IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2011/HP/599

RICHARD MUMBA AND 61 OTHERS — **PLAINTIFF**

AND

BP ZAMBIA PLC — **1ST DEFENDANT**

PUMA ZAMBIA PLC — **2ND DEFENDANT**

BEFORE : **HON. G.C. CHAWATAMA - IN CHAMBERS**

For the Plaintiff : *Mr. R. Malipenga- Robson Malipenga & Co.*

For the First Defendant : *Mrs. S. Kateka and Mrs. N. M. Simachela- Nchito & Nchito Associates*

For the Second Defendant : *Mrs.S.Kateka and Mrs. N.M. Simachela- Nchito & Nchito*

JUDGMENT

CASES REFERRED TO:

1. ***Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (a law firm) (1998) S.J.7***
2. ***Zambia Consolidated Copper Mines v Sikanyika & Others (2000) ZR***
3. ***Kankomba & Others v Chilanga Cement Plc (2002) ZR***
4. ***National Milling Company Limited v Grace Simataa & Others,***

This is an action commenced by way of Writ of Summons and Statement of Claim. The Plaintiffs' claim for:

1. *Declaration that the Defendants, BP Zambia and Puma Energy on the 6th April 2011 repudiated and breached the contract of employment by unilaterally cancelling the share-match scheme which varied the terms and conditions of the contracts of employment as a result the Plaintiff's employment was terminated.*
2. *Declaration that the Plaintiffs sale of shares was procured by the Defendants' fraud, dishonest, trickery and contrary to the terms and conditions enjoyed by the Plaintiffs.*
3. *Declaration that the Defendants took a unilateral decision to reduce the remuneration of the Plaintiffs without bargaining by all the parties which was fundamental breach of the employment contract.*
4. *Declaration that the 2nd Defendant has failed to replace the share-match scheme with substantially equivalent scheme in its share as undertaken.*
5. *Declaration that the purported sale of the Plaintiffs shares lacked consent through bargaining process by the Plaintiffs and the Defendants as there was no adequate time given to the Plaintiffs to make decisions.*
6. *Declaration that the 1st Defendant sale to the 2nd Defendant of its 75% shares included the Plaintiffs' shares.*
7. *Declaration and order to nullify the sale of the shares of the Plaintiffs by the 1st Defendant to the 2nd Defendant was illegal as the Plaintiffs did not participate in the negotiation and sale of its shares.*

8. *Declaration that the Plaintiffs were forced to sale their shares without being given other options which were available such as to retain them in their own names.*
9. *Declaration that the sale of the 1st Defendant is not the change in shareholding but sale of entire company which has terminated the employment of the Plaintiffs with the 1st Defendant.*
10. *Declaration that the Plaintiffs employer is not the same legal entity which the Plaintiffs entered into contracts of employment with.*
11. *Declaration that the Plaintiffs employment contracts were terminated by the Defendants and are entitled to separation or redundant or retirement benefits as from 6th April, 2011.*
12. *An order for payment of redundant or retirement benefits*
13. *Damages*
14. *Interest*
15. *Costs.*

In their defence the Defendants denied the allegations of the Plaintiffs and stated, among other things, that not all the Plaintiffs listed in the schedule participated in the Share-Match Scheme in which participants acquired and interest in BP International group and not BP Zambia Plc. Further that the Plaintiffs had no shares and/or interest in the 1st Defendant Company but only shares in BP International and that the shares in the 1st Defendant were sold by BP Africa Limited who was the majority shareholder. In

addition that the terms and conditions of employment of the Plaintiffs employment have remained the same and that the 1st and 2nd Defendants are in fact one company.

During trial, the Plaintiffs called only one witness and the Defendants did not call any witnesses.

PWI was **Victor Chisanga Ng'andu,** a Human Resource Practitioner who had worked as a Human Resource Manager for the 1st Defendant.

PW1 told the court that his role when he worked for the Defendants was to advise the Chief Executive Officer and the Line Managers on Human Resource Policy and other employee relations matters. Further that he was the country coordinator for the share-match program. As country coordinator he was responsible for informing the employees about the rights in the share-match program which was enshrined in their employment contracts. He transacted on behalf of the employees at certain periods as he had access rights to the share-match program. He explained that it was a benefit scheme for employees of Shell BP on permanent and pensionable basis. Employees would choose to exercise these rights as the program was enshrined in the contract of employment.

He explained that his role was to announce and explain to employees about the share match program, at particular times,

especially in June. He had access rights to transact on behalf of employees on the share match program. He further told that the announcement that was made to the employees was that the shares were available and that they could access the share match program on their personal computers, thereupon those who were interested would buy in a particular. The employees who would buy their shares would have their transactions completed by him, thereafter he would submit to the country's transactions to BP Global.

PW1 further told the court that it was called a share match program because whatever number of shares an employee bought, the company (BP Zambia Plc) would buy for that particular number of shares in addition to what the employee has bought. The shares were bought from BP International, BP Global at the London Stock Exchange. He further explained that the shares entitled the employee to a stake or an interest in the company.

On BP International, he explained that it was the parent company which had a subsidiary called BP Africa, which in turn was the holding company for the African associates comprising BP South Africa, BP Mozambique, BP Zimbabwe, BP Botswana, BP Tanzania, BP Malawi, BP Namibia. In summary, he explained that there was BP International which had a subsidiary BP Africa as a holding company for African associates and the African associates

also in fact used to report to BP South Africa which was the headquarters.

PW1 mentioned the documents that had entitled the employees to purchase shares as the employment contract, Human Resource Policy manual, brochures for the share match program and the share match scheme document. He read out clause 28, from the Human Resource Policy manual which he interpreted as implying that the employees who had shares in BP were shareholders and would get benefits entitled to shareholders, such as dividends. He further referred to a contract of employment for Richard Mumba and told the court that it was a standard contract which all the employees who were on permanent and pensionable employment signed. In addition, the court heard that the share match scheme was a fundamental term of employment; it fell under reward and remuneration.

PW1 told the court that the practice at BP was that whenever management wanted to change any term or condition of the contract of employment consultations were made with employees and then an agreement would be reached. ***PW1*** made reference to clause 15 of the contract of employment.

It was his testimony that in April, 2011, he received communication from Geneva telling him to broadcast a message to employees that they needed to sell of their shares because the new

owners of the company did not have a share match program. This, he said, was done without consulting the employees. He sent the message to the employees by email.

It was his testimony that the employer had changed from BP to Puma, and hence the instruction to sell off the shares that they held in BP because Puma did not have the share scheme. Under the share match scheme, the employees were entitled to sell their shares voluntarily as and when they felt like and if any need arose to ask the employees to sell their shares, notice of 30 days would be given. However, in this case notice was not given. What was given was a days' notice. He was instructed that since Puma did not have the share match scheme and the crossing over date for BP to Puma was 1st April, 2011, the share match should have been cancelled on 1st April, 2011. The instructions were received on 6th April, 2011. The implication was that the share match scheme had been unilaterally withdrawn by the company.

PW1 was referred to a document called the share match termination form which he identified as the form which was attached to the email instructing him to cancel the share match scheme. He further explained that the reason stated on the form for termination of the share match scheme were either one died or one separated from the company. The court heard that the scheme was cancelled on 1st April, but the email was only sent out to the employees on 6th April. The effective date for the cancellation of the

scheme was 1st April so that at the time the email was going out the scheme had already been terminated.

It was ***PW1***'s testimony that he never saw the Share Sale and Purchase Agreement between BP Africa Limited and Puma Energy of Ireland Holdings during the time of his employment until recently. He stated that having now seen the document part of the content is an undertaking that the Employees would continue enjoying the same conditions of employment without any amendments. Part of these conditions was the share match scheme. Shares have been defined as being part of the employee benefit arrangement which were being enjoyed by the employees.

It was further his testimony that there was an undertaking that the share match and other related employee benefits would not change, neither would they be withdrawn nor terminated. He recalled that the undertaking was made by the General Manager, who was the Managing Director for BP. He also recalled that the undertaking was made by the Chairman for Puma when they wrote to the National Union of Transport and Allied Workers. In addition, accompanied the new shareholders to one of the meetings where these assurances were made.

PW1 read a letter dated 13th May, 2010, addressed to Chilenga Muhango. This is the letter that contained the undertaking that the new shareholders would not make any changes to the

conditions of employment for the employees. He testified that due diligence was undertaken by the new shareholders, documents such as human resource policies, employment contracts, all governance documents, management reports, in addition consultations with their lawyers were made. ***PW1*** liased with his superiors when the issue of cancellation of the scheme came up and advised that the issue was one embedded in the contract of employment, these were contracts designed and approved in 2005.

In cross-examination, ***PW1*** explained that non-guaranteed benefits related to the performance of the company. If the company performed well then the employees would get dividends, if the shares fell then no dividends would be paid. The non-guaranteed benefits also included a valuably care program which was a performance bonus and the shares themselves.

PW1 also informed the court that the employees had an option to sell or transfer the shares once they were leaving the company, since they were leaving BP to Puma, the employees needed to exercise the option of selling their shares.

Further it was pointed out that the content of the email that the share match scheme operated at the discretion of BP is not true. It was enshrined in the employment contract. He added that he circulated that email but he did not generate it.

Counsel for the Plaintiffs has filed in submissions for which I am highly indebted. I have not received any submissions from the Defendants.

In summary, the Plaintiffs claim is that the Defendants, BP Zambia Plc and Puma Energy repudiated and breached the contract of employment by unilaterally cancelling the share match scheme which varied the terms and conditions of employment as a result the Plaintiff's employment was terminated. Further that this was done by fraud, dishonesty, trickery by the Defendants. Secondly that the 1st Defendant's sale to the 2nd Defendant of its 75% shares included the Plaintiffs' shares and therefore the sale without the Plaintiffs participation in the negotiation is a nullity and illegal. In addition that the sale of the 1st Defendant is not the change in shareholding but sale of entire company which has terminated the employment of the Plaintiffs as the Plaintiffs' employer is not the same legal entity which the Plaintiffs entered into contracts of employment with and therefore, the Plaintiffs employment contracts were terminated by the Defendants and are entitled to separation or redundant or retirement benefits as from 6th April, 2011.

The issues that seem to be in contention in this matter as far as the defence is concerned are as follows: firstly that the company has not changed, the 1st and 2nd Defendant are one and the same and is the employer of the Plaintiff. Secondly, it was disputed that

not all Plaintiffs listed in the schedule participated in the Share-Match Scheme in which participants acquired an interest in BP International group and that the interest acquired was not in BP Zambia Plc. Consequently that the Plaintiffs had no shares and/or interest in the 1st Defendant Company but only had shares in BP International and that the 1st Defendant Company was sold by BP Africa Limited who was the majority shareholder. In addition, it was disputed that there was a unilateral change to the Plaintiffs contracts of employment nor was there any breach of the Plaintiffs contracts of employment. The Defendants also contended that they remained in full compliance with the law and that the Plaintiffs enjoyed all the benefits in their contracts of employment. It was also the Defendants position that the Plaintiffs were advised from the beginning that Share-Match Scheme did not form part of their contractual terms of employment as it was operated at the discretion of the employer BP Plc and was not a fundamental term of the Plaintiffs employment contract. It was also denied that the variation clause applied to the Share-Match Scheme. It had its own rules which were strictly followed. It was also the Defendant's position that the Share-Match Scheme was a non-guaranteed benefit in terms of the Plaintiff's contract of employment. It was also denied that there was any fraud in relation to the documents, neither was there any dishonesty, trickery as alleged.

The law is settled in Zambia that a company is a legal person distinct from its shareholders. The company remains that person

even with the change of shareholders or even management. In the case of ***Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (a law firm) (1998) S.J.7,*** it was held that:

> ***"It is wrong in principle to distinguish between old and new shareholders or between new and old management or treat business transactions giving rise to the claim as one essentially between individuals. A principle of law which is now entrenched is that a company is a distinct legal person different from its members or shareholders". (Salomon v Salomon & Co. (1897) A.C.22, followed).***

This position has been followed in later cases such as in ***Zambia Consolidated Copper Mines v Sikanyika & Others (2000) ZR*** where it was held that:

> ***"Change of ownership of shares cannot result in the corporate entity becoming a new employer; it will be still the same employer and will be bound by the contracts of employment."***

Similarly, in a much later case of ***Kankomba & Others v Chilanga Cement Plc (2002) ZR*** the court upheld this position when it stated:

> ***"Change of shareholding does not change the company even if there in place a new management. The change in shareholding does not change the employer so as to make section 35 of the Employment Act apply."***

In view with this position of the law, I do agree with the Defendants that the employer, whether it be called BP Plc or Puma Energy remained the same and were bound by the Plaintiffs contract of employment.

Having established that the Defendant was bound by the same contracts of employment for the Plaintiffs, it is necessary to establish whether the Share-Match Scheme was a fundamental term of the contract of employment. The undisputed testimony of ***PW1*** was that the contract of employment was standard and all the employees had the same. I have, therefore, perused the contract of ***PW1*** himself, to examine the Share-Match Scheme clause. In the contract of employment, the Share-Match Scheme comes under Section C (Remuneration Details); under the breakdown of the Remuneration Package, it is clause 12. The said clause provides:

> ***"All employees are entitled to purchase shares in BP Plc in the month of June each. The Company will give you a matching share that you purchase, subject to a maximum."***

There was also a provision of the Share-Match Scheme in the Human Resource Policy and Administration Manual. The Clause 28 was couched in very simple language as follows:

> ***"Policy Statement: The Share-Match Scheme gives employees the opportunity to acquire an interest in BP Plc ("BP") and to be more closely involved in the fortunes of BP and its subsidiaries worldwide including BP Zambia Plc.***
>
> ***Eligibility: To be eligible to participate in an offer under the Share-Match to purchase shares of BP Plc, employees must be in permanent employment of a company which is participating in the Share-Match***

Scheme and you must have completed twelve (12) months' continuous service with the company with effect of the offer state date.

Employees who have given, or received, notice of termination by reason of dismissal, resignation, retrenchment or retirement from the Company, in writing, by the offer start date are not eligible to participate in the Share-Match Scheme."

In view of the foregoing, it is my considered view that the Share-Match Scheme was not only a policy item but also a fundamental term of the contract of employment where applicable. This was a term from which the affected employees derived a benefit. It was enshrined in the policy document and the contracts of employment in no uncertain terms, providing also on how this condition or benefit terminated therein.

As per clause 12, there was a great incentive coming through from the employer in that for each share purchased the employer would add one to the employee's credit. The only term given for an employee to stop participating was if they ceased to be employees whether by dismissal, resignation, retrenchment or retirement from the company.

In this case, while the employees were still in employment, they received an email asking them to sell the shares because they had crossed over from BP to Puma Energy and there the rules applicable on termination of employment would kick in. In line with what I have stated above this was a misapprehension of the

obligations of the Company. As far as the contracts of employment were concerned there was no difference between BP and Puma Energy.

In the case of ***National Milling Company Limited v Grace Simataa & Others,*** Ngulube, CJ, as he then was, had the following to say (obita dicta):

"We have considered the matters raised and argued in this case. We can affirm immediately that the change of ownership of the shares did not result in the appellant becoming a new employer; they were still the same employer and they were bound by the contracts of employment they already had with each one of their workers severally and collectively. We affirm also that, just as in the case of any other contract, a contract of employment can be varied for better or for worse with a variety of consequences, depending on whether or not the variation is consensual or accepted or rejected. In the cases to which the principles in the Kabwe case and the Marriot case apply, the unilateral changes were adverse and unacceptable to the employee who became entitled to treat the breach by the employer as terminating the contract and warranting the payment of redundancy or other terminal benefits, as appropriate. Those cases dealt with changes to a basic condition and the issue which arose here was whether a redundancy benefit could be such a basic condition. In the first place, the reference to basic condition must surely be to a fundamental or essential term, one affecting the essential character of the bargain and the breach of which would justify the innocent party to treat the contract as repudiated or rescinded by the party in breach. The alteration of a basic condition if consensual and probably beneficial would result in bringing about a replacement contract, different from the former. It is thus necessary to look at the nature of the condition breached and the consequences of such a breach in order to determine whether a

condition is basic or one that is relatively minor and not crucial to the contract. Variations to non-basic conditions even if unilateral and disadvantageous would not affect the essential viability of the contract and would in all probability not discharge it or justify the innocent party to treat the breach as effecting a termination by repudiation or rescission or otherwise."

In that case it was held that:

(i) ***If an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired as may be appropriate – as at the date of the variation and the benefits are to be calculated on the salary applicable.***

(ii) ***The alteration of a basic condition if consensual and probably beneficial would result in bringing about a replacement contract different from the former.***

(iii) ***Change of ownership of shares did not result in the appellants becoming a new employer; they were still the same employer and they were bound by the contracts of employment they already had with each one of their workers severally and collectively.***

It is my finding that the Defendant's action amounted to breach of a fundamental term of the contract of employment. In this regard the contract of employment was terminated on 6th April, 2011, the date of the email.

It is clear from the email that the decision was unilateral and the Plaintiffs were not given a choice as to the options available to them, neither were they engaged in any negotiations at all. This evidence was not challenged by the defence.

Furthermore, the argument by the Defendants that the Plaintiffs did not hold shares in BP Zambia Plc cannot be sustained; this would be a contradiction to the policy statement quoted above, which I will repeat here for the avoidance of doubt:

> ***Policy Statement: The Share-Match Scheme gives employees the opportunity to acquire an interest in BP Plc ("BP") and to be more closely involved in the fortunes of BP and its subsidiaries worldwide including BP Zambia Plc.***

The statement was unambiguous; even by implication if the Plaintiffs hold shares in the holding company they necessarily hold shares in the subsidiary as well.

It does not help the Defendant's case to say that the Share-Match Scheme was operated at BP's discretion. BP decided to operate this scheme at their own discretion but the Plaintiffs had since acquired a right in the same. In addition, at its discretion BP decided to make it a term of the contract of employment. The contract of employment had in itself a safeguard clause in terms of

variations. As pointed out by Mr. Malipenga, Counsel for the Plaintiffs, clause no. 15 of the contract did not allow any party to unilaterally vary the contract. The said provision provided as follows:

> ***"No agreement varying, adding to deleting from or cancelling this agreement and no waive of any right under this agreement shall be effective unless reduced to writing and signed by or on behalf of the parties."***

I have not come across any restriction of sale of shares by a majority shareholder. The only concern would be the protection of the minority shareholders. I cannot also hold that the sale of shares by BP to Puma was illegal, save to say that the new management has neglected to honour its obligations under various undertakings including the Share Sale and Purchase Agreement, dated 12th November, 2010. In schedule 8 of the said agreement under the heading "Employees and Benefits", where "Employees Benefit Arrangements" were defined as:

> "***the benefit and incentive/compensation schemes or arrangements in respect of Company Employees and former Company Employees which the Company participates and which are operated by the Company or in which the Company participates and which are in force at the Signing Date, including without limitation share and cash-based incentive/compensation***

arrangements and benefits, including without limitation those relating to sickness, ill-health, injury, disability, lifestyle, time-off, retirement, death or termination of employment.

Under 2.3 of the said agreement there is an undertaking that during the "Protected Period" (defined there in) the Purchaser undertakes that it shall not, and shall procure that the Company shall not:

"2.3.1 ***amend or terminate any Employee Benefit Arrangements, whether contractual or discretionary in nature, and shall continue to provide the same benefits or (where it is not possible to provide the same benefits) substantially equivalent benefits under the Employee Benefit Arrangements or replacement arrangements, if necessary, to all Company Employees (or such Company Employees as currently participate or are eligible to participate in such Employee Benefit Arrangements), unless the amendment or termination is required by law or agreed in relation to some or all of the Company Employees following a process of collective bargaining...***"

There was a clear derogation from this undertaking; neither was there any justification given to the employees for cancelling of the

Share-Match Scheme apart from stating that Puma did not have a similar scheme. The Employees had an option of holding the shares in their own names but this option was not made available to them. There was also no offer of any "*substantially equivalent benefit.*"

However, no evidence was presented before me to prove that the Defendants procured the sale of shares by fraud, dishonesty or trickery. In fact, a closer perusal of the pre-sale correspondence, including the ones between Management and the Union reveal that there was some acquiescence from the Plaintiffs on the sale of the shares. What I do find is that the Defendants were in breach of both the sale/purchase agreements and the contracts of employment and the Plaintiffs are entitled to damages.

Costs for the Plaintiffs; to be agreed in default of which they will be taxed.

DELIVERED AT THIS .....25th.....DAY OF .....June.....2015.

G.C. CHAWATAMA
JUDGE