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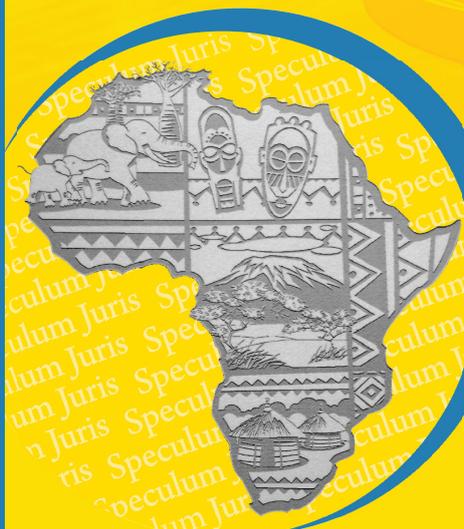
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# The World Health Organisation Life Expectancy Rate as a Determinant of Lump Sum Pension Withdrawal Entitlement in Nigeria: *Giwa v Arm Pension Ltd & Anor* in Perspective

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## Abstract

*In Nigeria, as in other jurisdictions, the law stipulates that the employee and employer contribute and set aside a certain percentage of money regularly paid over to a pension fund manager for the benefit of the employee after retirement. Thus, after retiring, the employee is entitled to access the funds in a calculated manner that will last him/her until death, with an initial lump sum as provided under the Pension Reform Act (PRA) of 2014, under which the percentage lump sum that a retiree can withdraw is not specified. This non-specification of lump sum withdrawal has led to controversy necessitating the court to adopt a sui generis determinant factor. This case note employs the doctrinal method in reviewing the decision of the National Industrial Court of Nigeria (NICN) in *Moroof Abdul Giwa**

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*v ARM Pension Manager Ltd & Anor, where the NICN held that a person who is sixty years old and retires mandatorily, is entitled to a lump sum withdrawal of at least 50 per cent from his Pension Retirement Savings Account (PRSA). The court based its decision on the World Health Organisation (WHO) life expectancy rate for a male. It is argued that this decision gave the law a “human face” as far as Nigeria’s pension administration is concerned and is therefore a welcome development. The impact of this decision on pension administration is highlighted as well as the essence of the pension system. In the event of appeal, it argues that the position taken by the NICN, should be affirmed by the Court of Appeal (CA) to serve as precedent. The authors make vital recommendations for the way forward.*

**Keywords:** Contributory pension scheme; pension manager; Nigeria; employee; retiree

## 1 INTRODUCTION

The NICN is a specialised court which has exclusive jurisdiction over labour- and employment-related matters.<sup>1</sup> Eyongndi, Onu and Ebiye<sup>2</sup> have reaffirmed the fact that the NICN was established in 1976 to adjudicate labour and employment disputes.<sup>3</sup> Despite several setbacks, the NICN, has finally emerged as a Superior Court of Record (SCR).<sup>4</sup> Akeredolu and Eyongndi<sup>5</sup> opined that the most prominent of these setbacks, was its conspicuous omission under both the 1979 and 1999 Constitutions which created the impression of the NICN being considered as an unconstitutional court. Since 2010 when the Constitution of the Federal Republic of Nigeria, 1999 (Third Alteration) Act of 2010 was enacted, the NICN’s constitutional status and stature have improved.<sup>6</sup> Thus, the status and jurisdiction of the NICN under the National Industrial Court Act of 2006, (NICA, 2006) particularly section 7, is limited compared to what is now obtained under section 245C of the CFRN, 1999 (Third Alteration) Act, 2010.<sup>7</sup> Since 2010, the NICN has, by its several pronouncements, delivered what could be considered as novel

1 Section 254C of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act of 2010 and s 7 of the National Industrial Court Act of 2006.

2 Eyongndi, Onu, and Ebiye, “Exclusive Jurisdiction of National Industrial Court of Nigeria on Labour-Related Fundamental Rights Disputes: *Onyiruka v. A.G. Enugu State* in Perspective” 2022 *Cavendish University Law Journal*, 337-354.

3 Akintayo “A Critical Examination of the Jurisdiction of the National Industrial Court” 1997–2000 *University of Ibadan Journal of Private and Business Law* 68–80.

4 Atilola “National Industrial Court of Nigeria and Exclusive Jurisdiction on Labour, Trade Union and Employment Related Matters under the Third Alteration Act: A Review of *NUT, Niger State v. COSST, Niger State*” 2012 *Nigerian Journal of Labour Law and Industrial Relations* 4.

5 Akeredolu and Eyongndi “Jurisdiction of the National Industrial Court under the Nigerian Constitution Third Alteration Act and Selected Statutes: Any Usurpation?” 2019 *The Gravitas Review of Business and Property Law, University of Lagos* 1–16.

6 Atilola, Adetunji, and Dugeri “Powers and Jurisdiction of the National Industrial Court of Nigeria under the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010: A Case for Its Retention” 2012 *Nigerian Journal of Labour Law and Industrial Relations* 33.

7 Eyongndi and Onu “The National Industrial Court Jurisdiction over Tortious Liability under Section 254C (1) (A) of the 1999 Constitution: Sieving Blood from Water” 2019 *Babcock University Socio-Legal Journal* 243–270.

judgments.<sup>8</sup> Some of these judgments evolved owing to purposeful interpretation of extant laws to fill the gaps caused by obsolete and inadequate legislation.<sup>9</sup> The judicial activism of the court is aided by the liberal rules regulating the practice and procedure of the court as contained in its successive Rules and in particular, the 2017 Rules.<sup>10</sup> In order to advance the cause of justice, the court applies both law and equity.<sup>11</sup> In doing this, the NICN is guided by the philosophy of ‘always and speedy’ delivery of substantial justice while avoiding technicalities at all cost.<sup>12</sup> Eyongndi<sup>13</sup> has noted that the NICN as a specialised court has adopted novel and speedy justice delivery procedures such as trial on records and non-adherence to technical rules of evidence (as well as the Evidence Act itself) when justice could be hindered by slavish adherence.

Recently, the NICN in *Moroof Abdul Giwa v ARM Pension Manager Ltd. & Anor*<sup>14</sup> espoused and expanded the frontiers of the law on pension management and retiree withdrawal. The court held that a retiree who is over sixty years, in the absence of express statutory provision on the percentage of lump sum entitlement to be withdrawn, is entitled to at least 50 per cent of his or her pension as opposed to 25 per cent which was offered by the 1<sup>st</sup> defendant. The court came to this conclusion by ingeniously placing reliance on World Health Organisation Life Expectancy Rate (hereinafter simply referred to as WHO LER) for a male Nigerian who is less than sixty years. This decision demonstrates a purposeful interpretation of the law, aimed at meeting needs as opposed to slavish adherence to obsolete and anachronistic legal rules. Pension as a contributory scheme is money saved by a person during his/her active working life which is meant to cater for retirement. Man by nature has needs and several wants. Working is one of the legitimate means of meeting these wants and needs. Thus, work is considered an important aspect of a man’s life and the benefits of working, transcends the worker to his/her dependants.

However, at a particular age, by virtue of diminished strength and physical fitness or even the occurrence of a disabling incident a person who hitherto funds for his/her needs may be rendered incapacitated. At this point, the fellow could fall back on the pension which has accrued while

8 *Mr Ebere Onyekachi Aloysius v Diamond Bank Plc.* [2015] 58 NLLR (Pt 199) 92. In this case, the NICN held that by virtue of Section 254C (1)(f) and (h) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act of 2010, the International Labour Organisation (ILO) Termination of Employment Convention, 1982 (No 158) and Recommendation No. 166., is applicable in Nigeria permitting it to have recourse to International Best Practices and International Labour Standards which requires that, in a master-servant employment relationship, contrary to the common law position that, an employer, can terminate the employment of an employee for any reason (good or bad) or no reason at all, it is no longer fashionable to do so based on international best practices hence, an employer, can only terminate the employment of an employee for a reasonable cause which must be connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking. See also *Afolayan Aderonke v Skye Bank* Unreported Suit No NICN/IB/08/2015, judgment delivered on 17 May 2017; Perchstone & Graeys, “Nigeria: You Can Fire but With Reason” <https://www.mondaq.com/nigeria/employment-litigation-tribunals/727714/you-can-fire-but-with-reason> (accessed 20-11-2023).

9 See the NICN decision in *Ebere Ukoji v Standard Alliance Life Assurance Ltd.* [2014] 47 NLLR (Pt 154) 531; *Patrick Modilim v United Bank of Africa Plc.* Suit No. NICN/LA/353/2012 Judgment delivered on 19 June 2014 where the court originated the concept of forced discharged/resignation and applied same to hold the employer responsible for the resignation of the employee thereby entitling them to damages which ordinarily, has neither statutory equivalent nor support.

10 National Industrial Court Rules of 2017.

11 Section 13 National Industrial Court Act of 2006.

12 *Atilola Recent Developments in Nigerian Labour and Employment Law* (2017) 70–81.

13 See for instance Order 25 of the National Industrial Court Rules 2017 which deals with cases to be placed on fast track procedure, Order 42 that deals and encourages amicable settlement, Order 38 Rule 33 that deals with trial on record. See also Eyongndi “Attainment of Speedy Justice Delivery through the National Industrial Court Trial on Records Procedure: Prospects and Challenges” 2020 *Nigerian Bar Association Section on Legal Practice Law Journal* 163–176; Eyongndi “Attainment of Speedy Justice Delivery through the National Industrial Court Trial on Records Procedure: Prospects and Challenges” 163–176.

14 *Moroof Abdul Giwa v ARM Pension Manager Ltd & Anor* Suit No NICN/ABJ/218/2018 Judgment delivered on 18 May 2020.

working. According to Akintayo<sup>15</sup> the underlying philosophy justifying pension scheme is to make available financial provision for the period when a person by virtue of age or any other incapacitating factor is unable to make ends meet. While pension administration in Nigeria is faced by various challenges and exposes contributors to avoidable hardship particularly at the point of making claims for payment which has instilled pension participation apathy in many; it is safe to argue that the decision of the court is capable of reawakening interest in the scheme couple with the mandatory provision of contributory pension for all employees under the PRA.<sup>16</sup>

This note reviews this decision by examining and highlighting its impact on pension administration in Nigeria as well as its socio-economic effects. It further examines the effectiveness and efficiency of the pension administration's legal regime. It raises the question whether the entitlement of a pensioner who is within or above the WHO LER for Nigerians to at least a 50 per cent lump sum withdrawal will induce participation in a contribution pension scheme. This note discusses these issues. By structure, the note is divided into four parts. Part one contains the introduction. Part two of this note focuses on the legal and institutional frameworks on pension administration. Part three is a critical interrogation of the NICN decision in *Moroof Abdul Giwa v ARM Pension Manager Ltd. & Anor*<sup>17</sup> focusing on the impact of the decision on pension administration and participation. Part four, contains the conclusion and recommendations.

## 2 EXAMINING THE PENSION ADMINISTRATION LEGAL REGIMES AND POLICY IN NIGERIA

Before further adumbration, we consider it necessary to examine the meaning of the word "pension". Animashaun<sup>18</sup> posits that pension is defined variously by different authorities. For him, pension is an amount of money paid regularly by a government or company to an individual (an employee) who is considered too old or too sick to work. According to Longman Dictionary of English,<sup>19</sup> a pension consists of a payment made periodically to a person upon retirement from service.<sup>20</sup> Oji and Amucheazi<sup>21</sup> posit that pension is the payment that is deferred until an officer has retired from active service. A pension scheme serves to provide an employee who has worked and retired or stopped working due to an incapacitating event with a secured income for life. The everyday use of the term is to describe the regular payment a person receives upon retirement.<sup>22</sup> This payment has traditionally been made in the form of a guaranteed annuity. . In terms of section 24 of the Pension Act,<sup>23</sup> retirement means cessation of service after serving for a period of not less than fifteen years.<sup>24</sup> Payment of pension commences upon termination of employment, i.e. retirement.<sup>25</sup>

Historically, the National Provident Fund (NPF), established in 1961, was the first formal pension scheme in Nigeria for non-pensionable private sector employees, although it was made compulsory for both private and public employees.<sup>26</sup> The scheme provided only for a once-off

15 Akintayo "Pension Rights of Political Office Holders in Nigeria" 2004 *University of Ibadan Journal of Private and Business Law* 103–127.

16 Pension Reform Act of 2014.

17 Suit No. NICN/ABJ/218/2018 Judgment delivered on 18 May 2020.

18 Animashaun "Pension Reform Act of 2004" in Atilola *Annotated Nigerian Labour Legislation* (2008) 208.

19 Curzon and Richards *The Longman Dictionary of English* (7 ed 2007) 434.

20 *Preston v Wolverhampton Healthcare* (1998) 1 WLR 280.

21 Oji and Amucheazi *Employment and Labour Law in Nigeria* (2015) 408.

22 Animashaun 208.

23 Pension Act Cap 346 LFN 1990.

24 *Aturu Nigerian Labour Law: Principles Cases, Commentaries and Materials* (2005) 212.

25 Oji and Amucheazi 410.

26 Chianu *Employment Law* (2006) 221.

lump sum package and was mainly a savings scheme.<sup>27</sup> By 1974 certain amendments were made and the private sector was retained in the NPF while the public sector was disintegrated. Before 1974, in Nigeria, pension and gratuity privileges were not considered as labour rights.<sup>28</sup> Under the 1979 Pension Act gratuity and pension rights were salary-related and solely financed by the government without any contributions by employees. By 1999 a further amendment was made culminating in the establishment of the Nigerian Social Insurance Trust Fund (NSITF) which was converted from a provident fund to a limited social insurance trust fund by virtue of Decree No 73 of 1993.<sup>29</sup>

The legal framework on pension management is set out in the PRA of 2014. This Act repealed the PRA of 2004. The objective of the Act (i.e. PRA, 2014) was to establish a uniform set of rules, regulations and standards for the administration and payments of retirement benefits of public servants of the federal capital territory and that of the state, local government and private employees which were not covered by the 2004 Act. It also provides for the smooth operation of the contributory pension scheme (CPS) established under the Act, and, like its predecessor ensures that all public or private sector employees, receive their retirement benefits as and when due; and ensure that workers can sustain their livelihoods upon retirement.<sup>30</sup>

The Act provides that the CPS covers all forms of employment in both public and private sector employees,<sup>31</sup> while under the 2004 Act, the CPS stipulated that private employers should have no fewer than five employees.<sup>32</sup> This seems to have been amended in the 2014 Act. However, the scheme's application is not sacrosanct, untrammelled or absolute as it applies subject to the exemptions made under section 5 thereof. Thus, every employee has a duty to maintain RSA in his/her name with a PFA of his/her choice as was held in *Mr Omale Audu Musa v G4S Nig. Ltd. & Anor*.<sup>33</sup> The persons excluded from the CPS include members of the armed forces and the intelligence and secret service of the federation.

Under the CPS, the employer is obligated to contribute at least ten per cent while the employee contributes eight per cent, totalling a minimum sum of eighteen per cent.<sup>34</sup> By mutual agreement the parties may, periodically, increase the minimum contribution and notify the commission of the upward revision for record purposes. Based on the provision of section 11 of the PRA of 2014, the Act aims to have the deductions made from the employee's remuneration and the contribution of the employer remitted to the employee's pension fund administrator as was held by the NICN in *Uwadia & Anor v Zen Engineering Nigeria Ltd*.<sup>35</sup> Employees who are under the CPS, in addition to the total contributions being made by them and the employer, may make voluntary contributions to their RSA.<sup>36</sup> Notwithstanding the arrangement above, an employer can elect, upon retirement, to pay additional benefits to an employee or bear the full responsibility for the scheme. Under such arrangement, the total contribution of the employer,

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27 Abdulazeez "Pension Scheme in Nigeria: History, Problems and Prospects" 2015 *Arabian Journal of Business and Management Review* 1–6.

28 Aborisade "Reflections on the Pension Reform Act (2004)" 2007 *Nigerian Journal of Labour and Industrial Relations* 7.

29 Odia and Okoye "Pension Reforms in Nigeria- A Comparison between the Old and New Scheme" 2012 *Afro Asian Journal of Social Science* 34.

30 Section 1 PRA of 2014.

31 *Ibid* s 3.

32 *Ibid* s 1(2) PRA of 2004.

33 [2014] 49 NLLR (Pt 163) 546 592, Paras G–H.

34 Section 4 PRA of 2014.

35 [2015] 56 NLLR (Pt 192) 380 at P. 406, paras B-E.

36 *Ibid* subsecs 2 and 3.

shall not be less than twenty percent of the monthly emolument of the concerned employee.<sup>37</sup> In addition to the employer's contribution to CPS, every employer, is duty-bound to maintain a Group Life Insurance Policy in favour of each employee for a minimum of three times the annual total emolument of the employee and the premium shall be paid not later than the date of the commencement of the cover.<sup>38</sup> Failure to make the payment as and when due, the employer shall arrange to effect the payment of claims arising from the death of any staff in its employ during such period. Apart from the provision of CPS made under the PRA of 2004, an employer is not forbidden by the Act from making provisions for additional benefits to employees, in addition to complying with the Act as was held in *Durugbor v Zenith Bank Plc.*<sup>39</sup>

It is apposite to note that notwithstanding the provisions of any other law, contributions to the CPS under the Act shall form part of the tax deductible expenses in the calculation of tax payable by an employer or employee under the relevant tax statute.<sup>40</sup> Interests, dividends, profits investment and other income accruable to pension funds and assets are not subject to tax like any amount payable as retirement funds.<sup>41</sup> However, any income earned as part of a voluntary contribution, pursuant to the relevant section of the Act, shall be subject to taxation at the point of withdrawal where same is made before the end of five years from the date of the voluntary contribution.<sup>42</sup> This is aimed at encouraging a culture of saving, as a five-year or longer term of voluntary contribution savings is not taxable. Every employee under the CPS shall maintain an RSA with any pension fund administrator (PFA) of his/her choice, inform the employer of the PFA and give details of the RSA for onward contribution and remittance by the employer.<sup>43</sup> Once this is done, the employer has a duty to make necessary regular deductions from the emolument of the concerned employee and not less than 7 (seven) days from the date the employee's salary is paid, add its percentage to it and remit to the Pension Fund Custodian (PFC) specified by the PFA of the employee.<sup>44</sup> By the combined effect of sections 7 and 11(5) and (7) of the PRA, of 2014, the employer can be compelled to make the deduction and remit same to the employee's PFA and where there is a deduction but failure of remittance, the commission can impose a fine of 2 per cent of the total contribution to be paid by the employer. This was the decision of the NICN in *Mrs. Ushakang Jerome A. v Leaders and Company Ltd.*<sup>45</sup>

Once the PFC receives the contribution from the employer, it shall bring it to the attention of the PFA who shall forthwith credit the RSA of the employee.<sup>46</sup> Failure to do so, a penalty will be imposed by the commission, as was held in *Mr Omale Audu Musa v G4S Nig. Ltd & Anor.*<sup>47</sup>

Despite this clear provisions, it is not uncommon for some employers despite being notified of the opening of a RSA by the employee and having the necessary details for onward deductions and remittances, to fail to remit to the PFC even after deductions from the employee's monthly emolument. This provision of the Act is susceptible to abuse and tacitly encourages non-remittance by employers after deduction from source. This is so because the punishment for failure to make remittance after deduction is not punitive enough to compel compliance.

37 Section (4) (a) and (b) PRA of 2014.

38 *Ibid* subsec 5.

39 [2014] 40 NLLR (Pt 122) 216 at 287 paras C–F.

40 *Ibid* s 10 (1).

41 *Ibid* s 10 (2) and (3).

42 *Ibid* subsec 4.

43 *Ibid* ss 11 (1) and (2).

44 *Ibid* subsecs (3) (a) and (b).

45 [2014] 49 NLLR (Pt.161)233 at Pp. 253–254, Paras. B-A, G-C.

46 *Fadaka v Air Nigeria Development Ltd.* [2014] 51 NLLR (Pt. 171) 510 at 532, Paras. B-G, P. 533 paras. A-C.

47 *Mr. Omale Audu Musa v G4S Nig. Ltd. & Anor.* [2014] 49 NLLR (Pt. 163) 546 at 593 paras C-F 593–594 paras F-A.

The punishment consists of a payment of not less than two percent of the total contribution that remained unpaid, in addition to making the remittance already due. In fact, if an employer who has a large number of employees of up to a thousand or more and invests the sum in an interest yielding account for some months, the interest generated will be sufficient to pay the two percent penalty fee while retaining a large profit. Thus, it is financially beneficial for the employer to delay remittance and save the money and generate revenue than making the remittance timeously as expected. However, such an action breeds corruption which necessitates a need to review the penalty for failure to remit pension within the stipulated time to deter future dereliction.<sup>48</sup> Penalty within the threshold of 12 per cent to 15 per cent as opposed to a negligible 2 per cent will serve as a deterrent.

Should an employee who has been employed for longer than six months fail or neglect to open an RSA with a PFA of his or her choice for the purpose of CPS arrangement, the employer has a duty and the power to open a nominal retirement savings account on behalf of the employee with a PFA for the remittance of his pension. Failure to do so, would expose the defaulting employer to a penalty stipulated by the commission from time to time.<sup>49</sup> The employee can only deal with his/her PFC through the PFA. Subject to guidelines issued by the commission, a holder of an RSA may not transfer his RSA from one PFA to another more frequently than once a year.<sup>50</sup> Where an employee transfers his service from one employer to another, the same RSA would continue to be valid, or transferred by the employee subject to the restrictions on transfer of RSA to PFA.<sup>51</sup>

Before attaining the age of 50 an employee is not permitted to carry-out withdrawals from his/her RSA.<sup>52</sup> However, an employee who retires or is disengaged or disengages from employment, on the advice of a competent physician or a properly constituted medical board certifying that the employee is no longer mentally or physically fit to discharge the duties of his employment due to total or permanent disability, either of the mind or body; shall be eligible to make withdrawals in accordance with the provisions of the Act. The same is applicable to an employee who is disengaged or who disengages before attaining fifty years in accordance with the terms and conditions of employment.<sup>53</sup> An employee who is disengaged or disengages before the age of 50 and is unable to secure employment within four months post-disengagement may make withdrawals not exceeding twenty five percent of the money in the RSA, with the approval of the Commission.<sup>54</sup> It is apposite to note that an employer in the private sector, pursuant to section 1(2) of the PRA of 2014, who has more than five employees on its staff list is required to establish a CPS for the employees as was held in the case of *National Pension Commission v. Zenon Laboratory and Chemical Industries Ltd. & Ors.*<sup>55</sup>

The National Pension Commission (hereinafter simply referred to as NPC or the Commission), is charged with the responsibility of administering the PRA of 2014.<sup>56</sup> The Commission is a legal person with perpetual succession, having a common seal and can sue and be sued in its corporate name.<sup>57</sup> The principal object is to administer the provisions of the PRA, of 2014.<sup>58</sup> It

48 Aborisade 18.

49 Section 11 (5) and (6) PRA of 2014.

50 *Ibid* s 13.

51 *Ibid* s 14.

52 *Ibid* s 16(1).

53 *Ibid* subsec (2).

54 *Ibid* subsec16 (4)

55 [2014] 42 NLLR (Pt. 132) 559 at 579, Paras. B-F.

56 *Ibid* s 17 (1).

57 Section 17 PRA of 2014.

58 *Ibid* s 18.

coordinates and enforces all other laws on pension and retirement benefits as well as ensuring the effective administration of pension matters and retirement benefits. The Head Office of the Commission is situated in the capital, Abuja and it reports directly to the President. It has the power to create offices and branches in any part of<sup>59</sup> the country as may be approved by the board, which is responsible for its day to day activities.<sup>60</sup> The board shall consist of: a part-time chairman who shall be a fit and proper person with cognate knowledge of pension matters; a director-general; four full time commissioners; a representative of the Head-of-Service of the Federation; Federal Ministry of Finance, Nigeria Labour Congress, Trade Union Congress, Nigeria Union of Pensioners, Nigeria Employees Consultative Association, Central Bank of Nigeria, Security and Exchange Commission, Nigeria Stock Exchange; and the National Insurance Commission.<sup>61</sup> The chairman, director-general and the Commissioner shall be appointed by the President subject to confirmation by the senate and the appointment shall reflect an equitable geopolitical spread.<sup>62</sup> The functions of the Commission includes the issuing of guidelines and regulation for the investment and administration of pension funds; sensitisation of the populace on pension and related matters; and the promotion of capability, improvement and institutional strengthening of PFAs and PFCs.<sup>63</sup>

The commission has the power to: articulate and supervise the inclusive policy on pension and allied matters; decide the terms and conditions of service of the Commission's staff; investigate a PFA, PFC or other party involved in the management of pension funds; and discipline any employers or PFAs or PFCs involved in any form of malpractice. It also has the power to demand information from any stakeholder in the industry pertaining to a retirement benefit, and charge and collect fees and allied charges as may be necessary for the provision of services.<sup>64</sup> The board has the functions and power to formulate policies and guidelines for the functioning of the Commission, supervise and see to the implementation of its policies, fix remuneration, allowances and benefits of the employees of the Commission; and carry out such other functions as are essential or beneficial to realising the aims and objectives of the Commission.<sup>65</sup> Also, the Commission has the power to maintain a fund for its activities.<sup>66</sup>

Before the 2004 and 2014 PRA, an employee who was dismissed from employment stands the risk of losing every benefit and entitlement including pension and gratuity, as dismissal carries infamy and extinguishes the rights and benefits of the employee.<sup>67</sup> However, under the CPS, the dismissal of an employee does not extinguish his/her right to pension as same is insulated from such. Aside from this, the money in an RSA is considered as non-taxable income. The PRA of 2014, securely guarantees and protects the pension entitlement of an employee. Under the current regime, business owners and employees working in micro, small and medium enterprises (MSMEs) are integrated in a pension arrangement. The Micro Pension Scheme of 2019 was commenced to aid Nigerian businesspersons and MSE workers with a staff strength not exceeding three employees to save towards retirement. The micro pension contributors can make daily, weekly or monthly payment into their pension accounts as they deem fit. A 40 per cent withdrawal is available while the outstanding 60 per cent can be accessed upon retirement,

59 See Pension and Gratuity Administration in Nigeria <https://www.modishproject.com/pension-and-gratuity-administration-in-nigeria/> (accessed 29-10-2020).

60 Section 17(4) and (5) of the PRA of 2014.

61 *Ibid* s 19(2).

62 *Ibid* subsecs (3) and (4).

63 *Ibid* s 23.

64 *Ibid* s 24.

65 Section 25(1) PRA of 2014.

66 *Ibid* s 32.

67 *JA Irem v Obubra District Council* (1960) 5 FSC 24.

plus the accumulated investment income.<sup>68</sup> Any person who contravenes any provision of the PRA of 2004, where there is no penalty expressly stipulated, shall be found liable to punishment, pursuant to section 85 and 90.<sup>69</sup>

### 3 *GIWA V ARM PENSION MANAGER LTD & ANOR EXAMINED*

At this point, the reader might well question the value of examining this decision, because of the fact that it is the decision of a trial court. However, it is worthy of critique for at least two reasons. One, the fact that it is a trial court decision (i.e. the NICN) does not make it less important because the NICN is a superior court of record (SCR), it is also a specialised court with exclusive original civil jurisdiction over labour and employment matters. Thus, the court is expected to act as a benchmark for espousing and developing Nigeria's employment and labour jurisprudence. Hence, critiquing its adjudicatory activities is important for understanding the development of the law in this area. More so, apart from having exclusive original civil jurisdiction over labour and employment disputes, the NICN also has and exercises appellate jurisdiction from statutory and administrative industrial tribunals such as the Industrial Arbitration Tribunal as alluded to be Eyongndi.<sup>70</sup> Critiquing its decision is important when it is recognised that its decisions, particularly when the one under review deals with a novel and complex aspect of the law which has a broad-spectrum application. Also, civil appeals from the NICN terminate at the Court of Appeal (CA), unlike appeals from other courts that could end at the Supreme Court. Thus, aside the NICN itself, the other court which would make a pronouncement on matters contested at the NICN, is the CA and before such decisions are given finality, interrogating them becomes necessary to permit the court recognise public perception and areas for possible improvement.

The brief facts of this case are that the claimant retired from public service on 24 December 2017. While in service he participated in the contributory pension scheme with the first defendant. At the date of retirement, he had saved the sum of Naira 21 196 906, 90 only. He registered the fact of his retirement with the second defendant and wrote the first defendant on 10 January 2019 to make a lump sum withdrawal in accordance with the provisions of the PRA of 2014. The first defendant offered to pay him 25 per cent as a withdrawal benefit of the lump sum. Through his solicitors, he rejected the first defendant's offer and made representation for an upward review on 15 January 2019, requesting the sum of Naira 10 589 453, 45 being 50 per cent of the saved sum. The first defendant pursuant to the claimant's solicitor's letter, asked the claimant to represent his documents for review which he did on 31 May 2019, however, the first defendant insisted on paying the already rejected 25 per cent.

As a result of this, the claimant instituted an action against the defendants seeking various reliefs, including but not limited to that the calculation of the claimant's lump sum/benefits by the first defendant on the basis of 2 per cent of the claimant's total retirement savings was carried out in bad faith and this defective and unlawful. He also sought a court order directing the defendants to pay him the sum of Naira 15 897 680 175, representing 75 per cent of the claimant's total retirement savings account (RSA) domiciled with the first defendant.

The first defendant responded that its actions were in compliance with the provisions of the PRA of 2014 that the claimant was yet to complete the documentation process required for approval of payment, the claimant's statement of fact before the court disclosed no reasonable cause of action and that he lacked the *locus standi* to institute the action. Thus, the claimant was not

68 Takor "Understanding the Contributory Pension Scheme in Nigeria" <https://penop.com.ng/contributory-pension-scheme-and-nigerias-economic-development/> (accessed 29-10-2020).

69 *National Pension Commission v. Zenon Laboratory and Chemical Industries Ltd. & Ors.* [2014] 42 NLLR (Pt. 132) 559 at 584–585 paras D-D, D-G.

70 Eyongndi, "Towards Repositioning the Industrial Arbitration Panel (IAP) for the Effective Settlement of Trade Disputes in Nigeria" 2019 *University of Ibadan Law Journal* 114–129.

entitled to any claim, and the case should be dismissed. The second defendant averred that as the regulator of the Contributory Pension Scheme under the PRA of 2014 had the power and duty to make uniform regulations and guidelines for the administration and payment of retirement benefits to all persons to whom the scheme applies including the claimant. It contended that every retiree who took part in a contributory pension scheme was entitled to withdraw a lump sum upon retirement, provided that after such withdrawal, the amount left shall be sufficient to provide withdrawals or an annuity for life, in accordance with guidelines issued from time-to-time. It averred that it did not refuse to approve the calculation of the retirement benefit of the claimant but rather the claimant's failure to submit the necessary documents as well as its refusal to accept the calculation, based on the guidelines it had issued. It further contended that the present case was an abuse of court procedure as the claimant had filed two similar suits against similar parties with similar claims.

During the trial, consequent upon Order 38 Rule 33 of the NICN (Civil Procedure) Rules of 2017, the parties sought and obtained a court order to have the matter determined on record by dispensing with the hassles of oral litigation characterised by examination-in-chief, cross examination and re-examination where necessary. The parties filed and exchanged final written addresses and reply thereof.

### 3 1 Parties' Arguments

In his final written address, the claimant contended that the calculation of his lump sum entitlement from his RSA by the first defendant on the scale of 25 per cent was inequitable, unfair and offends the principle of justice and good conscience, because, having retired at the age of 60, he was entitled to a lump sum payment in accordance with the provision of section 7(1) (a) of the PRA of 2014. He submitted that there was nothing to indicate that section 7(1) (a) of the PRA, 2014 intends to place a limit of 25 per cent on the lump sum amount that he was entitled to withdraw from his RSA, domiciled with the first defendant, in view of the fact that he retired mandatorily. He further argued that the Regulation for the Administration of Retirement and Terminal Benefits and the Guiding Computation Template (ARTBGCT) allegedly used by the first defendant in calculating his lump sum withdrawal issued by the second defendant, were both subordinate to the provisions of the PRA of 2014 and cannot be used to prejudice him as was held in *Mobil Producing Nigeria Unlimited v Okon Johnson & 17 Ors.*<sup>71</sup> Thus, the action of the first defendant using these subsidiary legislation to his prejudice were *ultra vires* and therefore, null and void without any legal effect.

The first defendant, in its final written address argued that by virtue of section 18(c) of the PRA of 2014, the second defendant as regulator issued the ARTBGCT which it is duty-bound to follow diligently. The first appellant therefore contended that the computation template issued by the second defendant only guarantees the claimant a maximum lump-sum withdrawal of 25 per cent, which is contingent on several variables. These variables include the amount reflected in the account as remitted by the employer; investment returns in the RSA; final salary based on the current payslip submitted by the RSA holder; and the RSA holder age at the time of retirement. It contends that countenancing the argument of the claimant would amount to interference with the clear and unambiguous provisions of the PRA of 2014, a situation that must be avoided. The first defendant further contended that it is not within the power of the claimant to determine the percentage of lump sum withdrawal he is entitled to. This is the duty of the first defendant, based on the guidelines issued by the second defendant.

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71 Suit No SC33/2010.

### 3 2 Resolution of Issues by the Court

The court considered the issues put before it by the parties and arrived at a single matter, namely the issue of whether or not the claimant was entitled to a lump sum of his accrued pension at the time he retired at age 60, and whether or not the defendant could prevent him from accessing same. The first defendant's objection to the claimant's *locus standi* to institute the suit and as well as the objection that the claimant's suit as constituted did not disclose a reasonable cause of action was dismissed. The court held that the claimant in his statement of fact before the court, particularly paragraphs 8, 11, 13, 14, 16, 18, 22 and 25, had disclosed a reasonable cause of action which was that he was entitled to withdraw either 75 or 50 per cent of the lump sum from his RSA upon retirement, which the defendant refused. The court relied on section 173(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 which entitles a person who has worked and retired from the public service to a pension which shall not be withheld or altered to his disadvantage. Moreso, the NICN, has the *requisite vires* to be seised of the dispute by virtue of section 254C(1)(k) of the CFRN, 1999 (Third Alteration) Act of 2010 which gives it exclusive original civil jurisdiction over every dispute pertaining to or connected with payment or non-payment of salary, gratuity, pension, allowances benefits and any of employee's entitlement. In ascertaining the claimant's *locus standi*, reliance was placed on the cases of *Atoyebi v Governor of Oyo State*<sup>72</sup> and *Edun v Governor of Delta State and Ors*<sup>73</sup> with the finding that the claimant had the requisite *locus standi* to institute the suit hence, the action was properly constituted and the court competent to adjudicate over it.

On the issue of the claimant's quantum of entitlement from his RSA with the first defendant, the court found that section 1 of the PRA of 2014 recognises the right of an employee whether private or public, who has participated in the contributory pension scheme while working, to make a lump sum withdrawal upon retirement. Sections 1, 23(b) and (d) of the PRA empowers the second defendant to make guidelines that would regulate pension administrators in managing pension funds. It also found that by virtue of section 7(1) of the PRA, a holder of a RSA shall upon retirement or attaining the age of 50 (whichever is later), has several options to utilise the amount credited to his account. These options include withdrawal of a lump sum from the said credit amount provided that the amount left after such withdrawal shall be sufficient to procure a programmed fund withdrawals or annuity for life in accordance with extant guidelines issued periodically by the Commission; and programmed monthly or quarterly withdrawals calculated on the basis of an expected life span.

For employees who retired at the mandatory age of 60, section 7 of the PRA of 2014, is silent on the percentage of lump sum benefit they can withdraw. However, section 7(1) (b) allows a retiree, to access the funds in his/her RSA to get programmed monthly or quarterly withdrawals calculated on the basis of an expected life span of the concerned retiree. The court, in construing the provisions of the PRA of 2014, in a bid to answer the question "what is the lump sum withdrawal that the claimant can be entitled to?" adopted two cardinal principles of statutory interpretation. It adopted the literal rule i.e. the rule that requires that plain and unambiguous words be given their ordinary grammatical meaning unless doing so will lead to absurdity and the *expressio unius est exclusio alterius*<sup>74</sup> (the express mention of one thing, is the exclusion of all others). By this rule, it held that the provision of the PRA of 2014, which makes a retiree of fifty years of age entitled to a 25 per cent lump sum withdrawal from his/her RSA, is clear and unambiguous and that, since the section expressly mentioned the age of 50, every other age, is expressly excluded from the application of the section. Thus, having mandatorily retired at age

72 [1994] 5 NWLR (Pt. 344) 290.

73 [2019] LPELR-47464 CA.

74 *Dada v Adeyeye* [2005] 6 NWLR (Part 920) 1.

60, the Act is silent on it and in any case, if a person of 50 is entitled to withdraw 25 per cent, a 60-year old, could certainly withdraw a higher percentage provided the balance, can procure annuity for life for him/her. Besides, section 173 of the CFRN, 1999 entitles the claimant to a pension and as such, shall not be withheld or altered to his/her disadvantage.<sup>75</sup> This right of the claimant is inviolable, sacrosanct, absolute and untrammelled being that it has a constitutional backing making it immutable, like the Constitution.<sup>76</sup> In order to determine the lump sum percentage that the claimant could withdraw from his RSA, the life expectancy rate of the claimant as provided under section 7(1) (b) of the PRA of 2014, was consulted. According to the court, the World Health Organisation (WHO) put the life expectancy rate of a male Nigerian at 54 years and seven months (approximately, 55). The court reasoned that:

A community reading of Section 173 of the Constitution, Section 7(1) of the Act as well as Clauses 4.0 and 5.1.1 of the regulation, clearly evinces that there is no specific amount or percentage stipulated as lump sum that a retiree of claimant's age (60 years and above) can withdraw ... the amount to be withdrawn by a retiree of the claimant's age is to be calculated in view of his life expectancy, his right to his pension shall not be altered or withheld to his disadvantage and finally the quarterly withdrawal, has to be at his discretion i.e. he has to opt for it and not at the whims and caprices of the 1<sup>st</sup> defendant to determine what and how he could withdraw same.<sup>77</sup>

According to the above reasoning, the court concluded that the entitlement of the employee to a lump sum withdrawal from his RSA domiciled with the first defendant, can neither be determined unilaterally nor taken away, by the first defendant, placing reliance on the Court of Appeal's decision in *Popoola & Ors. v Attorney General, Kwara State & Ors.*<sup>78</sup> Thus, based on the life expectancy rate of the WHO in accordance with section 7(1) (b) of the PRA of 2014, and the proviso thereof, the court held that, since the claimant has exceeded the expected life expectancy rate (i.e. 54 years of age), and has mandatorily retired, he is, entitled to withdraw at least a 50 per cent lump sum of his pension with the first defendant and the balance of 50 per cent, shall be used to procure a programme of fund withdrawals or annuity for life.<sup>79</sup>

The court's conclusion above is not only fair, just and equitable but logical and humane when the claimant's age is taken into consideration and the intended purpose the money was to be put to use is considered. By reason of strength any Nigerian, particularly a male who has attained the age of 60 is gradually reaching the end of his/her life. In the event that the claimant is not fortunate to have many more years on the side of the living as even the life expectancy of man as enshrined in the Holy Writ is 70 years) but by strength, he may live up to 80, years (all being variables), his pension, which is meant to cater for his need at a time when he is unable to work, could be reaped by others who did not labour for it.<sup>80</sup> Thus, the law at present is that anyone who retires either at an age which is over and above the WHO life expectancy rate, which is higher than the retirement age provided under section 7(1)(a) of the PRA of 2014 (i.e. 50), is entitled to at least a 50 per cent lump sum withdrawal from his/her RSA. This is a welcome development which the Nigerian Union of Pensioners should publicise and encourage its members to make use of. This position, should also be given legislative backing hence, there is a need to amend the PRA of 2014 to reflect this development. In the event of an appeal to the CA whose decision

<sup>75</sup> *Amao v Central Bank of Nigeria* [2010] 16 NWLR (Pt 1219) 271.

<sup>76</sup> *Momodu v Nigerian Union of Local Government Employees* [1994] 8 NWLR (Pt 362) 246.

<sup>77</sup> Suit No. NICN/ABJ/218/2018 Judgment delivered 18 May 2020.

<sup>78</sup> [2011] LPELR-3608 CA.

<sup>79</sup> *Ibid.* (n 73) 20.

<sup>80</sup> Psalms 90:9-10 King James Version.

is final on civil appeals from the NICN should affirm this decision as same is a good precedent.<sup>81</sup>

It is apposite to note that the decision examined above, is just one of the many instances where, since 2010, the NICN after the enhancement of its statute and status, has promoted the law beyond its usual limits. In fact, the court, more than any other in recent times, has engaged actively expanded the law by bringing it *in tandem* with socio-economic and legal realities. For instance, the common law position on the termination of master/servant employment, which has been assimilated and approved by Nigeria appellate courts is that an employer has the right, in accordance with the employment contract, to terminate the employment of the employee for any reason (good or bad) or for no reason at all.<sup>82</sup> However, the NICN, while acknowledging the right of the employer to terminate the employment of an employee, has pursuant to section 254C(1)(f) and (h) of the CFRN, 1999 (Third Alteration) Act of 2010 which empowers it to apply ILO Conventions, international best practices and standard limit same. Thus, the NICN has held that, an employer can only terminate the employment of its employee for good and reasonable cause pursuant to Article 4 of ILO Termination of Employment Convention, 1982 (No 158) and Recommendation No 166. This was the decision of the NICN in the cases of *PNGSSAN v Schlumberger Anadrill Nig. Ltd.*<sup>83</sup> and *Petroleum Court per Adejumo JNIC* held that:

The respondent also argued that it has the right to terminate the employment of any of its employee (sic) for reason or no reason at all. While we do not have any problem with this at all, the point may be made that globally it is no longer fashionable in industrial relations law and practice to terminate an employment relationship without adducing any reason for such a termination. The problem we however have here is, when a reason is given for the termination, whether the affected staff cannot contest the reason. It is our opinion that when an employer terminates an employment and gives a reason for such termination, the employee has a right to contest the reason.<sup>84</sup>

Also, the court in *Sahara Energy Resources Ltd. v Mrs. Olawunmi Oyebola*<sup>85</sup> contrary to the established norm for quantum of damages for wrongful termination of employment in master/servant employment<sup>86</sup> held that an employee, under deserving circumstances, was legally permitted to recover in damages, over and above the amount, ordinarily entitled had the employer followed the agreed procedure for terminating the contract. In fact, it has been acknowledged, and correctly so in our view, by Agomo<sup>87</sup> that the NICN is now doing, what the Supreme Court did in 1981 and 1985 to the development of individual employment labour jurisprudence.

It is apposite to note that the essence of institutionalising a pension scheme is to ensure that retirees are adequately catered for upon retirement, when they might lack the strength and energy to engage in gainful employment. Before now, it was common in Nigeria for parents to depend on their children as a means of social security but the prevailing debilitating socio-economic realities, have made this impracticable. The possibility of fresh graduates securing

81 *Skye Bank Plc. v Victor Anaemem Iwu* [2017] 7 SC (Part 1) 1.

82 *Chukwuma v Shell Petroleum Development Company* [1993] 4 NWLR (Pt. 298) 512; *First Bank of Nigeria Plc. v Chinyere* [2012] 2 NLLR (Pt. 41) 62; *Isheno v Julius Berger Nig Plc.* [2012] 2 NLLR (41) 127; *Obanye v Union Bank of Nigeria* [2018] 17 NWLR (Pt. 1648) 375; *Olanrewaju v Afribank Nigeria Pl.* [2001] 13 NWLR (Pt. 731) 691; *Osisanya v Afribank Plc.* (2007) 4 MJSC 128 147.

83 *PNGSSAN v Schlumberger Anadrill Nig. Ltd* Suit No. NIC/9/2004 delivered on 18 September 2007.

84 See also *Nasco Foods Nigeria Ltd. v Food, Beverage & Tobacco Senior Staff Association* Suit No. NIC/6/2003 Judgment delivered on 16 July 2009.

85 Unreported Suit No. CA/L/109/2016 Judgment delivered on 3 December 2020.

86 *Osisanya v Afribank Plc* (2007) 4 MJSC 128 at 147; *Olufeagba v Abdul-Raheem* [2009] 18 NWLR (Pt. 1173) 384; *Ativie v Kabel Metal (Nig.) Ltd.* [2008] 10 NWLR (Pt. 1095) 399; *Chukwuma v Shell Petroleum Development Company* [1993] 4 NWLR (Pt. 298) 512; *Commissioner of Works, Benue State v Devcon Ltd.* [1988] 3 NWLR (Pt. 83) 407.

87 Agomo, *Nigerian Employment and Labour Relations Law and Practice* (2011) 323.

gainful employment is extremely slim and thus parents are responsible for the wellbeing of their children who, normally would have been a social support system. Prior to the enactment of the PRA of 2014, pension administration was a nightmare for pensioners.<sup>88</sup> Several pensioners, while queuing to be verified, were reported to have died in queues in various parts of the country.<sup>89</sup> Apart from this, there were reports of embezzlement of funds by government personnel and hence, most pensioners who had diligently served the country during their prime were flung into abject poverty, neediness and depravity.<sup>90</sup> In 2021, a Federal High Court sitting at Abuja and presided over by Justice Okon Abang sentence Mr. Abdulrasheed Maina a former chairperson of the defunct Pension Reform Task Team (PRTT), to eight years imprisonment for a money laundering offence, involving Naira two billion of pension funds,<sup>91</sup> depriving honest beneficiaries from their pensions upon retirement. It is difficult to fathom the effect this act must have had on hard-working pensioners, rendering them financially incapacitated, reducing their quality of their life and possibly, lifespan owing to financial hardship. It is expected that the present system of CPS anchored in transparency will forestall the Maina's experience. To stop the plundering of pension funds by the custodians or government officials, the option of a fine as punishment must not be considered. Imprisonment and the accompanying fear and stigma would be a more effective mode of punishment. Also, when the government extends loans against pension funds, such loans should be secured to prevent them from becoming bad debt.

Considering the failure by the PRA or its predecessors to expressly specify the percentage of a lump sum that a retiree is entitled to withdraw, led to the decision under review, it is now necessary that the decision of the court be given statutory approval. This requires that the PRA of 2014 be amended to include that a retiree is entitled to a 50 per cent lump sum withdrawal.

#### 4 CONCLUSION AND RECOMMENDATIONS

As explained above, a pension scheme is instituted to make adequate financial provision for a person when he/she retires or is medically boarded. The PRA of 2014 which repealed the 2004 Act, makes provision for the CPS which requires both the employer and employee to contribute to the pension of the employee. While the Act makes provision for a percentage of lump sum withdrawal, available to an employee at the age of 50 or before attaining same, it is silent on retirement at the age of 60 and lays down the life expectancy test as the determinant of the lump sum percentage. The NICN has ingeniously held that contrary to the 25 per cent lump sum withdrawal provision for employees who retire, an employee who mandatorily retires at 60 is entitled, in accordance with the WHO life expectancy rate for a male Nigerian, which is 55, to make a 50 per cent lump sum withdrawal from the RSA with a PFA and the amount left, shall be used to buy annuity for life. Thus, in Nigeria today, a 60-year-old retiree is entitled to a lump sum withdrawal from his/her RSA of 50 per cent and not 25 per cent or less.

Pursuant to the above findings, it is recommended that the court's decision that an employee who mandatorily retires at the age of 60, is entitled to a withdrawal of up 50 per cent from his/

88 Binuomoyo "The Nigerian Pension System: Reform and Expectations" 2010 *Ana International Journal of Law* 3–10.

89 Kumulu, "Suffering and Crying on Pension Queues: The Untold Story of Nigeria's Senior Citizens" <https://www.vanguardngr.com/2010/07/suffering-and-crying-on-pension-queues-the-untold-story-of-nigerias-senior-citizens/> (accessed 20-3-2022); Ushakang, "Nigeria: Stakeholders and Agonies of Pensioners" <https://allafrica.com/stories/200502020248.html> (accessed 20-3-2022).

90 Onukwe, "Two Nigerian Banks Were Rebuked for their Role in a \$4 Million Theft from Pensioners" <https://qz.com/africa/2087355/judge-faults-two-nigerian-banks-for-role-in-mainas-pension-fraud/> (accessed 20-3-2022).

91 Ajekwoyinlo "Updated: Court Sentences Maina to Eight Years in Jail for N2 Billion Pension Fraud" <https://www.premiumtimesng.com/news/headlines/494090-updated-court-sentences-maina-to-eight-years-in-jail-for-n2-billion-pension-fraud.html> (accessed 20-3-2022).

her RSA, the PRA of 2014, should be amended. This would be a welcome development that could enable retirees to enter into private business ventures.

Furthermore, it is suggested that to safeguard pension funds from being plundered by government officials or custodians, punishment should be in the form of imprisonment rather than a fine.

Also, the Nigerian Union of Pensioners (NUP), which is the umbrella body of all pensioners should afford such a decision wide publicity. This is to ensure that its members, who are within the benefit category can take advantage of lump sum withdrawals from their RSA.

Furthermore, should the defendants, exercise their constitutional right of appeal to the Court of Appeal, the judgment should be affirmed on the ground of its soundness and plausibility.

There is also an urgent need to review sections 7 and 11(5) and (7) of the PRA of 2014 to increase the penalty an employer is liable to pay for failure to remit the deducted sum meant for the pension contribution of an employee to the PFA from the existing two per cent to an upward 15 per cent. This increase will balance the employers deducting and investing the money to generate income and pay the penalty from the interest since 15 per cent is high as opposed to the negligible existing two per cent.