provided for under the Pensions Scheme Regulations Act²¹ which is administered by the Pensions and Insurance Authority (PIA).

NAPSA's mandate is to act as the main vehicle for providing retirement and other social security benefits to workers in the country. The main functions of NAPSA are to collect contributions, invest the contributions not immediately required for payment of benefits and then pay benefits when they fall due.

In addition, the government has given powers to NAPSA to prosecute employers for the offence of failure to remit contributions on behalf of their employees²². These multiple functions therefore require that NAPSA has skills, systems and processes to meet the relevant demands imposed on it by legislation.²³

Following the enactment of the National Pension Scheme between 1996-1998, technical consultations were provided by the International Labour Organisation. These consultations were basically in line with the weaknesses in the Zambia National Provident Fund Act. In order to realise the objectives of providing social security to its members and to reduce hardships on citizens, ZNPF provided eight benefits namely;

1.1.1 AGE BENEFIT

This benefit was claimed by a member who had not retired from employment under a contract of service but had reached fifty years of age. Such a member would not be entitled to a further payment of benefit until after an expiration of two years.²⁴

1.1.2 RETIREMENT BENEFIT

A retirement benefit under the Zambia National Provident Fund was claimed by a member who had attained fifty years of age and had retired from regular paid employment under a contract of service.²⁵

¹ Chapter 256 of the Laws of Zambia, section 41

² Chapter 256 of the Laws of Zambia, Section 51(1)

³ National Pension Scheme Authority, Strategic plan, 2010-2014, p3

⁴ Chapter 273 of the Laws of Zambia, section 27(1) and (4)

1.1.3 EMIGRANT BENEFIT

This was a benefit payable to a member who was about to emigrate or had already emigrated from Zambia and had no intention of returning to Zambia.²⁶ This benefit was applicable to both Zambians and non- Zambian nationals upon satisfying certain conditions as stipulated in the repealed ZNPF Act.

1.1.4 SURVIVOR'S BENEFIT

This was a benefit paid to the beneficiaries upon the death of a member. A member would nominate the beneficiaries to receive his benefit upon death.

Where the member did not specify or nominate the beneficiaries, the benefit would be paid to the widow or widower with whom at the time of the member's death, the member was co-habiting.²⁷ The benefit would also be paid to the dependants of a deceased member.

1.1.5 PHYSICAL AND MENTAL WITHDRAWAL BENEFIT

This was a benefit paid to a member who was permanently incapacitated from doing any work owing to a physical or mental disability.

1.1.6 MATERNITY GRANT

This was a benefit meant to provide one with pre-natal and post natal care as well as the provision of funds for the maintenance of a member and her child during the period of abstention from work.

1.1.7 FUNERAL GRANT

This is a death gratuity paid to the next of kin on the death of the deceased member. It was a grant paid to any person who is liable for the cost of the funeral of the deceased member. Out of

²⁶ Monika Queisser, *Reforming Pensions in Zambia: An analysis of existing schemes and options for reform*, (World Bank 1997) 17

²⁷ Chapter 273 of the Laws of Zambia, section 30

Chapter 273 of the Laws of Zambia, section 28(5)

the afore- listed benefits under ZNPF, NAPSA has retained four benefits and these are retirement, survivors, Invalidity and funeral grant benefits.²⁸

Out of the afore- listed benefits under ZNPF, NAPSA has retained four benefits and these are retirement, survivors, Invalidity and funeral grant benefits.²⁹ The NPS Act sets out the conditions applicable for one to qualify for these benefits and how the computations are done. It further sets out the number of contributions to be made in order for one to be eligible for a benefit.³⁰

NAPSA's primary objective is the payment of benefits. As this research analyses the benefits payable by the authority, two terms will have to be distinguished. While these are interchangeable, their meaning is different and this has to be clarified.

(i) Pension

Where this term is used in this research, it means a benefit payment which one receives at regular intervals for one's life time until death. In most cases, this is passed onto the survivors who include the spouse and children.

(ii) Lump sum

This refers to a benefit payment which is a one off payment and no other payments will accrue to such a member once this payment is made in respect of that benefit. It is also important to mention at this point therefore that pension benefits refer to regular income received after retirement. Pensions are part of social security schemes whose fundamental objective is to protect individuals from the hardships which would otherwise result from unemployment, retirement or death of wage earner.³¹

(iii) Grant

This is an ex-gratia payment or a donation made to survivors of the deceased member to enable them undertake a meaningful burial. The amount of the funeral grant has been set at ten times the minimum pension in the year of the members death.

(iv) Pension Plan and Pension Fund

²⁸ Chapter 256 of the Laws of Zambia, Sections 18-34

²⁹ Chapter 256 of the Laws of Zambia, Sections 18-34

³⁰ Statutory Instrument Number 71 of 2000, Section 3 (1) (a) (b)

³¹ International labour Office, Introduction to Social security (La Concorde, Epalinges,1976), Geneva, 74

A pension plan is a contractual arrangement that sets out the rights and obligations of all the parties. A Pension Fund on the other hand is a pool of assets set aside in a trust collateral for the promised benefits.³²

1.2 SUMMARY

Pension Schemes are usually contributory in nature and made by both employer and employee's earnings in order to guarantee a regular income when such employees retire. Payment of benefits is subject to cessation from gainful activity and calculated on the wages earned. The formula for calculating such benefits is fixed in such a way as to ensure that they do not fall below a certain minimum.³³

In most schemes, the pension amount is calculated directly from the beneficiary's previous earnings. The actual amount is limited by applying a ceiling on the earnings on which the benefit is calculated. Irrespective of this ceiling however, in many cases, the National Pension Scheme Authority provides for a maximum pension, often expressed in monetary terms.³⁴

Supervision of the various social security firms is carried out by various government Ministries and agencies. The Pension Scheme Regulation Act³⁵ was enacted for such a purpose. Supervision of pension Schemes is also administered through the Ministry of Labour and Social Security.³⁶ Supervision of pension schemes is key to the effective running of any pension scheme as it protects the rights of benefits and other interests of the members in accordance with the corresponding pension scheme³⁷

The National Pension Scheme provides for payment of three types of benefits and these include retirement, invalidity and survivor benefits.³⁸ It sets out the conditions applicable for one to

Z. Bodie The Foundations of pension Finance (ILO, Geneva,2000) 17

Musonda. Cheta, Coordination among multiple pension schemes: The experience of the National Pension Scheme Authority(ISSA, ILO,Geneva, 2005), 253

Ewane j. Ejuba, Pension Schemes in Africa(ISSA,ILO, Geneva,2000] 123
Number 27 (2005)

Musonda Cheta, The experience of the National Pension Scheme Authority: Social Security in the African context,(ISSA, ILO,Geneva,2005), 252

Pension Scheme Regulation Act, Number 27 of 2005, section 7

Statutory Instrument Number 71 of 2000, Section 2(1)

qualify for these benefits and how the computations are done. It further sets out the number of contributions to be made in order for one to be eligible for a benefit.³⁹

1.3 STATEMENT OF THE PROBLEM

One notable feature of a viable pension scheme is to provide benefits to its members when they fall due. A Pension scheme should guarantee a standard of living for people in retirement and other contingencies. NAPSA was established to provide income security against the risk arising from death, retirement and invalidity through payment of different kinds of benefits to its members⁴⁰. Despite the backdrop of providing seemingly adequate social security and pension provisions on the part of NAPSA, cries about destitution still abound from retired employees. There are serious complaints about the suffering of former employees who had been contributing to NAPSA. These complaints emanate from the fact that most former employees have had to wait for longer periods of time after retirement to get their benefits which are duly over delayed.

NAPSA has been mandated by law to receive contributions and pay out benefits as and when they fall due.⁴¹ Whilst NAPSA is committed to payment of benefit claims, there are a number of challenges faced by the Authority. One of the major challenges is the delay in the payment of pension benefits arising from a lot of irregularities and lack of adequate enforcement provisions in the National Pensions Scheme Act to register employers and collect contributions as and when they fall due. This has grossly affected the operations and capacity of the pension scheme to pay pension benefits adequately and on time.

1.4 RESEARCH OBJECTIVES

1.4.1 Main Objectives

This research seeks to establish whether the mandate placed on the NPS Act to collect contributions and pay out benefits is being met.

1.4.2 Specific Objectives

Statutory Instrument Number 71 of 2000, Section 3 (1) (a) (b)
NAPSA Newspaper supplement (2012), 17
National Pension Scheme Act, Number 40 of 1996, section 8

This research seeks to establish the enforcement provisions under the NPS Act in order to determine whether the provision to enforce compliance under the Act are adequate for the purpose for which the Act was formulated.

This research will also endeavor to discuss at length the benefit provisions under the NPS Act and determine whether benefit payments under this stipulated Act are adequate and made on time and to establish reasons for the delay in the payment of pension benefits.

5 RESEARCH QUESTIONS

Does the NPS Act provide for adequate provisions to ensure that contributions are paid into the scheme

What are the main causes for the delay in paying out pension benefits

Does the NPS Act specifically provide for a time frame when a benefit must be paid?

Does the NPS Act make provisions for the preservation of pension benefits?

6 JUSTIFICATION OF THE STUDY

The extreme poverty and vulnerability levels in Zambia require that the affected communities and individuals are protected from constant shocks. It is also important to note that many laws pertaining to inadequate pension provisions have been passed since independence. However, not much research or analysis has been conducted to determine to what extent the National Pension Scheme Act has contributed to delayed pension benefits and how this has contributed to an increase in poverty levels in Zambia.⁴²

7 METHODOLOGY

This research will be based on both primary and secondary information. The research will be qualitative in nature and will be carried out by way of desk study. The primary information will

Social Security Survey (2004), 52

ered through an intensive study of the NPS Act with regard to the law on contributions benefits as well as interviews from personnel of the National Pension Scheme Authority.

of this intensive research will be to find out whether benefits payable under NAPSA are e and timely. The secondary information will be gathered through desk studies of d materials on the subject from various books and articles.

OUTLINE OF CHAPTERS

er is divided into five chapters. Chapter one introduces the subject of this research and the scope of the study. It gives a brief background as well as a general overview of the types of pension benefits and their characteristics.

two will discuss the role of the Pension Scheme Regulation Act⁴³ and the Pensions and e Authority⁴⁴ as supervisory and regulatory bodies and the extent of their supervisory will further discuss the role of the Ministry of Labour and Social Security on pension tions and benefits.

three will discuss the law pertaining to pension contributions and the problems related - payment of contributions to the National Pension Scheme Authority by all contributing rs. Specific reference will be made to specific provisions of the NPS Act which deals yment of contributions and offences for non-payment of pension Contributions.⁴⁵ This will also discuss case law pertaining to non- payment of contributions.

four discusses pension benefit provisions under the NPS Act and the main causes of n paying out pension benefits to qualifying members. This chapter will further discuss fits provided for under the NPS Act as well as the rights of the members as stipulated e NPS Act.. Particular reference will be made to the different types of benefits provided r the NPS Act and the law on assessment of pension benefits and eligibility. Finally, five will outline the conclusion of the subject matter and make recommendation.

CONCLUSION

28 of 1995

ibility of Social Security Systems in Zambia (Pensions and Insurance Publication, Geneva, 2005), 2
256 of the Laws of Zambia, section 15 and 51(d)

common feature in most social security schemes is the weakness in the system of collecting contributions and enforcing compliance resulting in considerable delays in the payment of benefits. The National Pension Scheme Act (NPS)⁴⁶ makes it mandatory for employers to pay contributions with accompanying schedules and to pay out benefits when they are due. The National Pension Scheme Authority (NAPSA) should ensure prompt and timely payment of pension benefits so that the beneficiaries will be able to sustain themselves. There is a need to strengthen the enabling legislation with regard to enforcement provisions and increase contribution levels as well as quicken benefit processing of all benefit payments.

The directive principles of state policy in the Zambian Constitution clearly recognise the importance of social security for public officers, the substantive part of the constitution does not guarantee social protection for both public officers and other employees working in both formal and informal employment. This particular provision is not also subject to periodic review and does not take into account changes in the value of money.

It is therefore recommended that pension benefits should clearly be enshrined in both the constitution and other appropriate legislation to ensure adequate and timely payment of pension benefits. The Constitutional provision should also enable affected persons to seek judicial relief in the event of delayed payment of pension dues. Furthermore, enforcement provisions with regard to the payment of contributions should be strengthened in the enabling Acts to lessen delays in the payment of benefits to beneficiaries.

⁴⁶ Act No. 40 of 1996, section 15

discusses the role of the government through Ministry of Labour and Social Security on pension contributions and benefits.

An interim report on the Constitutional Review Commission⁴⁸ noted that social security systems in Zambia have evolved as a fragmentation of schemes, leading to a number of difficulties in the co-ordination and implementation of social security policies.⁴⁹ Thus, the reports recommendation to reform pension schemes into a three pillar structure to include a mandatory pension scheme, statutory pension schemes and occupational pension schemes was adopted.⁵⁰

2.1.1 CONTRIBUTORY AND MANDATORY BASIC PENSION SCHEME

The first pillar is a basic mandatory scheme, which is the National Pension Scheme (NAPSA) established in February 2000.⁵¹ NAPSA is managed by a statutory body supervised by an independent tripartite body comprising the government, employee and employer representatives. It is a social security pension scheme for both private and parastatal sector employees.⁵²

Membership is compulsory for all regularly employed persons except for a few exceptions.⁵³

These exceptions include the following:

- (a) An employed person whose monthly earnings are less than K15.00
- (b) A spouse of the employer.
- (c) A member of the family of the employer who resides with the employer.
- (d) An employee of an international organisation who is not a citizen of Zambia.⁵⁴

NAPSA is a scheme that is earnings related for purposes of both contributions and benefits and is designed to provide a basic pension to all categories of workers in formal sector employment.

⁴⁸ Government of the Republic of Zambia, Constitutional Review Commission (Lusaka, 2005), 688

⁴⁹ Government of the Republic of Zambia, Constitutional Review Commission, 689

⁵⁰ Muna Hantuba, A case for privatization of social security in Zambia, (ISSA ,ILO, Geneva,2005) , 233

⁵¹ Hantuba, A case for privatization of social security in Zambia, 234

⁵² Chapter 256 of the Laws of Zambia, Section 11

⁵³ Chapter 256 of the Laws of Zambia, second schedule, section 10

⁵⁴ Chapter 256 of the Laws of Zambia, second schedule, section 10

It could be argued that the condition for eligibility to NAPSA membership (of requiring a minimum earning of K15.00 per month) contradicts with the current Minimum Wage and Conditions of Service⁵⁵ which sets the minimum wage at K500.00. This could encourage employers to pay very low wages as long as they adhere to the NAPSA requirement of paying earnings from which a deduction of only K15.00 would be made. In essence, the pension scheme seeks to cover every person in formal employment irrespective of how much a person earns as long as they are above a threshold of K15.00 NAPSA aims to capture as many people as possible in order to strengthen the capacity of the poor and vulnerable as well as to reduce income inequality at retirement.

Furthermore, the interpretation of clause (d) of the second schedule of the National Pensions Scheme Act has also been quiet contentious. This is so because the Diplomatic Immunities and Privileges Act⁵⁶ defines an 'international organisation as one which the president may by statutory order declare to be an organisation of which the government and more or one states or governments are members.' This entails that an international organization can be defined in two ways.

- (i) It is an organisation that has been declared or can be declared as such by the president through statutory order. This therefore means that the criteria to declare the organisation as being an international organisation is in the president's discretion.
- (ii) It is an organisation in which there is existence of more than one government or state membership.

This therefore entails that non-Zambians who qualify for exemptions are those working for organisations that qualify by the fore-going definition. This in essence means that all other foreign nationals working for foreign companies including non-governmental organisations are required under the National Pensions Scheme Act to remit contributions.

This particular provision has brought out mis-understandings among employees of foreign nationals with regard to payment of statutory contributions for non- Zambians. This mis-understanding has been created by the fact that from the inception of NAPSA in February 2000,

⁵⁵ Statutory Instrument number 2 of 2011

⁵⁶ Chapter 20 of the Laws of Zambia, Section 4

NAPSA has been informing the Public that foreign nationals working for International Organisations are exempted from making statutory contributions.

This mis-interpretation was reflected in the NAPSA employers guide⁵⁷ and as such, a number of International companies had not been making statutory contributions on behalf of non-Zambians because of lack of clear guidance of who or what an international organisation is.

From the above therefore, the law is still not clear with regard to payment of statutory contributions for non-Zambians working for International Organisations. Notwithstanding this, the National Pension Scheme Act has no provision for waiving of penalties charged on all late payments of contributions. Late payment of contributions attract a penalty equal to twenty percent (20%) cumulative for every month the contribution remains unpaid⁵⁸ and therefore requires everyone in formal employment to be contributing to the scheme as and when the contribution falls due.⁵⁹ Applying the law as it stands today may therefore bring out some misunderstanding about what this particular provision entails.

2.1.2 OCCUPATIONAL PENSION SCHEMES

Occupational schemes are tied up to respective employers and in most cases are funded pension schemes. A good example of such schemes include, the Public Pension Scheme (PSPF) and the Local Authorities Superannuation Fund (LASF) which are publicly managed schemes based on a computation of figures from earnings and years of service.

PSPF on one hand is a funded defined benefit scheme and covers retirement benefits for all civil servants.⁶⁰ It is run by a Board, whose functions are to control and administer the scheme in accordance with sound business practices and in the best interest of the members of the scheme.⁶¹ LASF on the other hand covers benefits for local government employees. It is designed to provide income security in the event of retirement, permanent invalidity and survivorship benefit. It is the oldest pension scheme, having been first created in 1954.⁶² It is

⁵⁷ National Pension Scheme Authority, Employers Guide,(Lusaka, 2012) , 3

⁵⁸ National Pension Scheme Authority, Employers Guide(Lusaka, 2012), 3

⁵⁹ Chapter 256 of the laws of Zambia, section 11 and 15

⁶⁰ Chapter 260 of the laws of Zambia

⁶¹ Muna Hantuba, A case for Privatisation of Social security Schemes in Zambia, (ISSA, ILO, Geneva, 2005) ,235

⁶² Government Notice No. 314 (1954)

administered by a tripartite Board of directors appointed by the Ministry of Local Government and Housing⁶³

One point to note is that although the National Pensions Scheme Act makes it mandatory for newly recruited civil servants to be members, new members still join the PSPF from government departments. This therefore makes it practically impossible for these schemes to operate as second pillar or complimentary schemes.

Instead, they are working to restore the previous status quo of being mandatory pension schemes for all civil servants⁶⁴ This therefore defeats the whole purpose of establishing NAPSA to be a mandatory scheme as envisaged by government so that PSPF remains strictly an occupational scheme for civil servants in the three pillar structure.

2.1.3 FORMALISED VOLUNTARY SCHEMES

The third pillar is a formal voluntary savings pillar available to anyone who wants to supplement the retirement income provided by the first and second pillar schemes. The Pension Scheme Regulation Act provides for and allows the formation of personal retirement schemes.⁶⁵

There is need however to harmonise voluntary schemes with NAPSA because by its very nature, NAPSA has been mandated to capture employees both in the private as well as the Public sector. The law may therefore overburden individuals through salary deductions that go both to the State Scheme (NAPSA) as well as voluntary schemes.

This in turn may also encourage employers to reduce the numbers of the employees being paid for as it would be an extra cost to the employer to remit deductions to two schemes, thereby denying most employees a pension benefit at retirement. (to rework this)

2.2 ESTABLISHMENT OF THE PENSION SCHEME REGULATION ACT

The government was urged to introduce a regulatory body which culminated in the establishment of the Pensions and Insurance Authority.⁶⁶ Prior to the enactment of the Pension Scheme

⁶³ Chapter 284 of the laws of Zambia.

⁶⁴ Zambia, Social Protection expenditure and Performance Review and Social Budget (Geneva, ILO,2008) p69

⁶⁵ Committee on Economic Affairs and labour for the Fourth Session of the Tenth National Assembly(2009) ,2

⁶⁶ The Pension Scheme Regulation Act, Number 28 of 1996, section 3

members, monitoring the viability of the pension scheme and ensuring that the pension scheme is operating on sound financial and actuarial principles.⁷¹

Finally, it is also noteworthy to state that although the Pension Scheme Regulation Act establishes the Pensions and Insurance Authority, it is not a corporate body but rather a department under the Ministry of Finance and National Planning.⁷² Thus, in its current structure, the Pensions and Insurance Authority is not a legal entity and therefore cannot sue or be sued in its own right.⁷³

(ii) REGISTRATION OF PENSION SCHEMES

Section 8(2) of the Pension Scheme Regulation Act provides for the registration of pension schemes. It stipulates that every pension scheme, other than a pension scheme established by a written law shall be established under an irrevocable Trust.⁷⁴ The Land (Perpetual) Succession Act⁷⁵ defines and establishes a Trust through incorporation of a pension scheme into a legally established institution through the Trust deed executed by the Trustees of the scheme.⁷⁶ This however only applies to private occupational pension schemes and does not apply to NAPSA.⁷⁷

Section 8 of the Pension Scheme Regulation Act also provides for the manner of appointment and election of trustees, their powers and duties, grounds for their removal and election and appointment of the chairperson of the Board.⁷⁸

The case of *R v Christophe*⁷⁹ confirms and clarifies key fiduciary principles in any pension scheme. This case arose as a result of the failure by the Board of trustees to monitor and

⁷¹ Pension Scheme Regulation Act number 28 of 1996, section 7 (6) (a) (b)

⁷² Social Security Report, Non-banking Sector (2009) ,82

⁷³ Social Security Report, Non- banking Sector (2009, 82

⁷⁴ Pension Scheme Regulation Act number 28 of 1996, section 8 (2)

⁷⁵ Chapter 186 of the Laws of Zambia,

⁷⁶ Country Profile, Evaluation of Retirement Systems of Countries within Southern African Development (Geneva, ILO, 2000) ,21

⁷⁷ Country profile, Evaluation of Retirement systems of Countries within Southern African Development , 22

⁷⁸ Pension Scheme Regulation Act Number 28 of 1996, Section 8(2)

⁷⁹ (2011) FC 911

supervise the Investments committee on key investment portfolios of the pension scheme assets. The court in this case held that fiduciaries must not only monitor and prudently supervise all committees of a pension scheme for the benefit of the members but must also seek expert advice or assistance to help them fulfill their role because a fiduciary standard is a high one and must not be lowered if a person has limited capacity or skill in their role.

It is noted that the functioning of NAPSA relies on the board of trustees to carry out their duties in the interest of the members. Trustees typically include senior management, whose interests naturally lie with the continued operation of the Company. In addition, some trustees are employees and will clearly be difficult for them to take a strong position when their careers are in the hands of company management to whom they report. They will also naturally have an interest in their continued employment if matters come down to choosing between member security and their own immediate income.

NAPSA also incorporates pensioners as trustees. This poses a challenge as pensioners come at the top of the priority order and could therefore afford to be less concerned about overall member security.

The Public Service Pensions Fund (PSPF) is regulated by the Pension Scheme Regulation Act. This Fund covers retirement benefits for all civil servants in Zambia and draws its membership from the teaching service, the judiciary, the police and prisons, defense forces and Zambia Security and Intelligence Service.⁸⁰ The Fund however closed its scheme to new entrants in February 2000 when the National Pension Scheme was created in February 2000.

The Pension Scheme Regulation Act thus has a bearing on both the public and private pension schemes to ensure that they operate in the most prudent manner so as to protect the pension scheme members' accrued rights and benefits at all times. This Act however only provides for regulation and supervision of all pension schemes except NAPSA.

⁸⁰ Chapter 260 of the laws of Zambia, section 10

Strangely however, the National Pension Scheme Act states that the Authority shall ensure that the Scheme is managed in accordance with the prudential management principles specified in the Pension Scheme Regulation Act.⁸¹

There seems to be a conflict in the two regulations as the Pension Scheme Regulation Act clearly stipulates that it is not mandated to supervise NAPSA whilst the National Pensions Scheme Act on the other hand stipulates that it shall be guided by the Pension Scheme Regulation Act in the management of the scheme.

It can also be argued that the Pension Scheme Regulation Act does not take into account small and medium enterprises as well as the informal sector. The current regulatory framework therefore is inadequate with regard to coverage as it is only restricted to formal sector employees.

(iii) SUPERVISION OF PENSION SCHEMES.

In accordance with section 18 (1), a pension scheme shall make adequate arrangements for the preservation of pension rights in order to protect the interests of the members. The Act authorises the pension schemes to lay down the rights and obligations of the members in writing, a copy of which should be given to a member and that each year, a member should receive a benefit statement showing the members' actual benefits and accrued portable benefits in the case of a defined benefit scheme.

Section 18(1) also provides that a pension scheme should carry out an actuarial valuation every two years during the first four years after registration and every three years to review and determine the sound funding of the pension scheme. The Act thus provides for the appointment of an actuary and makes provisions for the regulation of minimum interests on pension benefits.

An actuary is a business professional who deals with the financial impact of risks and uncertainty. An actuarial valuation therefore address financial questions including those involving the level of pension contributions required to produce a certain retirement income. An

⁸¹ Chapter 286 of the laws of Zambia, section 40

actuary also assembles and analyses data to estimate the probability and likely cost of the occurrence of events such as death, sickness, injury and disability.⁸²

The Pension Scheme Regulation Act also provides that pension schemes should maintain the real value of members' accrued portable benefits and grant to members before a benefit is paid, the accrued retirement benefit at the time the members leaves the scheme.

The case of *Halliburton Group v Alberta*⁸³ discusses at length the restrictions on benefit reduction. The brief facts of the case were that applicant introduced a defined contribution pension scheme and froze all accrued benefit entitlements and required all members to participate in a defined contribution scheme. The affected members appealed to the Superintendents of pensions who rejected the freezing of benefits under the defined benefit plan. On appeal, the court held that the superintendents rejection to freeze benefits was reasonable.

The Pension Scheme Regulation Act makes provisions for defined benefit and defined contribution schemes. One critical difference between the two types of schemes is that in a defined benefit scheme, the Fund guarantees a pension based on a set of rules that include the years of contribution, levels of contributions and reference salary for pension calculation whilst in a defined contribution scheme, the pension to be received by the beneficiary depends upon the contributions made, the returns realised as well as all administration costs incurred in the running of the scheme.⁸⁴

Another decision was made in the case of *Quinn v Brunswick (Minister of Finance)*⁸⁵ where applicant had amended employees rate of contributions and reduced benefits. The court held that retired members who had fulfilled their contractual obligation were entitled to get their benefits without any form of amendments. It was also held that employees contributions could only be increased if employers contributions were also increased.

The decisions in the two cases indicated above potentially restricts employers ability to alter benefit formulas in any way and suggests that earnings frozen under defined benefit schemes is

⁸² Charles Trowbridge, *Fundamental Concepts of Actuarial Science* (Actuarial Education and Research Fund, Washington, 1989), 28

⁸³ (2009) ON CJ 586

⁸⁴ International Social Security Association, *Social Security in Africa* (Geneva, ILO, 2000), 48

⁸⁵ (2011) NB QB 182

prohibited even under the pension scheme rules as NAPSA is clearly a defined benefit scheme which specifies formulas for the cash benefits to be paid after retirement and the employer guarantees the benefits by taking into account the years of service and the level of wages or salary earned for each year of service.⁸⁶ Moreover, it is important to mention at this point that a pension plan is a contractual arrangement that sets out the rights and obligations of all the parties and failure to abide by these contractual arrangements may constitute a breach of the pension scheme rules and may lead to de-registration of such a pension scheme⁸⁷

Section 22 and 23 of the Act provides for the preparation of audited reports by the Board of trustees and also provides for the appointment of Auditors to audit accounts for the pension fund for each financial year. The Act also provides for penalty for late submissions of annual reports rates to be applied when calculating portable benefits.⁸⁸

The Act further requires that audited financial statements are prepared and released not more than three months after the end of each financial year. This however only applies to private schemes since NAPSA has a limit of six months while the Public Service Pensions Fund and the Local Authorities superannuation Fund have no mandated deadline for production of their accounts.

In practice therefore, it becomes difficult to regulate public pensions schemes because there seem to be a conflict on the period required to prepare the financial statements between the regulatory body and substantive Acts.

(iv) DE-REGISTRATION OF PENSION SCHEMES

The Board may, on the recommendation of the registrar deregister a pension scheme if it has not complied with the provisions of the Act or if it is wound up.⁸⁹ Section 37 provides for an appeal to the Minister by any person aggrieved by the decision of the board. It also stipulates that any person not satisfied with the decision of the Minister may appeal to the High Court.⁹⁰

⁸⁶ International labour office, Introduction to Social security: Workers Educational manual (La Concorde, Epalinges, 1976), 158

⁸⁷ Pension Scheme Regulation Act, Number 28 (1996), section 33

⁸⁸ Pension Scheme Regulation Act number 28 of 1996, section 18(4) and 20

⁸⁹ Pension Scheme Regulation Act, Number 28 (1996) section 33

⁹⁰ Pension Scheme Regulation Act, Number 28(1996) section 33

There is however no record to indicate that any appeals have so far been made to the High Court by any aggrieved party on issues of deregistration of any pension scheme. This is partly due to the fact that the regulatory body is fairly new considering that it was only enacted in 1996.

One of the key Canadian decisions that could be relevant for this research even though of persuasive value only is the case of *Buschau v Rogers Communication*.⁹¹ The brief facts of the case were that the respondent established a defined benefit plan but closed it later to new entrants. By this time, the respondent had an actuarial surplus which entitled the employer not to make contributions for a specific period because of the profit that it realized from the contributions made into the scheme.

The respondent further merged this scheme with other types of schemes and made amendments to the pension plan that would entitle him to revert all the profits to the operations of the company and not to the members of the scheme upon termination of the scheme. Members sued the respondent and sought among other things a declaration that the merger was unlawful. The court held that while the merger was valid, the members remained entitled to the surplus. Respondent appealed and argued that he could re-open the plan to new members and use the surplus to fund new members. The Supreme Court noted in *Bushau v Rogers Communication* that plan members seeking a plan termination could apply to the Federal superintendent of Financial Institutions which could order that a pension plan be terminated in specific circumstances.

In 2006, members applied to the superintendent for an order terminating the plan and distributing the surplus to the members. The superintendent refused to terminate the plan and distribute the surplus. Members then applied for Judicial review of the Superintendents decision. The Federal Court of appeal held that the Superintendents decision was reasonable.

This decision is crucial in determining the extent of the powers of the registrar under the Pension Scheme Regulation Act to order costs to be made under a pension scheme as well as his jurisdiction to order a wind up at the request of a member. It was held that courts do not have the jurisdiction to order a winding up of a pension plan as this falls under the jurisdiction of the Superintendent who should provide a notice of the proposal to wind up to the employer.

(2011) F.C.911

Employer however has the right to appeal if dissatisfied with the tribunal's decision. The tribunal's appeal could be appealed to the divisional court.

2.3 DEPARTMENT OF SOCIAL SECURITY

It should be noted at this point that the Ministry of Labour and Social Security is the major stakeholder in the development of government policy on social security. This is appreciated through government's efforts of establishing the Social Security Department in 1992. The government also involved all stakeholders in the development of this policy by appointing a tripartite National Social Security Reform Implementation Committee to advise on the mechanics of this reform.⁹²

Recently, the government appointed new board members of the National Pension Scheme Authority with a call for them to provide effective policy direction to make the pension scheme viable.

The Minister of Labour indicated that the Board will play a key advisory role in ensuring that the institution becomes efficient and effective in reforming the social security systems in the country. The Board is tripartite in nature as it will take care of the interests of the employers, employees and the Government.⁹³

Furthermore, the Pension Scheme Regulation Act requires that the governing board of a pension scheme should have equal representation of both employers and employees.⁹⁴ The Public Service Pensions Fund, the Local Authorities Superannuation Fund and NAPSA however have composition of their governing bodies dominated by employers. The Public Service Pensions Fund, the Local Authorities Superannuation Fund and NAPSA for example have compositions of their governing bodies dominated mostly by employers and only one seat for workers' representatives.⁹⁵

2.3.1 KEY FUNCTIONS

⁹²B Miswalo. Management of Social Security Services In Zambia: General Aspects of Pensions in Zambia as a Social Protection System(Copperbelt University, Kitwe,2000),36
⁹³ Zambia Daily Mail, Home News, Friday 28th December 2012, 2
⁹⁴ Pension Scheme Regulation Act number 28 of 1996, Section 6(2)
⁹⁵ Zambia, Social Protection Expenditure and Performance Review and Social Budget, (International Labour Office , Geneva,2008), 87

The Department of Social Security derives its mandate from the Government Gazette Notice⁹⁶ which directs the Ministry to be responsible for matters pertaining to social security in the country. The Department is headed by a director and performs two functions, these being legislation and research and inspection and enforcement.⁹⁷

The main functions of the department includes formulation of appropriate social security policies, monitoring and evaluation of social security schemes, co-ordination and application of appropriate social security research, application of appropriate social security awareness programmes and maintenance of an effective social security information system.⁹⁸

Institutions collaborating with the department include the Ministry of Finance and National Planning, Ministry of Local Government and Housing, Ministry of Community Development and Social Services, Ministry of Health, Ministry of Justice, NAPSA, Workers Compensation Control Board, Public Pensions Fund, Pensions and Insurance Authority, Local Authorities Superannuation Fund and all other occupational pension schemes.⁹⁹

Although the mandate for social security regulation and policy implementation falls under the Ministry of Labour and Social Security, there are other pension schemes that fall out of their jurisdiction. These include the Public Service Pensions Fund, established as a defined benefit scheme in 1997, Local Authorities Superannuation Fund, and occupational pension schemes established by employers to cater for pension and other types of insurance.

The Ministry responsible for Labour and social security supervises NAPSA and Workers Compensation Fund Control Board. The Office of the President is responsible for the supervision of the Public Service pensions Fund and the Ministry responsible for Local Government and Housing supervises the Local Authorities Superannuation Fund.¹⁰⁰

From the above, it is noted that adequate supervision of pension schemes can never be overstated. Regulation and supervision of pension schemes is important in order to increase transparency and protect beneficiaries as the regulator would demand regular financial reporting

⁹⁶ Number 46 of 1992

⁹⁷ Ministry of Labour and Social Security , Structure and Core Function (2010), 1

⁹⁸ Ministry of Labour and Social Security, Structure and Core Functions (2010) ,2

⁹⁹ Ministry of Labour and Social Security(2010) ,2

¹⁰⁰ Government of the Republic of Zambia, Interim Report of the Constitutional Review Commission(2005), 689

in terms of coverage, investment policies and expenditures. Furthermore, the government has a greater responsibility in ensuring that managers comply with basic rules of pension schemes to ensure that they are adequately supervised. This is so because pensions are more complicated than other forms of savings because they are long term contracts between the employer and the employee.

2.4 CONCLUSION

The government has played and still continues to play an important role in the development and formulation of a formal pension and social security system. The importance of adequate regulation in improving governance of social security protection cannot be over-emphasised as regulation is relevant for both private and public pension schemes. Regulation of pension schemes not only increases transparency and protects beneficiaries but provides accurate information regarding costs, returns and balances in private schemes. Regulation and supervision is equally important for mandatory social security schemes such as NAPSA as most of these schemes have been ruled by statutes that created them and board compositions have been heavily laden in favor of government representatives. This research notes that the lines of responsibility with regard to regulation and supervision of pension schemes in Zambia is unclear. It is thus imperative that all social security schemes including NAPSA be subject to full prudential requirements of the Pension Scheme Regulation Act and accept supervision of the PIA.

CHAPTER THREE

LEGAL FRAMEWORK FOR STATUTORY PAYMENT OF CONTRIBUTIONS

3.0 INTRODUCTION

The preceding chapter looked at social security in Zambia with regard to regulatory framework and policy implementation and the extent to which government seeks to enhance and strengthen existing laws on social security in Zambia.

It discussed at length the role of the Pension Scheme Regulation Act¹⁰¹ and the Pensions and Insurance Authority and the extent of their supervisory role. The Chapter further discussed the role of the Ministry of Labour and Social Security on pension contributions and benefits.

This chapter will give an evaluation of the law pertaining to pension contributions and the problems related with non- payment of contributions to the National Pension Scheme Authority by all contributing employers. Specific reference will be made to section 15 and 51(d) of the NPS Act¹⁰² which deals with payment of contributions and offenses for non -payment of pension Contributions. This chapter will also discuss case law pertaining to non- payment of contributions.

Currently the main source of revenue for NAPSA are contributions from members and their employers. However other employers like Anglo American do not want to be contributing to NAPSA as they have their own scheme. Therefore on account of this, NAPSA is compromising its stance of being a compulsory scheme and the feasibility of maintaining real value of benefits as well as timely payments of benefits is being questioned.¹⁰³ In addition, this has created practical limits to the sums that can be extracted from the economically active population in order to finance and pay benefits on time. It is therefore, prudent that the financing of a proposed benefit must be legally and adequately provided for to ensure a timely payment of a pension benefit.

3.1 KEY PROVISIONS ON PAYMENT OF STATUTORY CONTRIBUTIONS

The National Pensions Scheme Act governs the administration of contributions and clearly stipulates whose responsibility it is to administer contributions.¹⁰⁴ Generally, the employer is required to contribute to the scheme an amount equal to 10% of an employee's gross earnings subject to the prevailing contribution ceiling amount in the calendar year in which the earnings are earned.¹⁰⁵ The contribution ceiling is the maximum threshold that one is expected to contribute for each particular year and this is revised at the beginning of every year. A contribution ceiling is the maximum monthly contribution payable to the scheme in any given calendar year on behalf of the employee.

¹⁰¹ Number 28 of 2005

¹⁰² Chapter 256 of the Laws of Zambia

¹⁰³ Monika Queisser, Bailey, Clive and Woodall and John, Reforming Pensions in Zambia: An Analysis of Existing Schemes and Options for Reform (World Bank Policy Research Working Paper No. 1716.), 37

¹⁰⁴ Chapter 256 of the Laws of Zambia, Section 14

¹⁰⁵ NAPSA Employers' Guide,(Lusaka, 2005), 8

Furthermore, The National Pensions Scheme Act defines who an employer is and states that this is any person, association, institution or firm registered as a tax payer with a contract of service with an employee and is responsible for paying the employee's wages.¹⁰⁶ This definition includes the government of the Republic of Zambia, domestic servants, maids, gardeners, all casual workers, Non-governmental organisations and foreign missions that have employed Zambian nationals.¹⁰⁷

The inclusion of domestic servants, maids and gardeners in this definition of an employee has been quiet contentious because in practice, not every employer of domestic servants, maids and gardener is mandated to register as a tax payer under the Income Tax Act as is the case with other institutions, associations or firms. This in essence therefore may deny pension benefits to domestic servants as an employer of such category of employees may argue that they are not covered under this definition.

Furthermore, it remains to be seen when occupational pension schemes such as the Public Service Pension Scheme will stop registering new members who join the public service as the law currently mandates all government employees who join the civil service to register with NAPSA and not the Public Service Pensions Fund. In essence therefore, one may argue that currently there exists two mandatory pension schemes in Zambia, these being NAPSA and the Public Service Pension Scheme making the three pillar structure practically non-existent.

Every employer to whom the Act applies must register with the Authority within one month of his first engagement with an employee eligible for membership to the scheme. He becomes a contributing employer at the beginning of the following month.¹⁰⁸ In the event that the employer fails to register within the stated period, the employer shall be required to pay arrears together with penalties effective the date he should have registered.

There are however several conceptual and practical problems with the NPS Act. In the first instance, NAPSA by design is a compulsory scheme whose members are all regularly employed persons. The NPS Act stipulates that every person who is under pensionable age and not less than 16 years shall be registered as a member of the scheme.¹⁰⁹ It is noted however that the NPS Act¹¹⁰ grants religious organisations a choice of whether to become members or not. Furthermore, employees from Konkola

¹⁰⁶ Chapter 256 of the Laws of Zambia, Section 12

¹⁰⁷ National Pensions Scheme Employer's guide, revised edition (Lusaka, 2012), 3

¹⁰⁸ National Pensions Scheme Employer's guide, revised edition(Lusaka, 2012),4

¹⁰⁹ Chapter 256 of the Laws of Zambia, section 11 (1) and (2)

¹¹⁰ Chapter 256 of the Laws of Zambia, section 13(9)

Copper Mines and Mopani are exempted from becoming members of the scheme.¹¹¹ This defeats the whole purpose of the mandatory requirements to membership of the scheme which should draw members from private as well as parastatal and government institutions.

This exemption seems to be in conflict with the NPS Act¹¹² where the Minister of Labour is mandated to provide through a Statutory Instrument conditions under which anyone can become a member. Although one would argue that the provision allows the scheme to draw its' members from the self-employed and workers in the informal sector, this creates confusion as the condition for registration already exists under the NPS Act¹¹³.

3.1.1 Assessment of Contributions

Currently, the employer is required to contribute to the Scheme an amount equal to 10% of an employee's gross earnings subject to the prevailing contributions ceiling amount in the calendar year in which the income is earned.¹¹⁴ One half of the amount computed above is known as the employee's share and the other half as the employer's share.¹¹⁵ The appropriate employees' share which is 5% must be deducted before paying wages to an eligible employee, and an employer is not entitled to recover any arrears of the employee's share of the contribution from wages earned in the subsequent months.

Payments for contributions should be paid to the scheme within 10 days of the end of the calendar month to which the earnings relate, that is, contributions for salaries for the month of June for example should be paid by 10th July.¹¹⁶ Where the due date falls on a weekend or a public holiday, the due date shall be the following working day.

3.1.2 Penalties for late remittance of contributions

Any contributions that are not paid within 10 days of the end of the calendar month to which they relate attract penalties equal to 20 percent cumulative for every month the contribution or underpayment remains unpaid.¹¹⁷ This penalty is charged on two major grounds. Firstly, it is

¹¹¹ Statutory Instrument number 14 of 2000

¹¹² Chapter 256 of the Laws of Zambia, section 11(1)

¹¹³ Chapter 256 of the Laws of Zambia, section 11(10)

¹¹⁴ Chapter 256 of the Laws of Zambia, section 14

¹¹⁵ National Pension Scheme Employer's Guide, Revised Edition (Lusaka, 2012), 5

¹¹⁶ National Pension Scheme Employer's Guide, Revised Edition (Lusaka, 2012), p5

¹¹⁷ Chapter 256 of the laws of Zambia, section 15(2)

compensation to NAPSA for the lost investment gains which would have been made and eventually passed on to the pensioner. At the time of retirement, the pensioner will have to be paid as though the money was received in the month it was deducted irrespective of whether NAPSA received it or not.¹¹⁸

3.1.3 Liability for contributions

The NPS Act imposes upon the employee, liability to pay his contribution which is 5% of his total gross salary and upon the employer the other 5% bringing it to 10% of the total contributions to be paid to NAPSA.¹¹⁹ However, the factual liability is on the employer who has been given the responsibility to register his employees.¹²⁰ The responsibility for payment of the NAPSA contributions has also been placed on the employer.

A contributing employer shall pay to the scheme a contribution in respect of an employee in his employment consisting of the employer's contribution and the employee's contribution at the prescribed percentage.¹²¹

The employer thus is mandated to pay the total of the joint contributions due. He does this by withholding the contribution of the employee from his wages. He also simultaneously presents a copy of his payroll for each period when the contribution is due. This is done on a prescribed form which shows the names of all persons employed at any time, their respective earnings and the corresponding contributions.

The provision of information by most employers however has proved to be a challenge as most employers are legally mandated to keep accounting records for a minimum of five years. NAPSA on the other hand requires that employer provides information as and when it is necessary to do so. This poses a challenge because by virtue of it being a pension scheme, NAPSA may require time and again to check employers records and ascertain the correctness of contributions made on behalf of employees.

Furthermore, the employer has always been held liable where the incidence of earnings-related contributions is avoided or reduced by means of irregular or unequal payments or even by

¹¹⁸ NAPSA and You, A Newspaper Supplement (Lusaka, 2012) 3

¹¹⁹ Chapter 256 of the Laws of Zambia, section 16

¹²⁰ Chapter 256 of the Laws of Zambia, section 13(1) and 13(3)

¹²¹ NPS Act No.40 of 1996, section 14 and 15

underpayments. These may be due to the employer understating the number of employees or by basing the required percentage on the basic pay instead of the gross salary.¹²²

3.1.4 Offences and Penalties

The employer has also been given a specific time limit in which to pay the contributions, failure to which, “a sum equal to twenty per centum of the unpaid amount shall be added as penalty for each month or part thereafter the date the payment is due and the amount of the penalty shall be recoverable as a debt owing to the scheme by the employer.”¹²³

Failure to pay contributions for which one is liable is an offence and also results in the offender accruing penalties. The NPS Act¹²⁴ provides that ‘Any person who-

- (a) Evades paying for any contribution by him or some other person and makes any false statement or representation;
- (b) Fails to register within the period specified in or under this Act when required to register;
- (c) Deducts from a member’s wages any amount by way of the member’s share which is in excess of the amount due to be deducted under this Act;

Shall be guilty of and shall be liable on conviction to a fine not exceeding one thousand penalty units or to imprisonment for a term not exceeding three months or to both.”¹²⁵

It can be argued however that this penal sanction is too weak to enforce compliance with regard to payment of contributions. There is therefore need to strengthen penal sanctions by increasing the term of imprisonment to a longer period in order to deter would be offenders from breaching provisions of the NPS Act.

In its strategic plan of 2011-2014, NAPSA indicated that the Institution was faced by a huge number of employers who defaulted in paying contributions as and when they fell due.¹²⁶ The government debt for example, stood at K162, 661,632,314.32 inclusive of penalties in December 2012. This figure comprises arrears amounting to K64, 098,950,700.02 and penalty on late payments amounting to K98,

¹²² International Labour Office, Introduction to Social Security: A Workers Education Manual (La Concorde, Epalinges, 1976), 162

¹²³ NPS Act no.40 of 1996, section 15 (2)

¹²⁴ Chapter 256 of the Laws of Zambia, section 51(1) (a) to (c)

¹²⁵ National pension scheme Act no. 40 of 1996.

¹²⁶ NAPSA Strategic Plan 2010-2014, p23

562,681,614.30. Ministry of Finance has however signed an agreement to liquidate this debt beginning with the arrears by 31st December 2012. This debt however has not yet been cleared.¹²⁷

Apart from government departments, NAPSA faces huge unpaid contributions from both private and parastatal organisations as well. The Zambia Wildlife Authority (ZAWA) for example is currently in court for non-remittance of statutory contributions.¹²⁸ The case of *The people v ZAWA*¹²⁹ is one good example that involves unremitted statutory contributions for periods from 2000 to May 2012. ZAWA's indebtedness based on this period alone is K 149,231,205.51 and this amount includes arrears and penalties.

The brief facts of the case are that ZAWA, having been warned several times by NAPSA to pay outstanding contributions failed to pay these contributions amounting to K16,580,765,432.16 and 20% cumulative penalty of K132,650,440,073.03 for the months of June 2000 to February 2012 in respect of its eligible employees. Legal proceedings have thus been preferred against ZAWA for the offence of failing to pay statutory contributions to NAPSA.¹³⁰

ZAWA was prosecuted in the year 2008 for failing to remit contributions and a consent order was entered into between NAPSA and the named employer. They defaulted on this Consent agreement and NAPSA took steps to distress them. During the course of effecting the warrants of distress, there was intervention from government and legal proceedings were therefore stopped.

Fresh Indictments were instituted against them in 2012 and the same resulted in the consent order which the accused firm is now defaulting on. At the time of the research, a date of hearing for the named case was set for tuesday the 13th of August 2013 for determination on the way forward by the court.

The court seriously warned NAPSA against withdrawing this matter or attempting to handle it outside court. This is because the case at hand involves a convict and thus withdrawing it would imply "pardoning" an already serving convict which in essence is foregoing the debt owed. It would therefore be prudent for NAPSA not to hold any discussions with the accused firm as this

¹²⁷ NAPSA monthly Compliance report, November 2012

¹²⁸ The People v ZAWA (Unreported,2013)

¹²⁹ Unreported(2013)

¹³⁰ Chapter 256 of the Laws of Zambia, section 13(1), 15(1) and (2)

would be tampering with the proceedings in court. Currently, ZAWA is in contempt of court by not having followed the earlier Consent Order.

3.1.5 Inspections ¹³¹

Ancillary to the collection of contributions is that of inspecting employer's books of Accounts.¹³¹ The National Pensions Scheme Act provides for the appointment of Inspectors who have exclusive and overriding power on a routine or exceptional basis to enter and inspect any books of the employer whether physical or electronic to ascertain an employer's obligations to the Scheme under the Act.¹³² The purpose of appointing inspectors is to verify that the contribution payments tally with the number and wage rates of the persons employed. This provision however seems to be in conflict with NPS the Act¹³³ which also requires employers to submit with the payment all the relevant information pertaining to the identity of his employee.

This conflict was elucidated in the case of *the People v Hill and Delamain*¹³⁴ where the accused were acquitted of the charge of failing to produce documents. The court explained that although evidence adduced clearly showed that the accused did not produce the documents in the given time frame, the accused provided documents much later and because the NAPSA Inspector did not use the legal power provided for under the NPS Act¹³⁵ to make impromptu visits and request for the documents. The court concluded that this did not constitute a breach of failure to provide information as required by the Act.

The cases of *the People v Bridge Cargo*¹³⁶, and *the People v Khuene and Nagel*¹³⁷ were equally withdrawn from prosecution under the provisions of the Criminal Procedure Code¹³⁸ because the accused in both cases had subsequently provided the documents required of them after being served court summons. It was also prudent that the Authority uses alternative ways of ensuring compliance with the demand made on the employers as the legal process was proving to be quite costly and time consuming.

¹³¹ Chapter 256 of the Laws of Zambia, section 7
¹³² Chapter 256 of the Laws of Zambia, Section 7(5)
¹³³ Chapter 256 of the Laws of Zambia, section 15
¹³⁴ Unreported(2012)
¹³⁵ Chapter 256 of the Laws of Zambia, section 7(5)
¹³⁶ Unreported(2012)
¹³⁷ Unreported(2012)
¹³⁸ Chapter 88 of the Laws of Zambia

In light of the outcome from the case indicated above, the law still remains unclear on who exactly should avail documents to NAPSA on demand by the Inspectors. The law does not clearly provide guidance on these aspects and when loosely used, this may be an excuse by some employers not to comply with the provisions of the Act.

3.2 CONCLUSION

At the end of 2005, NAPSA was the largest pension scheme in Zambia with about 355,200 members drawn from about 15,000 registered employers.¹³⁹ It is also noteworthy to mention that the pension scheme in 2007 recorded 45% increase in contributions collected exclusive of penalties and an overall increase in net assets of 20%. The Scheme had a total number of 18,563 registered employers while the total cumulative membership stood at 985,747 and the schemes monthly average collection stood at K35.1 billion.¹⁴⁰

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In his address to parliament, the former Minister of Labour, stated that the level of benefits by NAPSA were significantly higher than what was being paid under ZNPF as the benefits had been indexed to inflation through the National Average Earnings. He further added that NAPSA investments Guidelines had been gazetted to guide the trustees of NAPSA in the manner of investing member funds.¹⁴²

The amount of assessments that employers are required to pay to NAPSA are calculated based on the number of workers and their earnings. In this regard, employers' capacity to pay is

¹³⁹ International Labour Office, Zambia, Social Protection Expenditure and performance Review and Social Budget (Geneva, ILO, 2008), 71

¹⁴⁰ Ministerial Statement by Honorable Austin Liato, Minister of Labour and Social Security (2009) p.3

¹⁴¹ Ministerial Statement by Honorable Austin Liato, Minister of Labour and Social Security (2009) p.3

¹⁴² Gazette Notice Number 457 (September 2001)

dependent on their solvency.¹⁴³ In addition, there is a restriction on assessable earnings and this is limited to K13, 392.90 per month.¹⁴⁴

In addition, legal protection has been given to certain employers such as the Local Authorities against whom no execution of judgment could be effected. This has resulted in loss of revenue due from accumulated assessment debts and future assessments. Furthermore, the exclusion of potential contributions from certain mining entities such as Konkola Copper Mines and Mopani Copper mines still awaits formulation and implementation of the necessary regulations by government and this implementation has been deferred due to challenges of the global economic crisis. As the matter remains unresolved, these potential contributions still remain uncollected from the employees of the two mining companies.

Furthermore, there are no explicit provisions in the NPS Act detailing the structure of NAPSA investments guidelines on each of the categories of investments. Furthermore, investment of the scheme is at the discretion of the Board¹⁴⁵ which has been empowered to invest the money in ways provided under the Act. This however limits the growth of the scheme as the Act places a limitation on how the funds must be invested.

In addition, the introduction of NAPSA did not automatically exempt employers from their obligations under the provisions of the supplementary law to the Minimum Wages and Conditions of Service Act.¹⁴⁶ The Act stipulates that an employee, who has served with the employer for not less than ten years and has attained the age of fifty-five (55), shall be entitled to three months basic pay for each completed year of service.¹⁴⁷ This lack of harmonisation between the two Acts has contributed to non-compliance by most employers to the mandatory scheme as this has proved to be expensive on the part of the employers.

In addition, the labour laws in Zambia in their current form do not accommodate a wide-range of employee categories that exist today and do not offer prudent legal protections to each individual type of employee. The Employment Act¹⁴⁸ for example, does not expressly exclude informal

¹⁴³ Ministerial Statement by honourable Austin Liato,(2009), 3

¹⁴⁴ NAPSA Contribution table (Lusaka,2013)

¹⁴⁵ Public Service Pensions Act, Chapter 260 of the Laws of Zambia, Section 29.

¹⁴⁶ Chapter 276 of the Laws of Zambia

¹⁴⁷ Chapter 276 of the Laws of Zambia, section 8

¹⁴⁸ Chapter 268 of the Laws of Zambia

sector workers. However for an oral contract to be valid under the Employment Act, it has to be reduced into a record of the contract of service stipulating the conditions and terms of service. The Employment Act requires that such a record should be signed by both the employer and the employee.¹⁴⁹

These requirements are not fulfilled in the informal sector making it practically impossible to prove the existence of an employer/employee relationship. The current pension scheme in Zambia is limited to the formal sector and excludes the informal sector which constitutes the majority of Zambia's labour force. Reportedly, 46% of Zambia's population in under the age of 15 years and an estimated 6.2 million persons constitute the labour force in Zambia. Of the 4,131,531 persons reported to be employed, a total of 3,184,271 persons or 88% are in the informal sector employment compared to the 416,324 persons or 12% in the formal sector employment.¹⁵⁰

The other major constraint faced by NAPSA is that it is not free from government interference. Funds thus, have tended to be somewhat politically controlled.¹⁵¹ The NPS Act for example empowers the board to 'invest in such a manner as it thinks fit such of its' funds which does not immediately require for the performance of its functions'¹⁵² The funds available for investing and the effectiveness of investing determines how well these schemes meet the main objective of providing financial protection for their members and eligible survivors.¹⁵³

NAPSA has in the recent past received a lot of criticisms on some of the investments it has made. NAPSA's investment in the \$98 million transaction with the Zambia National Building Society (ZNBS) for example, to refurbish the latter's Society House was considered scandalous and shameful.¹⁵⁴ This was so because NAPSA adopted investments guidelines in 2001 which were meant to insulate the funds of the scheme from risky investments through the application of prudential principles and recognition of the trustees fiduciary responsibilities.¹⁵⁵ However, the guidelines do not deter the Authority from lending other public institutions as long as the

¹⁴⁹ Chapter 286 of the Laws of Zambia, section 24

¹⁵⁰ CSO Labourforce Survey Report (2005) ,44

¹⁵¹ Muna Hantuba, A Case For Privatisation of Social Security Schemes (ISSA, Geneva,2005) , 242

¹⁵² Muna Hantuba, A case for privatization of Social Security in Zambia, 242

¹⁵³ Muna Hantuba, A Case for Privatisation of Social Security in Zambia,242

¹⁵⁴ The Post Online, 20 May (2011)

¹⁵⁵ Government Gazette Notice No. 457, September, 2001

ventures are viable and the institution has the capacity to pay back the loan. Furthermore, NAPSA's decision to also purchase bare land from an individual at an inflated price of \$15 irked both employer and employee members as it was suspected that the government wanted to use members' funds for political purposes or patronage.¹⁵⁶

Furthermore, although the NAPSA Act made it mandatory for newly recruited civil servants to be members of the scheme effective February 2000, new members of the civil service still join PSPF from the Zambian Army, Zambia Air Force, Security wings and the Teaching Service.¹⁵⁷ This therefore defeats the whole purpose of streamlining the operations of the scheme and widening the income collection target for timely payment of pension benefits.

Finally, social security schemes keep funds for and on behalf of citizens who are not necessarily involved in the day-to-day management of the schemes. Consequently, there is great need to set up effective supervisory structures so that the members accrued rights in the schemes are safeguarded and benefits paid as and when they fall due.

CHAPTER FOUR

BENEFITS AND ELIGIBILITY UNDER THE NATIONAL PENSIONS SCHEME ACT

4.0 INTRODUCTION

¹⁵⁶ The Post Newspaper Zambia, Thursday 3rd March (2011)

¹⁵⁷ International Labour Office. Social Protection and Expenditure and performance Review and Social Budget(ILO, Geneva,2008) p.75

Fundamentally, social security is the protection that aims to maintain social normality in the areas of sickness, maternity, invalidity, old age, death, accidents at work and other needy situations.¹⁵⁸ Before the recent transformation into NAPSA, on 1st February, 2000, The Zambia National Provident Fund (ZNPF) was the only uniform social security scheme for private sector and non-pensionable public sector employees. It was the only compulsory savings scheme which provided lumpsum benefits to its members. ZNPF was controlled by a Board appointed by the Minister of Labour and Social Security.

4.1 BENEFITS PAYABLE

The National Pensions Scheme Act pays out four benefits. These are Retirement, Invalidity, Survivors and Funeral grant.¹⁵⁹

4.1.1 RETIREMENT PENSION

A retirement pension is payable to a member who has attained the minimum age of 55¹⁶⁰ or has contributed for a minimum for a minimum of 180 months or an equivalent of fifteen years or has qualified under the reduced criteria between the ages of 39 and 48 years.¹⁶¹ The Act recognises the fact that there are some members who, at the inception of NAPSA had not reached retirement age and therefore must not be disadvantaged in receiving a pension. Members however, who do not meet the minimum criteria to receive a pension are entitled to a lump-sum payment made up of contribution payments plus interest calculated on their indexed contributions.¹⁶² The National Pensions Scheme Act also provides for early retirement when a member attains fifty years of age.¹⁶³

Mwenda in her book, Employment law in Zambia¹⁶⁴ however recognises the fact that besides the payment of a basic pension benefit, an employee can go on early retirement if the conditions of service permits because retirement benefits are payable in accordance with the Conditions of

¹⁵⁸ B. Miswalo, Management of Social Security Systems in Zambia (Copperbelt University, Kitwe 2001), 1

¹⁵⁹ Chapter 256 of the Laws of Zambia, Section 18-34

¹⁶⁰ W.S Mwenda, Employment Law in Zambia, Cases and Materials (University of Zambia, Lusaka 2004)

¹⁶¹ Statutory Instrument No. 71(2000), section 3

¹⁶² Chapter 256 of the Laws of Zambia, Section 21

¹⁶³ Chapter 256 of The Laws of Zambia, Section 22

¹⁶⁴ W.S Mwenda, Employment Law in Zambia, Cases and Materials (University of Zambia, Lusaka, 2004), 77

service. The case of *Samuel Manga, Christopher Mimbulu and Jeremiah Mulambia v Zambia Consolidated Copper Mines Limited*¹⁶⁵ lays down the law on payments of retirement benefits according to applicable conditions of service. The Supreme Court in this case held that employment can be terminated by either redundancy or early retirement and that one is entitled to get the terminal benefits in accordance with the conditions of service obtaining at the time an employee opts to retire.

Furthermore, an employee who has served with an employer for not less than ten years and has attained fifty five years is entitled to three months basic for each year of completed service. Where an employer however has established a pension approved by the Ministry of Labour and Social Security, such benefits are paid in accordance with that Pension Scheme.¹⁶⁶

4.1.2 INVALIDITY PENSION

Invalidity Pension is a pension that is intended to cushion members against the loss of capacity to engage in substantial gainful employment.¹⁶⁷ As invalidity can occur at any point in one's working life, the minimum criteria for one to be eligible for this benefit are therefore lower than the retirement benefit. The invalidity pension is payable to members who should be certified as incapacitated, has reached a pensionable age and have paid at least 60 months contributions.¹⁶⁸

Invalidity pension is therefore granted as a rule not only to individuals who are certainly incurable, but also to those whose sickness has lasted beyond the maximum period for which sickness benefit is payable. The decision relied upon is that of *Saint John City v Saint John Firefighters Association*¹⁶⁹ in which the court held that the grievance claiming that the firefighters had a right to return to active employment or be placed on sick leave under the collective agreement was not correct at law.

¹⁶⁵ Appeal No. 41 of 2001 (Unreported)

¹⁶⁶ Zambia, Social Protection Expenditure and Performance Review and Social Budget (International Labour Office, Geneva, 2008), 87-88

¹⁶⁷ International Labour Office, Introduction to Social Security (International labour Office, Geneva,1976), 120

¹⁶⁸ Chapter 256 of the Laws of Zambia, section 23-27

¹⁶⁹ (2011) NBCA 31

It held that the Pensions Board Act of Canada clearly stated that a member must cease to be an employee due to permanent disability in order to be entitled to receive a pension. Under the City of Saint John Pension Act, 'any member of the city of saint John's pensions plan who had not reached retirement age and ceased to be an employee by reason of having been totally and permanently disabled was entitled to receive an annual disability pension for life'.

In 2007, the Trustees of the plan reviewed the status of the members receiving permanent disability pensions for the first time and determined that certain of the firefighters were no longer totally and permanently disabled. The court therefore had to make a determination as to whether a member under the Saints John's Pensions Act who had not reached retirement age but was disabled, was entitled to receive an annual disability pension for life.

Whilst this decision is based on a unique private statute, it may have wider implications for most employers in Zambia who may provide disability pension under any pension scheme and face claims of a duty to accommodate situations where an employee recovers from a disability and would want to return to work. The conditions however for one to be entitled for disability pension under the NPS Act are clearly spelt out. For one to qualify for such a benefit under the NPS Act, a member should have not reached pensionable age but declared permanently disabled for life to qualify for such a benefit.¹⁷⁰ The NPS does not give options for a member to return to work when he/she recovers from a disability.

4.1.3 SURVIVORS PENSION

The Survivors Pension is aimed primarily at protecting spouses and children of the deceased member in the event of death.¹⁷¹ NAPSA will only pay a survivors pension only to surviving spouses and children, regardless of whether the marriage took place under statute or customary law.¹⁷² Surviving spouses are eligible for a pension until death or until they re-marry if they are caring for one or more children of the deceased. The disadvantage with this provision is that if a

¹⁷⁰ The National Pensions Scheme Benefits and Eligibility Regulations (S.I No. 71 of 2000), section 10(1)

¹⁷¹ Chapter 256 of the Laws of Zambia, Section 29-32

¹⁷² Mukuka and Others, Social Security Systems In Zambia (ISSA, 2002) ,20

surviving spouse is less than 45 years and does not have children of the deceased to care for, he or she will receive a pension for only two years.¹⁷³

In recent years, NAPSA has experienced an increase of claims brought to it for determination and distinctions based on age and marital status. In most instances however, NAPSA has been faced with claims of members whose dates of birth are unclear. The National Pensions Scheme Act however does not provide guidance as to what should be done in such cases. The NPS Act therefore is unclear on these aspects and in most cases contributes to delays in payment of a benefit as NAPSA has to make a determination by looking at various other options to determine eligibility for one to qualify. NAPSA has in some cases engaged the National Registration office to assist them with records of such a member. This process has slowed down processing of such claims because the institution has had to wait in certain cases for long periods before a record is retrieved from National Registration Office.

In most cases however, NAPSA has taken the last month of the year as the qualifying period for eligibility to a pension benefit. This too has disadvantaged a lot of claimants as they have to wait for the year to end before lodging in their claim.

Another problem that NAPSA has encountered is the determination of what a spouse entails. In *Robinson v University of Guelph*¹⁷⁴ however, it was held that any person who married a retired member would be automatically be considered a spouse. The brief facts of the case were that the applicant, Margaret Robinson was the seventy eight year widow of the former plan member, Thomas Carter. Carter was a long time employee of Guelph University until his retirement in 1995. At the time of his retirement however, he was married to Geraldine Carter who predeceased carter in 1996. The court thus held that Robinson did not qualify under such a criteria and was therefore not eligible for survivors benefits under the plan.

¹⁷³ Mukuka and Others, Social Security Systems in Zambia, 21

¹⁷⁴ (2010) ONSC 6150

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¹⁷³ Mukuka and Others, Social Security Systems in Zambia, 21

¹⁷⁴ (2010) ONSC 6150

In *King v King*¹⁷⁵, a retired member, Mr. King sought a declaration that his former spouse Mrs. Raines waived her entitlement to a survivor's pension through a general release in the separation agreement executed following their marriage breakdown which occurred after retirement.

The court held that Mrs. Raines was entitled to the survivor's benefits at the date Mr. King died and because Mr. King died and Mrs. Raines were married on the date of the first instalment of Mr. King's pension, Mrs. Raines was the spouse entitled to a survivor's pension. The court considered whether the general release in a separation agreement was a valid waiver of a survivor's pension by Mrs. Raines. The Court found that Mr. King could not rely on the waiver contained in the separation agreement to deny Mrs. Raines a survivor's benefit.

The eligibility requirements for one to qualify for a survivor's pension under the NPS Act makes reference to a survivor's spouse but does not state clearly who a surviving spouse is. The Act only recognises the fact that a surviving spouse under the age of forty-five year old and at the death of a member and who has care of one or two minor children by the deceased shall qualify for such a benefit.¹⁷⁶

In most cases however, NAPSA has had to rely on affidavits of marriage and has paid more than one spouse of the deceased member to avoid future litigation by anyone who may later claim as a deceased spouse. This poses a challenge as those that do not qualify as spouses to the deceased may falsely obtain this benefit at the detriment of the eligible spouses. In addition, the NPS Act does not clearly indicate whether a deceased spouse who was on separation at the death of the member could still be entitled to a survivor's benefit.

4.1.4 FUNERAL GRANT

This is payment made to any person who has and is liable for the cost of the funeral of the deceased member.¹⁷⁷ The amount of the funeral grant is ten times the amount of the minimum pension in the year of the deceased members death.

¹⁷⁵ (2010) BCSC 346

¹⁷⁶ Chapter 256 of the Laws of Zambia, section 30(a)

¹⁷⁷ National Pensions Scheme(Benefits and Eligibility) Regulation 71 (2000), section 13(1)

4.2 CONCLUSION

All pensions in payment (Retirement, Invalidity, Survivors) are adjusted annually to reflect changes in the National Average Earnings. This adjustment is automatic and does not depend on the feelings of the Board of Trustees. This is a key feature of the Scheme not found in any scheme in Zambia.¹⁷⁸

There are however conceptual problems with regard to payment of benefits under the National Pensions Scheme Act. Notable among these is the fact that the National Pensions Scheme Act is silent on the duration of processing of the claim. The Act only stipulates that 'a person shall have the right to benefits if he makes a claim to the Director-General in the prescribed manner within the prescribed time'¹⁷⁹. This provision is vague because it does not indicate the time frame for payment of benefits. The Act only provides for the time and manner of making benefit claims. This therefore entails that NAPSA will not be penalised for delaying payment of a benefit claim by any eligible and qualifying member entitled to the benefit.

Furthermore the NPS Act provides for the establishment of Medical Boards.¹⁸⁰ It stipulates that the Authority shall appoint Medical Boards or appoint medical officers for the purpose of examining claimants or beneficiaries who have claims to any benefits under the Act and that the Board shall be paid remuneration or allowance by NAPSA.

NAPSA has however been operating without Medical Boards from inception to date but has only been relying on reports from health Institutions across the country. This has slowed the process of benefit payments as officers from the health institutions are subject to manipulation and do not give priority to requests made by NAPSA to make a determination as to whether one is permanently disabled or not. In addition, unemployment levels in Zambia are too high and certifying authorities may be tempted to apply its rules of assessment less strictly.¹⁸¹

In some cases, claimants have been faced with a lot of challenges when making a claim due to the rigidity of the system of benefit processing. Claimants for example, who were not registered as dependents at the time of death of a member would not be recognised under the NPS Act as

¹⁷⁸ Chapter 256 of the Laws of Zambia, Chapter 35

¹⁷⁹ Chapter 256 of the Laws of Zambia, Section 36(1)

¹⁸⁰ Chapter 256 of the Laws of Zambia, Section 26

¹⁸¹ International Labour Office, Introduction to Social Security (La Concorde, Epalinges,1976), 121

eligible beneficiaries. In most cases, this slows down processing of claims as family members have had to provide proof that the claimant is a bonafide dependant of the deceased.

NAPSA has been faced with challenges of non- compliance by employers in remitting contributions to NAPSA which in turn has led to delays and errors in member records resulting in delays in benefit payments and failure by most members to qualify for benefits under the Scheme. It therefore remains to be seen when NAPSA will resolve all weaknesses of the Act that result in the delay of processing and payment of benefits to its eligible members. This could be done through enhancement of key provisions under the NPS Act for payment of benefit claims by amending archaic provisions and making them more clearer to avoid future litigation.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.0 CONCLUDING OBSERVATIONS

One notable feature of a viable pension scheme is to provide benefits to its members when they fall due. We note however in this research that the National Pensions Scheme Authority (NAPSA) has not been able to maintain real value of pensions provided. This is so because there

have been problems of compliance with the law pertaining to pension scheme regulation resulting in undue delays in the payment of benefits to members.

This research recognised that social security is very broad and thus narrows it down to an analysis of the law pertaining to pension benefits with specific reference to relevant provisions of the *National Pensions Scheme Act* as well as the *Pension Scheme Regulation Act* in order to determine whether or not the National Pension Scheme Authority's mandate is in line with the prescribed standards under the Pensions Scheme Regulation Act to provide timely and adequate benefits and affordable retirement that corresponds with contributions paid.

In all these endeavours, the research aimed to fulfil part of Government's mandate as set out in the *Zambian Constitution* of "providing to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable."¹⁸²

The aim of this research was to show a legal perspective of an overview of the National Pensions Scheme Authority (NAPSA) with regard to delays in payments of benefits to members of the Scheme. It was undertaken in view of the fact that retirees are still suffering despite Parliament having enacted the *National Pensions Scheme Act* which established the National Pensions Scheme Authority (NAPSA) in February 2000.

The research noted that social security system development in Zambia has had its own short falls since independence. The Ministry of Labour and Social security is the major stake holder in the development of the government policy on social security. This is appreciated through governments efforts by establishing the social security department within the Ministry in 1992. The office of the Registrar of pensions and insurance also known as the Pensions and Insurance Authority was established in February 1997 after the enactment of the *Pension Scheme Regulation Act* to serve as a supervisory and regulatory institution for the pensions and insurance industries.

Therefore, the Pensions and Insurance Authority's role in the social security sector borders around the aspects of social insurance which deals with measures to protect income earners and

¹⁸² Chapter 1 of the Laws of Zambia, Article 112(f)

their families against a reduction or loss of income as a result of exposure to risks that impair one's capacity to earn the income.

The Board of Trustees under NAPSA have the fiduciary responsibility to ensure that the institution operates and applies best pension fund management practices in the best interest of the scheme beneficiaries in terms of investment. It is also the role of the Board of trustees to institute and enforce the investment guidelines and make sure that the guidelines are followed. It is also their task to hire the best skills for the job and monitor their performance¹⁸³.

Further, by way of practice, NAPSA can be said to be a self-regulating institution. Although trustees are answerable to the Minister who is also answerable to parliament this is only in respect of supervision. Given the fact that it is managing public funds, NAPSA is required to follow the prudential management principles as provided for under the Pensions Scheme Regulations Act which is administered by the Pensions and Insurance Authority (PIA).

Despite establishing NAPSA however, some companies are offering their workers other in-house pension schemes to supplement the basic pensions they will receive from NAPSA due to the many challenges that members face when they attain retirement age. This shows how important it is to have a pension scheme that people will have confidence in, a scheme that will be able to make a retiree be able to sustain oneself after retirement.

5.1 RECOMMENDATIONS

The Zambian Constitution¹⁸⁴ provides for protection of pension benefits to a specified category of employees. This protection however is only restricted to public officers, staff of the National Assembly and members of the Armed Forces. Other than this, the Constitution has no further provisions regarding pensions. This therefore means that the Constitution does not adequately cover the majority of the population who are in the informal sector or in formal employment but not public officers. In addition, this Constitutional provision does not grant judicial relief in the event of non-payment of dues or undue delay in the payment of pension contributions.

¹⁸³ Number 28 of 1996, Section 8(2).

¹⁸⁴ Chapter 1 of the laws of Zambia, Article 124

In light of the above therefore, there is need to seriously review legislation to provide Constitutional protection of social security to all Zambians regardless of where they were employed and to also provide for appropriate legislation which would cover all employees both in the formal and informal sector.

This research has also established that pension schemes do not stipulate clearly and do not specifically state the period within which compensation should be paid to the worker or the dependent and most if not all Social security regulations are silent on what measures a worker and dependant must take against the fund if compensation is not paid on time. Regulations therefore should clearly stipulate and where possible, a time frame in which a benefit is paid.

It is also important to state that social security regulations and policies should be considered within the prevailing social and economic context of the country. In developed countries, most social security regulations and policies are concerned with loss of income while in the Zambian context, social security policies also need to address the prevailing lack of income.¹⁸⁵ There is therefore need for social and economic policies to complement one another.¹⁸⁶ This is so because the aim of social security policies is to reduce and alleviate poverty and inequality. The Constitution of Zambia therefore should recognise and make provisions for this important policy objective and make social security payments a priority. The Constitution should provide for proper safeguards which would protect the rights and interest of members, beneficiaries and the public at large.¹⁸⁷

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¹⁸⁵ Marius Oliver, *Acceptance of Social Security in Africa* (ILO, Geneva, 2005) p.61

¹⁸⁶ Oliver, *Acceptance of Social Security in Africa*, 61

¹⁸⁷ Oliver, *Acceptance of Social Security in Africa*, 61

¹⁸⁸ Oliver, *Acceptance of Social Security in Africa*, 61

¹⁸⁹ Oliver, *Acceptance of Social Security in Africa*, 61

In addition, the Pension Scheme Regulation Act should be amended to fully address the PIA's mandate and authority over all pension schemes including NAPSA and the supporting rules and regulations of all matters pertaining to trusteeship, management and the general administration of pension schemes. It has been noted for example, that rules governing private schemes are the same rules governing public schemes as the operational risks of public schemes are so different to those managed publicly.

It should be noted that considerable challenges face government and social security systems in Zambia with regard to excessive state interventions or interference where the government controls the composition and appointment of governing boards, the management of funds and investments decisions. It can thus be noted that good governance in social security schemes is critical for the viability and sustainability of the schemes.¹⁹⁰ Government in many instances has heavily borrowed from pension schemes leaving them with huge deficits.

5.2 CONCLUSION

The transformation of ZNPF into NAPSA has brought about a better social security scheme. After having evaluated the failures of ZNPF, NAPSA was formed with the knowledge of what type of a social security scheme that workers wanted. It has now enabled a retiree to have a monthly pension on which he can depend on. NAPSA pays a monthly pension to retirees and its lowest paid pension is currently K669.65 which is reviewed every beginning of the year. This pension is paid until the pensioner dies and his or her family ceases to get the pension when the spouse dies and when the pensioner's youngest registered child reaches the age of 25 years.

NAPSA also bears the inflation on the pension and as such this removes the risk of inflation from being passed on to the pensioner. NAPSA, currently, stands on a very good financial base and as such it has had too much interference from the Government. There is too much political intervention and this is mostly done through the Board.

On the other hand, apart from the administration part of NAPSA, pensioners interviewed, who are currently on the monthly payroll, think NAPSA is currently the best pension scheme. Previously retirees complained that they wanted a lump-sum paid to them but after being on the

¹⁹⁰ Oliver, Acceptance of Social Security in Africa ,46

pension pay-roll, most have come back to commend NAPSA for providing periodic pension payments of benefits.

On the whole, it can be said that the transformation of ZNPF into NAPSA was inevitable, to try to restore the corporate image that had been dented. However, implementation of NAPSA programs should be given the seriousness it deserves if the scheme has to win back the public confidence lost as a result of failures by ZNPF to provide an efficient social security system in Zambia. In order for NAPSA to attain its goals therefore, the administration, through legislation should be redesigned to give the organisation unquestionable autonomy. This will enable management efforts to be focused on the objectives of social protection aspects especially with regard to payment of pension benefits. The government should only come in as a regulatory body of the entire social security organisation to monitor and regulate operations so that they conform to the enabling legislation.

Finally, on the question of law, it is imperative to create a unified body of case law so that disputes on a variety of questions and between a variety of pairs of parties arise in the administration of a social security system. It is also argued that there can be no social security unless the claimant or beneficiary can appeal against an administrative decision denying him a benefit as and when it falls due. NAPSA should work towards amending its legislation to include an appeals tribunal which should not only be impartial and well acquainted with the legal and social context in which the dispute arises but should also follow a procedure that is quicker in order to provide practical justice in benefit disputes.

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