Investigating the limits of the Pension Reform Act

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1. Introduction

Recently, the Pension Reform Act[1] (the Act) came into force in Nigeria. The Act established a compulsory contributory pension scheme in Nigeria. The applicability of the Act is however restricted to organisations that employ up to five persons.

Prior to the Act, while there was a broad regulatory framework that established a pension scheme for public sector employees,[2] there was no comprehensive regulatory framework governing either the establishment or the administration of pension schemes in Nigeria. However, there were sector specific attempts to regulate retirement benefit schemes[3] from a tax perspective by the tax authorities[4] and

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1 Act No. 2 of 2004 and published in the Federal Republic of Nigeria Office Gazette No. 60, Vo. 91; Government Notice No. 133 of 2004. The Act came into force on 25 June 2004.

2 This article will however be restricted to private sector related aspects of the Act.

3 These schemes were described as either gratuity, savings, provident or pension schemes.

4 Third Schedule, No. 16 - 19 of the Personal Income Tax Act (PITA) which exempts gratuity from income tax for public officers, employees in the private sector, etc. Also, the Fourth Schedule contains provisions on retirement benefit schemes, including definitions of 'pension fund' and 'provident fund', computation of income to determine contributions to pensions/provident funds, etc. Section 20 (e) of the Companies' Income Tax Act (CITA) provides that any contribution to a pension, provident or

from an investor protection perspective by the Securities and Exchange Commission (SEC)[5]. Expectedly, this created a jurisdictional war between the relevant regulatory authorities. And there were also instances of conflicting, or even contradictory, requirements by these authorities.[6] In addition, all the pension schemes and other retirement benefit schemes that existed in the private sector were either established voluntarily by employers or came into being on the basis of collective agreements between employers and employees' unions. The absence of a regulatory regime that either compelled the establishment of pension and/or other retirement benefit schemes or that adequately regulated the establishment and administration of pension schemes had two fundamental impacts. First, most private sector workers retired

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other retirement benefits or scheme (as approved by the Joint Tax Board) would be treated as deductible expenses wholly, exclusively, necessarily and reasonably incurred in the course of business and thus, would be allowed for, in ascertaining profit to be subject to income tax.

5 Regulations 41(3), 249, 250 – 271 of the Rules & Regulations pursuant to the Investment & Securities Act of 1999 (the Regulations) provides for the authorisation of pension funds by SEC and registration of pension funds managed by a fund manager as third parties .

6 Regulation 265 of the Regulations provides that all applications for authorization of pension funds shall comply with the requirements of the Trustee Investment Act and the rules of the Securities and Exchange Commission. On the other hand, Regulation 261 compels trustees to invest at least 50% of the value of the trust fund in government securities and other capital market instruments. Ikeyi has argued (*Is Nigeria's Trustee Investments Act Restrictive or Facilitative – Business Law Review, December 2003, 293)* that these regulations are contrary to each other. Under the Investment & Securities Act, a trustee cannot validly make investments in government securities. Furthermore, the Investment & Securities Act permits a trustee to invest one third of its funds in securities listed therein. Thus, the trust deed of a pension fund which seeks authorization from the Securities & Exchange Commission would impose these restrictions on the investment powers of the trustee/manager of the pension fund as provided under Regulation 265. This is contrary to Regulation 261. The net effect is that since technically an application for the authorization of a pension fund would have to meet the investment conditions and limitations, the trustees would have no power to invest as required under Regulation 261.

without formal pension or retirement benefits. Second, some of the existing schemes were not properly managed with the effect that they were either un-funded (even in instances where the schemes were required to be funded and not operated as 'pay-as-you-go' schemes) or they were under-funded. This issue of underfunding came up as a live issue in the very few cases where the pension schemes underwent periodic actuarial valuation.[7]

The passage of the Act typifies one major advantage of the law-making process in a democracy over the law-making process that Nigerians were accustomed to under the erstwhile military governments. The preparation of the bill was preceded by the constitution of a committee, whose work culminated in the draft bill that was forwarded to the federal legislature. Notwithstanding that the work of the committee was characterised by a fair degree of public consultation, the draft bill, which was forwarded to the federal legislature generated tremendous controversy[8].

It would however seem that the public hearings organised by the legislature prior to the passage of the bill were not sufficient to resolve all the controversial issues – except it can be said that some of the resolutions canvassed at the public hearings did not find their way into the bill[9]. Thus, even in its current form, and in spite of the efforts

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7 For example, the shortfall in the gratuity and pension schemes of two of the biggest multinational companies in Nigeria has been estimated at N4.72bn: Mobolurin, *'Pension Reform Act 2004: Implications for Unfunded And Under-funded Pension Schemes'*, presented at the KPMG/Capital Alliance Seminar on The Pension Reform Act, 7 October 2004.

8 For instance, 17 private sector unions resolved not to participate in the pension reform as it did not protect their interest (see THISDAY, Vol. 10, No. 3374, of 19 July 2004, page 6.

9 It has also been stated that since the inception of the National Assembly, no law has engaged the time of the National Assembly as much as the Pension Reform Bill (*Keynote Address titled the Background and Process of Enactment of Pension Reform Act delivered by Honourable Abubakar E. Momoh, Acting Chairman of Committee on Labour, House of Representatives at the National Workshop to appraise the Act organized by the Centre for Law & Development Studies from 5 – 6 August 2004.*

made by the legislature to accommodate the various contending interests, the Act remains a controversial piece of legislation.[10]

One of the controversial aspects of the Act is the definition of its reach, especially with regard to existing retirement or terminal benefit schemes. The resolution of this controversy will have two major implications. It would determine the identity of existing schemes to which the transitional provisions of the Act[11] apply. It would also determine whether the provisions of the Act would apply with equal force to all retirement benefit schemes in Nigeria – whether or not they are pension schemes. By logical extension, the discussion would relate to the reach of the power granted to the National Pension Commission (the Commission) established under the Act.[12]

In what follows, it is proposed to review the key provisions of the Act, and, thereafter, discuss the structure and nature of retirement benefit schemes that existed (and still exist) in Nigeria prior to the enactment of the Act. This would include a discussion of the nature of the Nigerian Social Insurance Trust Fund established under the Nigerian Social Insurance Trust Fund Act. We will then examine the reach of the Act to form an opinion on what falls to be regulated under the Act and over which the Commission may exercise jurisdiction. Logically, what does not fall to be regulated under the Act will fall outside of the jurisdiction of the Commission. The last section of the article would be devoted to summarising our arguments.

2. Overview of the Act

The primary focus of the Act is to establish a *contributory pension scheme* for public and private sector employees, which would pay retirement benefits to such employees as determined under the Act (the "Scheme"). The Act aims to apply to all employees in private sector organisations that have a minimum of 5 employees. However, employees who have less than three (3)

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10 Some of these issues include the retirement age, which was canvassed by different interest groups to be 55 or 60 years. It eventually became 50 years. The treatment of public sector funds was very hotly debated, also.

11 S. 39.

12 S. 14.

years before they retire and who are presently in an existing pension scheme are exempt from the Act[13]. Also, exempted are judicial officers appointed to the Supreme Court or the Court of Appeal and other courts under Section 291 of the Constitution of the Federal Republic of Nigeria, Cap 23, Laws of the Federal Republic of Nigeria, 2004.[14]

On the face of it, the objectives behind the establishment of the Scheme are very laudable especially for private sector employees who have hitherto had no voice to advocate for retirement benefits from their employers. The Scheme is to ensure that all individuals save for their upkeep when they become unable to work and to ensure that every employee would receive pension benefits as and when due.

The Act also seeks to establish a uniform set of rules, regulations and standards for the administration and payment of pension benefits in Nigeria. The fact of the matter is that the socio-cultural outlook of Nigeria has changed and the aged population, now more than ever, is now required to fend for themselves. Without an effective retirement benefit scheme, it is difficult to see how a majority of the workforce can meet their needs upon retirement. However, concerns have been raised as to whether the retirement benefits, which would accrue to individual beneficiaries under the Act would be sufficient to meet their basic requirements upon retirement.

The Scheme establishes the concept of a Pension Fund Custodian ("PFC"), who is responsible for handling the pension funds and assets under the management of a Pension Fund Administrator ("PFA"). A company with more than ₦500m pension fund and assets may apply to the Commission for a license to operate as a closed PFA. One of the conditions to be satisfied is that such activity would be the sole object of the company. This in effect means that a company would have to set up a subsidiary to carry out such an object.

Under the Act, every employee is required to establish a Retirement Savings Account (RSA) with a PFA of his choice, into which all

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13 S.8(1).

14 S.8(2).

contributions in his favour would be remitted[15]. An employee is at liberty to transfer his RSA from one PFA to another, at least once a year (presumably, he would have to adduce cogent reasons for more than one transfer in a year) and he can only deal with his RSA through the PFA. It has been posited that the status of the PFA is that of a trustee and that his role is akin to the role of the Unit Trust Manager under the Unit Trust Scheme[16]. It is doubtful whether this proposition is completely correct. In the absence of any provision of the Act constituting the PFA as a trustee, it is difficult to see how such a status with its onerous implications could be established by implication. The law of trusts has clearly established the ways by which a trust may be created[17], and, none of the ways could be said to apply to the circumstance of the PFA under the Act. It is therefore submitted that the status and role of the PFA are akin to that of a portfolio or fund manager. This is more so where ownership of pension funds is not at any time vested in the PFA, which may warrant the introduction of the trust doctrine in order to isolate the incidents of legal ownership from the enjoyment of the benefits arising from the funds and investment thereof.

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15 S.11(1).

16 Submission made by Timi Austin Peters in his presentation on the Act delivered at KPMG/Capital Alliance seminar held on 7 October 2004.

17 A trust of pure personalty is properly constituted by the transfer of the trust property to trustees who are directed to hold it on trust for the persons or purposes intended to benefit; or by the settlor declaring that from that time onwards he holds the property on the specified trusts. A trust for land is created by a 'strict settlement' or by means of a trust for sale. If the former method was employed, the land was vested in the tenant for life, or statutory owner, by a vesting instrument, the trusts being declared by a separate instrument. All powers over the land, such as sale and leasing, were then exercisable by the tenant for life or statutory owner. If a trust for sale was employed, the land was vested in trustees who held it on trust for sale, and the trusts of the net proceeds of sale and of the net rents and profits until sale were again normally declared by a separate instrument. All the powers were then exercisable by the trustees. Money might also be settled upon trust to purchase land to be held upon trusts appropriate to a settlement of realty. In the case of registered land, the relevant vesting deed or assurance would be in the prescribed form of transfer and the transfer would need to have been lodged for registration in order to achieve the vesting of the legal estate in the appropriate person – Books on Screen.

For the private sector, the minimum contribution expected is 7 ½ % of monthly emoluments, by both employee and employer.[18] Monthly emoluments comprise basic salary, housing allowance and transport allowance. However, the Act provides that an employer may *agree or elect* to make good all the contributions provided that such contributions are not less than 15%.[19] Contributions by an employee under the Scheme are expected to form part of the tax deductible expenses in the computation of tax payable by the employee under the Personal Income Tax Act ("PITA").[20]

The wording of the Act with regard to the tax deductibility of contributions made by employers in the computation of employers' tax is ambiguous. One would have felt more comfortable if the Act had clearly provided that contributions by employers shall be tax deductible in the computations of tax payable by employers. It is however arguable that being a statutory deduction and also a payroll cost, contributions by employers under the Act, should without more, be allowable deduction for tax purposes, such contribution being expense incurred wholly, reasonably and necessarily for the purpose of an employer's business. It may however be argued, on the contrary, that in the absence of a repeal of the provisions of the Companies Income Tax Act ("CITA") requiring the approval of the Joint Tax Board ("JTB") as a condition precedent to the tax deductibility of an employer's contribution to a retirement benefit scheme[21], such contributions under the Act would be deductible only with the approval of the JTB unless the Act is amended to clearly entitle employers to such deductions for tax purposes. This argument may however be countered by reference to the mischief, which the provision of the CITA might have been intended to address. Retirement benefit schemes prior to the Act were private arrangements between employers and employees, and, in the absence of intervention by the appropriate tax authority, could be employed as a tax avoidance mechanism. This risk is, however, absent under the Scheme, and so no further regulatory oversight is necessary.

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18 S.9(1)(c)(i) & (ii).

19 S.9(2).

20 S. 20 (g) of PITA.

21 S.20(e) of CITA.

The Act also creates the role of PFCs, which will have custody of contributions made through the PFAs[22]. Deduction of contributions would be done before the payment of salaries to employees and remitted within one (1) week of the date of payment of salaries.[23]

No employee may make any withdrawals from an RSA before he attains 50 years.[24] However, an employee may be able to make withdrawals from his RSA in the exceptional cases where he suffers a lack of physical or mental capability (medically certified), total or permanent disability (of mind or body)[25] or as specified his employment contract.

Upon the attainment of 50 years or retirement (whichever is later), an employee may only utilise the proceeds of his RSA as prescribed under the Act. This may be by way of programmed monthly or quarterly withdrawals calculated on the basis of life expectancy, an annuity for life (with monthly or quarterly payments), or lump sum from the balance of the RSA *provided* that there will be an amount left for an annuity or programmed withdrawals of an amount not less than 50% of his annual remuneration as at the date of retirement[26]. Where an employee retires under the terms of his contract of employment and before he reaches 50years, the Act, Section 4(2) provides that he may be entitled to lump sum payments on the fulfillment of certain conditions namely, he can only withdraw a maximum of 25% of the total funds in his RSA in this manner and secondly, he must have left employment for at least 6 months and thirdly, he does not secure another employment.

As obtained before the promulgation of the Act, retirement benefits are not taxable.

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22 S. 46.

23 S.11(5)(b). Failure by an employer to make such remittance within the 1 week period specified would leave such an employer liable to a penalty (to be contained in the Commission's guidelines but not less than 2% of the total contribution that remain unpaid) and be recoverable as a debt against such an employer. See S. 11(7).

24 S.3(1).

25 S.3(2). However, an employee may re-enter the scheme, if he can obtain an evaluation by a medical board or suitably qualified physician that he is now mentally or physically capable of working – S.3(3).

26 S.4(1)(c).

Pension funds may only be invested as provided under the Act.[27] Also, pension funds and assets may be invested outside the country with the approval of the President. The Act also grants power to the Commission to review the list of permissible investments with a view to imposing additional restrictions where necessary, in order to protect the interest of the beneficiaries of the RSAs.[28]

Part VII of the Act provides substantial transitional provisions for the different sectors who come under the purview of the Act. With regards to the private sector, the Act provides that any pension scheme in the private sector existing before the commencement of the Act may continue to exist provided certain conditions are fulfilled[29]. These include the fact that an employer obtains a license from the Commission to manage its own pension fund, such scheme is fully funded, the pension funds and assets are held by a PFC and segregated from those of the company, each employee has the option of transferring to the Scheme.[30]

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27 S. 73(1) provides that subject to Guidelines issued by the Commission, pension funds and assets shall be invested in (a) bonds, bills and other securities issued or guaranteed by the Federal Government (FG) and the Central Bank of Nigeria (CBN); (b) bonds, debentures, redeemable preference shares and other debt instruments issued by corporate entities and listed on a Stock Exchange registered under the Investment & Securities Act, 1999 (c) ordinary shares of public limited companies listed on a Stock Exchange registered under the Investment & Securities Act, 1999 with good track records having declared and paid dividends in the preceding five years; (d) bank deposits and bank securities; (e) investment certificates of closed-end investment fund or hybrid investment funds listed on a stock exchange recognized by the Commission; (f) units sold by open-end investment funds or specialist open-end investment funds listed on a stock exchange recognized by the Commission; (g) bonds and other debt securities issued by listed companies; (h) real estate investment; and (i) such other instrument as the Commission may, from time to time, prescribe.

28 S.77(1).

29 S.39(1)

30 S.39(1)(a) – (h). Other conditions include the fact that all amounts computed in favour of an employee would be transferred to the RSA maintained in a PFA of his choice, etc.

3. Existing Arrangements

i. Non-statutory arrangements

Before the promulgation of the Act, some employers, especially multinational companies, have felt the need to provide retirement and other terminal benefits to their employees. In most cases, employee benefits under these arrangements depended on their earnings and years of employment. More often than not (especially depending on the bargaining power of the employees on a collective basis), such arrangements were solely at the expense of the employer. Thus, the employer would fund whatever scheme was in existence till it was time to pay out. There were however instances where employees also contributed to the scheme. Another characteristic of such arrangements was that pay-outs were usually in the form of lump sum '*one off*' payment. Thirdly, although most of the arrangements could be deemed to be retirement benefits, some of them accrued, based on the length of time an employee had worked in an organization. Fourthly, such arrangements only benefit the salaried employees. Finally, some of these arrangements, especially the ones that were solely funded by employers, were funded on a 'pay-as-you-go' basis, and this resulted in massive deficits and unfunded or underfunded liabilities.

The more common of such arrangements include the provident fund, the savings scheme, the gratuity scheme, retirement/redundancy scheme, each of which we shall describe shortly.

A provident fund means any fund which is approved by the relevant regulatory authority (in the case of Nigeria, the JTB collected as a permanent fund *bona fide* established solely for the purpose of providing benefits for employees on retirement from employment or solely for the purpose of providing benefits for the dependants or nominees of deceased employees or deceased former employees or solely for a combination of such purposes.[31]

It has been argued that at inception, provident funds, established in Anglophone countries of Africa, were expected to be

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[31] Description adapted from the definition of 'provident fund' under Income Tax Act 58 of 1962, South Africa.

transformed to pension schemes[32]. However, this did not exactly happen and they constitute the commonest form of retirement benefits scheme, at least in the manufacturing and energy sectors in Nigeria.

A gratuity scheme provides for the payment of a lump sum to employees on retirement. The amounts payable differ in range depending on the length of time an employee has spent in the organization and the income earned by the employee in the course of the employment. In most cases, there is a minimum number of years (say 5 years), that an employee must have worked with the organization, before he becomes entitled to gratuity.

From the above descriptions, it becomes obvious that most of these arrangements are typically similar and differ only in terms of what rate of contributions, whether both employer and employee make the contributions, length of stay to qualify to join the scheme, etc.

A Pension Scheme, on the other hand, provides for the regular payment of a fixed amount of money to an employee during retirement by the government, a former employer, or insurance company.[33]

Based on the above, we submit that there is a fundamental difference between pension schemes and other arrangements (provident funds, gratuity schemes, etc), which is that for pension schemes, there is the expectation of graduated payments while with other arrangements, payments are mostly one-off, lump sums.

Even under the Fourth Schedule of the Personal Income Tax Act, 1993, the Pension Fund and Provident funds are defined to mean different things. A ‘pension fund’ means a society, fund, contract or scheme, the assets of which are held under irrevocable trusts and any scheme established by a law in Nigeria or elsewhere, the main objects of which are, in the opinion of the Board, the provisions of non-assignable and non-commutable retirement pensions or annuities for an individual or his dependents after his death, or for any group or class of individuals and their dependants. A ‘provident fund’ is a society, fund or scheme other than a pension scheme.

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32 Paper presented by Giovanna Ferrera, Social Security Consultant on ‘Social Security Reform in Less Developed Countries’ at the IAA International Insurance Seminars on Pensions in June 2001.

33 Encarta Dictionary: English (North America).

ii. Statutory arrangement

Another important scheme is the social security scheme known as the Nigerian Social Insurance Trust Fund ("NSITF" or "the Fund"). It is designed to provide retirement and disability benefits to qualifying employees, including retirement grant, invalidity grant, survivors' grant/benefit, funeral grant, emigration grant, etc. Every employer is statutorily required to register with the Fund.

Both the employer and the employees are required to contribute 6.5% and 3.5% of gross insurable earnings (i.e. basic salary, housing allowance and transport allowance) respectively, subject to a maximum basic salary of N528,000 per annum. Contributions are to be remitted by the employer to the Fund on a monthly basis.

The Act provides that the NSITF shall establish a company to undertake the business of a PFA. Previous contributions made under the NSITF Act, not required for the purpose of administering minimum pension as may be determined by the Commission, will be computed and credited to each individual's RSA. The Act appears to have given the NSITF about 5 years to complete the transfer of funds by providing that any contributor or beneficiary under the NSITF Act can only elect the PFA of his choice after at least five (5) years from the commencement of the Act.

It should be noted that the Act did not repeal the NSITF Act. Thus, it appears that under the new regime, NSITF will continue to provide social security services such as disability benefits, particularly for contributories to date. It is also safe to assume that in the absence of a clear provision in the Act abolishing contributions under the NSITF Act, NSITF may still validly require employers/employees to continue to make contributions as provided under the NSITF Act. It is hoped that this situation would become clearer when the Commission publishes a set of guidelines as provided for in the Act.

4. The reach of the Act

It would seem that the determination of the reach of the Act is most relevant in the application of the Act's transitional provisions. The Act provides that any pension scheme in the private sector existing

before the commencement thereof may continue to exist subject to certain conditions.[34] The conditions are as follows:
i) the pension scheme shall be fully funded[35]
ii) the pension funds and assets shall be fully segregated from the funds and assets of the employer and transferred to a PFC,[36] and
iii) the employer shall undertake to the Commission that the pension fund shall be fully funded at all times, and any shortfall thereof shall be made up within 90 days.[37]

The Act also provides that all investments *in assets*, by pension schemes, which are not permitted under the Act may continue to be maintained subject to any rules that may be made in respect thereof by the Commission.[38]

As we would show later this waiver would seem to apply only to such investments by existing schemes as may be attributed to beneficiaries of existing schemes which have converted to the Scheme. Investments attributable to beneficiaries of existing schemes who have not chosen to come under the Scheme would continue to be maintained without reference to the provisions of Act.

S. 39(1) is however not without confusion. In addition to the conditions listed above, it provides that:

> Every employee in the existing scheme shall be free to exercise the option of coming under the Scheme established under section 1 of this Act and his employer shall compute and credit to his account his contributions and distributable income earned as at the date the employee exercises such an option subject to the regulations to be made by the Commission.[39]

This provision raises two fundamental questions. The first is what happens if an employee does not opt to come "*under the Scheme*

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34 S. 39(1).
35 S. 39(1)(a).
36 S. 39(1)(b)&(c).
37 S. 39(1)(g).
38 S. 39(1)(f).
39 S. 39(d).

established under section 1 of this Act." The second is whether the provision applies to non-contributory and or to non-pension schemes. The answers to these could have far-reaching implications. With regard to the first question, it would seem that a reverse interpretation of the autonomy granted to an employee would mean that *he has a right to elect not to come under the Scheme established by under the Act*. The next question would then be whether the scheme to which the employee has decided to continue to participate in (and which is not established under the Act) would fall to be regulated by the Act. It would be seen from a combined reading of sections 1 and 2 of the Act that the applicability of the Act cannot, on a literal interpretation thereof, be extended beyond the Scheme.[40] Thus if the Act grants the right to an employee to opt out of this scheme, it would seem that the Act intends to exclude such employee and the scheme to which he belongs from its purview. To argue otherwise would lead to some difficult consequences.

For example, if the existing scheme to which an employee belonged, and to which he has opted to continue to belong is regulated by a trust deed with very wide powers of investment granted to the trustees, inconsistent with the provisions of the Act on permissible investments, a difficulty would arise as to whether the provisions of the Act would override the terms of the trust.[41] A similar difficulty

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40 The words of the provisions are clear and unambiguous and a literal interpretation of those words does not give rise to any inconsistency with the rest of the Act, there is no basis for not adopting a literal approach. As was held by the Supreme Court in the case of *Uwazurike v A.G. Federation* (2007) 8 NWLR (Pt. 1035) 1 at pp. 15 -16, paras H – A; (2007) 2 KLR (Pt.230) 1057 – *"Where the language of a statute is plain, clear and unambiguous, the task of interpretation can hardly arise. It is therefore, the duty of the courts in such a situation, to give the words their ordinary, natural and grammatical construction, unless such interpretation would lead to absurdity or some repugnancy or inconsistency with the rest of the legislation."* See also: *Obusez v Obusez* (2007) 10 NWLR (Pt. 1043) 430; (2007) 4 KLR (Pt 235) 1971.

41 It is our view that in such a situation, in the absence of a retroactive provision in the Act overriding existing trusts, such intention may not be implied or read into the Act. The reason is that the terms of trusts, like those of contracts, are binding on the parties thereto. Hence in *Shell v nwaka* (2003) 1 S.C. (Pt. II) 127 at 135, the Supreme Court held *per* Ayoola JSC:

would also arise if the powers of investment granted to the trustees are less generous than the provisions of the Act- in which case the trust would be seen to have adopted a very conservative investment policy. It would also be argued in support of this view that one reason an employee may elect to remain in an existing scheme is the fact that the scheme and its rules appear to him more beneficial and protective than the regime created under the Act[42]. If, in spite of the election to continue with an existing scheme, an employee and his chosen scheme were brought under the Scheme, then the election would have amounted to nothing.

It may however be argued that the election to remain under an existing scheme may relate, not to the scheme rules or structure, but to the proportion of contributions being made by the employer and the employee. It may also be argued that the election could relate to the fundamental nature of the scheme as to whether it is a defined benefit scheme, a non-contributory scheme or a contributory scheme. These arguments may be met as follows: With regard to the proportion of contributions made by the employer and the employee, it would be said that an employee would only 'opt for' an existing scheme if the proportion contributed by the employer is higher than the minimum prescribed under the Act.

In this case, there is really no election to opt out of the Scheme since the Act merely prescribed minimum levels of contribution – employers and employees are allowed to increase these levels. With regard to the second question, our answer would be that section 39 would not be relevant except where the existing scheme is a

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"When parties make a contract they make their own law to which they are subject and which creates the rights and obligation which bind them to which the general law only gives recognition and force. The common law we practice recognizes the freedom of contract." This legal principle is so hallowed that parties are allowed to contract out rights created by statutes for their sole benefits, unless it will be contrary to public policy so to do. Accordingly, it is to be expected that a subsequent legislation meant to take away a right granted prior to its commencement must state so in no uncertain terms.

42 As a matter of fact, the rules of some of the existing schemes are more beneficial to the employee than the provisions of the Act.

contributory pension scheme. The chief reason for this view is that the Act is only intended to regulate contributory pension schemes (which is the type of retirement benefit scheme created under s. 1) so that other types of retirement benefit schemes such as non-contributory or non-pension defined benefit schemes or gratuity schemes or savings schemes do not come under the Act.[43]

It is a trite principle of statutory interpretation that an Act cannot regulate more than has been intended by the legislature and such legislative intention is to be gathered from the plain words of the statute unless the words of the statute are ambiguous[44]. We are unable to see any ambiguity in the wording of ss. 1 and 2 of the Act, which are relevant in this inquiry. The wording of s. 39(1) and 39(1) (d) also supports this view. S. 39(1) clearly refers to a '*pension scheme'*, while a careful reading of s. 39(1)(d) would disclose that it refers to a '*contributory pension scheme'* by requiring that an employer shall compute and credit to an employee's account *'his contributions and distributable income earned'* on the date the election is made. It would also seem that since s. 39(1)(e) is dependent on s. 39(1)(d), no duty would arise under the former section unless the latter section is applicable.

The provision of s. 39(1)(h) is slightly confusing as it seems to lump up the option to maintain an existing contributory pension

43 See Mobolurin, *op. cit.*; See also the advertorial of the Nigerian Employers Consultative Assembly (NECA) to the extent that company's operating provident funds prior to the Act should continue to operate them as they wished because such schemes do not come under the purview of the Act. . We may however not go as far as the NECA to say that all existing provident funds do not come under the purview of the Act for the reason that some of the schemes that were described as provident funds actually operated as contributory pension schemes. To us, the determining factor should be the substance of the nature of the scheme and not its description.

44 In *Ugwu v Araraume* (2007) 11 NWLR (Pt. 1048) 365, at 498 paras C-D, the Supreme Court held thus –*"Where the language of a statute is clear and explicit, the court must give effect to it, for in that case, the words of the statute speak the intention of the legislature. The court must bear in mind that its function is that respect is jus dicere, not jus dare, and the words of a statute must not be overruled by the judge and reform of the law must be left in the hands of the legislature."*(Emphasis supplied)

scheme (which vests in employees) with the right to establish a closed PFA (which is vested in the employer – even though the right cannot in fact be exercised without the concurrence of employees)[45]. The inclusion of paragraph (h) in s. 39(1) and the use of the conjunctive word 'and' at the end of paragraph (g) would seem to suggest that the choice of an employee to elect to remain in an existing scheme would depend on the employer's eligibility to manage a pension fund. It would therefore appear that an existing scheme may not validly continue to exist if the affected employer fails to demonstrate the capacity to manage pension funds, and the right of an employee to elect to stay in such scheme may not arise because, as a threshold issue, the scheme may not validly continue to exist. This would be the effect of a literal interpretation of s. 39(1) and the proviso in paragraph (h) thereof[46]. The employee in such a situation would necessarily opt for the Scheme, and his contributions and distributable income would be computed and paid into an RSA maintained with a PFA of his choice.

It may be possible to find some basis for making the continuation of an existing scheme dependent on the capacity of an employer to manage pension funds in the prevalent practice in Nigeria where pension funds were mixed up with other funds of an employer and managed by the employer[47]. This was also the case in instances where pension schemes were established by way of trusts, and employee representatives were appointed as trustees to the trust with powers of management. While this reasoning may provide some

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45 It is however listed as another proviso to the right of an existing pension scheme to continue as follows: "*the employer demonstrates that it possesses managerial capacity for the management of pension funds and assets for a period not less than 5 years before the commencement of this Act.*"

46 It would read as follows: "*Notwithstanding any other provisions in this Act, any pension scheme in the private sector existing before the commencement of this Act may continue to exist: Provided that - ...the employer demonstrates that it possesses managerial capacity for the management of pension funds and assets for a period not less than 5 years before the commencement of the Act.*"

47 Such employers usually set up a limited liability trust company whose sole business consisted in the management of pension funds of the parent's employees.

justification for the paragraph (h) requirement in the former case, it may not offer a valid basis in the latter case where the managers of the fund are trustees, who in some cases have delegated their powers of management to independent and professional pension fund managers. Our argument may however lose some force in situations where the trust and the trustees are in fact controlled by the employer. It is only in this sense that the focus of the Act on employers (and not trustees of pension funds) who manage existing pension schemes may be justified. Otherwise, it would be argued that the right of an employee to choose to remain in an existing scheme should not be predicated on the demonstrated capability of his employer to manage pension funds. It would therefore be suggested that at the appropriate time, reference to 'employer' in s. 39(1) (h) should read 'managers.' The reality check however would be that no reasonable employee would opt to remain in an existing pension scheme the management of which is doubtful. And where the management of such a pension scheme is effective, but not undertaken by an employer, it remains to be seen how the Commission would exercise its powers under the Act in dealing with the situation.

We have so far discussed the paragraph (h) proviso as though it relates only to the continuation of an existing scheme where the employees – or a substantial proportion thereof - have chosen to make an election to save the scheme, in which case the scheme, though being a contributory pension scheme, does not fall to be regulated by the Act.[48] This view is however challenged by the provision of s. 40 of the Act, which empowers an employer to set up a closed PFA to manage its pension scheme that falls under s. 39.[49] This would be the case where employees have chosen to come under the scheme

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48 The Commission merely satisfies itself at the time of approving the continuation of the scheme that it shall continue to be properly managed – as it had been prior to the Act.

49 S. 40(1) provides that *'Any employer managing its pension fund that fall under section 39 of this Act shall apply to the Commission to be licensed as a closed pension fund administrator to manage such pension fund either directly or through a wholly owned subsidiary of such employer dedicated exclusively for the management of such pension fund, provided that all its pension funds are transferred to a custodian of its choice.'*

established under s. 1 of the Act. And as soon as this election is made, the existing scheme technically comes to an end, and a new scheme, which falls to be regulated by the Act, comes into being.[50] If this is a valid view of the context in which an employer may continue to participate in the management of pension funds, then it would seem that the provision of s. 40 is confusing. This confusion would however cease to exist if one takes reference to s. 39 in s. 40 as a specific reference to s. 39(1)(d) - where an employee or a group of employees have decided to come out of an existing scheme to join the Scheme. S. 40 would therefore be seen as concerned with the management of the Scheme – without any relationship with s. 39(1)(h), which stipulates a condition for the continuation of an existing contributory pension scheme, which would not be regulated by the Act, and in respect of which therefore no PFA (as prescribed by the Act) would be required. S. 39(1)(h) would therefore be seen as not being concerned with the establishment of a closed PFA.

It remains to be added, that in addition to the limitation that s. 39 applies only to contributory pension schemes, the section would only become relevant if the existing pension scheme is fully funded as at the commencement of the Act. Thus any underfunded or unfunded scheme would not come within the transitional provisions of s. 39 notwithstanding whether it is a contributory scheme. Such schemes would be dealt with under the provisions of s. 12(1) (b).[51]

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[50] The wording of s. 40(3), which requires an existing scheme with funds of less than N500m to be turned over to a third party PFA seems anomalous. A scheme would technically remain an existing scheme if it is saved by at least one employee (and in which case it will not come under the Act). However, if a decision is made by at least one employee to come under the Scheme and for which a PFA is required, then a new scheme comes into being, and may not be correctly referred to as an existing scheme. S. 40(3) is also conceptually flawed in its wording in that it is not in the place of an employer to choose to maintain an existing scheme under s. 39. There is however no doubt that an employer may be required to support the decision of an employee to maintain an existing scheme, e.g. by undertaking to the Commission that the pension fund shall be fully funded: s. 39(1)(g).

[51] The employer is required to credit the RSA of each employee with any fund to which the employee is entitled under the scheme, and any insufficiency shall immediately become a debt of the employer to the employee and be

The limit of s. 39(1) (f) also requires definition. This provision saves all investments of pension funds in assets prior to the commencement date of the Act (i.e. 25 June 2004), which are not contained in the list of permissible investments under the Act,[52] subject however to any rules to be made by the Commission. Having already made the point that the application of the Act is limited to contributory pension schemes, it would only be added that investments made for the benefit of existing retirement benefit schemes other than contributory pension schemes, are not caught by this provision.

Thus the relevant question to resolve is whether pension funds, which have accumulated up until the effective day of the Act, but which had not been invested[53] up until that day are caught by this provision. The answer would depend on whether the pension scheme to which the fund relates is saved as an existing scheme under s. 39 or whether such scheme ceases to exist by the reason that all the beneficiaries thereof elect to come under the scheme established under the Act. In the former case, it would seem that any funds, which have accumulated up to the effective date of the Act, but which had not been invested as at that day, may not be affected by the provisions of s. 39(1)(f), since such funds were not accumulated pursuant to the Act and the scheme does not fall to be regulated under the Act. The funds would therefore be invested pursuant to the investment policy of the scheme or the terms of trust in the case of a scheme that is set up by way of a trust. This would also be true of any proportion of the funds, the beneficiaries of which have not opted to come under the scheme established by the Act.

The answer would however be different in the latter case, or with regard to any proportion of the funds the beneficiaries of which

treated with the same priority as salaries owed. The employer shall immediately issue a written acknowledgement of the debt to the employee.

52 S. 73.

53 We recognise that it may be argued that money placed in an interest yielding account may be regarded as 'investment' in the sense that the money is deployed in a manner that it is intended to produce some income. If this broad definition of investment is accepted, then s. 73 would not be relevant since such investment is already consistently with the Act in that bank deposits are listed as permissible investments.

have opted to come under the scheme established by the Act, since upon the election the existing scheme would be deemed to have come to an end and the assets thereof transferred to the Scheme.

Also with regard to the latter case, funds, which have continued to accumulate since the effective date of the Act, but which may not be invested now in the absence of PFAs and PFCs, may not come within this provision since the provision applies to investments already made and not funds accumulated for the purpose of making investments.

At the time of accumulation, these funds may not be technically regarded as investments, until a positive act is taken to place them in an income yielding account or other income-generating instrument. Even if the accumulated funds are taken to be investments (which would be permissible investment under the Act) it may not be justifiable for an employer to change from such permissible investment to a non-permissible investment. Such act would fall outside the scope of s. 39(1)(f), which provides for the maintenance of existing investments, and not for the making of new investments.

Thus, even if it is argued successfully that funds accumulated in deposit accounts constitute investments, s. 39(1) (f) simply requires that such investments should be maintained: the section does not authorise conversion from a permitted investment to a non-permitted investment, or worse still from one non-permitted investment to another. It is unlikely that the powers of the Commission may be invoked to ratify any such investment, if made outside of the list of permissible investments contained in the Act – unless the Commission would treat such accommodation as an exercise of its power under the Act to approve additional instruments for the investment of pension funds. However, whether such approval may be held to have been validly given retrospectively would remain to be seen; and this would be more so in a situation where a loss of investment has occurred.[54]

The boundaries of the Act *vis-à-vis* the NSITF Act also require delimitation. While the provisions of the Act regarding the NSITF would seem to be clear enough, their interpretation appears to be

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54 It is possible that in such a situation an employee who has suffered loss or diminution in the value of assets may be able to maintain an action against his employer or whoever took the decision to make such investment.

clouded by the arguments of the various interests that debated the role of the NSITF under the new dispensation.

The Act provides that the NSITF shall continue to provide social security insurance services other than pension to every contributor thereof[55]. A corollary of this provision is that contributions to the NSITF would continue[56]. While it is true that all pension contributions may only be made as provided under the Act, all other non-pension contributions under the NSITF Act remain valid and cannot be regulated by the Act or by virtue of any power granted thereunder. It is for this reason that the Act did not repeal the NSITF Act: the NSITF Act is only deemed amended to bring it in full compliance with the Act, i.e. in relation to pension matters.

The Act also requires the NSITF to establish a limited liability company to undertake the business of a PFA,[57] and to open a retirement savings RSA for each contributor under the NSITF scheme into which would be paid funds, which were contributed, to the NSITF before the commencement of the Act, excepting the funds that are not required to administer minimum pension.[58] Such funds standing to the credit of contributors to the NSITF as at the date of the commencement of the Act, and in respect of which the NSITF has opened RSAs in favour of the contributors, will remain under the management of the NSITF for a minimum period of 5 years from the commencement of the Act. Thereafter, each contributor may elect a new PFA. However, the Act does not contain a direct prescription that existing contributors to the NSITF should retain the NSITF as their PFA for a minimum period of 5 years for their current contributions, i.e. contributions to be made under the Act. The question then arises as to whether an employee can appoint a different PFA to manage his

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55 S. 71(2).

56 These contributions relate to, viz. i) survivor's benefit ii) death grant iii) invalidity benefit iv) invalidity grant v) such other benefits as may be approved by the board of the Fund, see the NSITF Act. The point has however been canvassed that the rate of contributions should be reduced to reflect the reduction in scope:

57 S. 42(1)

58 The term 'minimum pension' remains to be defined by the Commission.

current contributions during the mandatory 5-year period that the NSITF would manage his accumulated contributions. There are two ways to approach the problem.

One way would be to answer the question in the negative due to an operational problem. The operational problem is that the Act provides for the maintenance of only one RSA by an employee[59]. Thus, once the NSITF has opened the mandatory RSA for an employee at the commencement of the Act for the transfer of his accumulated contributions, such employee may not be able to open another RSA with a different PFA for his current contributions until after the mandatory 5 years that the NSITF would manage his accumulated contributions under the NSITF scheme.

The other way to answer the question would be to argue that the compulsory RSA opened by the NSITF in favour of an employee couldn't operate to take away the right of an employee under the Act to open an RSA *by himself*. This argument would seek to draw a distinction between the RSA, which comes into being automatically by operation of the law (and managed by the NSITF), which should relate to past contributions under the NSITF Act, on the one hand, and the RSA voluntarily opened and maintained by an employee for his current contributions. The way this matter is resolved in the event of litigation would depend on how the courts choose to interprete the operative word in s. 11 of the Act, to wit, '*maintain*'.

If to '*maintain an account*' is interpreted to mean to '*open and operate*' an account, then a right to open a new account may be found to exist because such employee would not have exercised the *right to open an account* as provided under s. 11. However, if the phrase is interpreted to mean *'to open and operate an account* <u>*or*</u> *to operate an account'* (whether or not opened by the individual), then a right to open a new account other than the account opened by the NSITF may not exist. We would also say that contrary to the views expressed in some quarters that this matter should be resolved by the Commission, any resolution offered by the Commission would be effective if it is accepted by the NSITF.

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[59] S. 11.

We may only add that the jurisdiction of the Commission can only be exercised with regard to contributory pension schemes, which are established under the Act. We are unable to find any provision of the Act, which empowers the Commission to exercise jurisdiction over all manners of retirement benefit schemes in Nigeria. The Commission would also not be able to exercise jurisdiction over any existing contributory pension scheme in respect of which any of the beneficiaries has elected to continue in force.

5. Conclusion

As the title of the Act states, the Act was enacted to establish a contributory pension scheme in Nigeria. We have endeavoured to show that the concept of pension is not co-terminus with the concept of retirement or terminal benefit. Pension benefit is but one of the several kinds of retirement benefits from which an employee may benefit upon his retirement or other termination of his employment. By expressly limiting the scope of the Act to pension, without mentioning the other kinds of retirement or terminal benefits, it goes without saying that the Act does not apply to other kinds of benefits. The applicable legal principle is *expression unius est exclusion alterius*. The fact that the NSITF Act, applicable to several kinds of social security benefits - including pensions and other forms of terminal benefits, which existed before the Act, and was in fact considered by the Act, was not repealed by the Act but only modified to take away pension from its ambit, lends credence to the view that it was never intended by the legislature that the Act should regulate other kinds of retirement or terminal benefits outside pensions.

Moreover, even in respect of pension schemes, the Act is further limited in scope to only contributory pension schemes. By implication, non-contributory pension schemes do not fall to be regulated by the provisions of the Act except as shall be pointed out *anon.*

Furthermore, contributory pension schemes that have been in existence prior to the commencement of the Act did not automatically become extinguished by the Act, nor did they automatically become subject to the provisions of the Act. For by the provisions of subsection (1) of section 39 of the Act, employees in such existing schemes have the option of either continuing in their respective schemes or respectively switching over to the Scheme. If any employee should choose to continue with his existing scheme, such scheme would operate in respect of that employee independently of the provisions of the Act.

However, the position is somewhat different with regards to the scope of the jurisdiction of the Commission over pension matters in Nigeria. Section 15 of the Act states that the principal object of the Commission shall be to regulate, supervise and ensure the effective administration of pension matters in Nigeria. In effect, the Commission was established, not only for the purpose of regulating or supervising the Scheme, but also for the purpose of regulating other pension schemes as may be in existence independently of the provisions of the Act. Accordingly, paragraph (a) of section 21 of the Act empowers the Commission to *"formulate, direct and oversee the overall policy on pension matters in Nigeria."*

Nevertheless, notwithstanding the foregoing jurisdiction of the Commission over pension matters in general, we have argued that the regulation of schemes other than the Scheme does not *ipso facto* call for the application of the provisions of the act to them[60] except as expressly provided by the Act[61]. It is our view that the recognition and preservation of the existence of other pension schemes by the Act[62] is sufficient expression of the intention of the legislature that they should, in appropriate cases, be operated side by side with the Scheme. It would therefore seem that, subject to the overall policy on pension matters as may be formulated by the Commission[63] pension schemes other than the Scheme are to be regulated in accordance with the laws respectively establishing them.

Finally, it is important to note that the jurisdiction of the Commission does not extend to the regulation of other forms of retirement benefits outside pensions. It is on this basis that we have

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60 See section D of this Article on *"The reach of the Act."*

61 As for instance, such general policies on pension matters as may be formulated by the Commission pursuant to section 21(a) of the Act.

62 See section 39(1) thereof.

63 Pursuant to section 21(a)

expressed the view that NSITF will continue to provide social security benefits, other than pensions, for contributors thereto irrespective of the provisions of the Act. It is also in this regard that we rather take the view that the Act is still an on-going project, in the sense that several issues likely to be raised by its application are yet to be clarified. One such issue is the relationship between the Commission and the Board (?) of NSITF as regards the provision by NSITF of other forms of benefits. Another issue is the definition of "minimum pension" without which the sum required to be credited into the respective RSAs as may be opened by NSITF for contributors pursuant to subsection (2) of section 42 of the Act.