

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**

1995/HP/1345

*(Civil Jurisdiction)*

BETWEEN:

DARIUS CHIKULU KATUTWA & 65 OTHERS **PLAINTIFFS**

AND

THE ATTORNEY GENERAL

DEFENDANT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA  
ON 31<sup>ST</sup> OCTOBER, 2017 - IN CHAMBERS

For the Plaintiff : Mr. Katolo – Messrs Milner Katolo & Associates  
For the Defendant : Mr. Lukwasa – Attorney General Chambers

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**JUDGMENT**

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CASES REFERRED TO:

1. *ER Dorset County Council (1994) ZWLR 554*
2. *Zambia Consolidated Coppermines Limited and Ndola Lime Limited V Emanuel Sikanyika and Others (2000) ZR 105*
3. *Peter Ngangwe and Others V Zamox Limited and Zambia Privatisation Agency (1999) ZR 90*
4. *Photo Production Limited v Securicor Transport Limited (1980) AC 827 (HC)*
5. *Salmon v Salmon (1897) AC 22*
6. *Zambia Consolidated Coppermines, Ndola Lime Company Limited V Emmanuel Sikanyika and Others SCZ Judgment No. 24 of 200.*

AUTHORITIES REFERRED TO:

1. *Section 35 of the Employment Act Chapter 268 of the Laws of Zambia*
2. *Section 5(3)(e) of the Zambia Development Agency Act No. 11 of 2006*



OTHER WORKS REFERRED TO:

1. **Clarkson and Lindsell on Torts 17<sup>th</sup> Edition on page 25**
2. **Contract Law 11<sup>th</sup> Edition at page 308**

A brief background of this case was that the Plaintiff took a Writ of Summons out of the Principal Registry seeking the following reliefs.

- a) *Special damages for loss of housing calculated in the manner particularly set out in the said schedule and general damages arising as a result of the inconvenience caused and to continue during the duration of their employment or until they are again accommodated. The amounts due hereunder to be assessed by the District Registrar.*
- b) *Salaries/wages arrears calculated in the manner particularly set out in the particulars appearing in the said schedule and to continue during the duration of this employment.*
- c) *Retirement or as the case may be retrenchment benefits for those Plaintiffs who have been retrenched or retired being Cosmas Kafusha, Greenford Phiri, Darius Kafunda, Godfrey Ngoma, Geoffrey Banda, Lucy Katamoyo and David Chansa.*
- d) *An order that an account to be taken before the District Registrar for the salaries and benefits due under (b) and (c) hereof.*

- e) *A declaration that the purported dismissals and successions as aforesaid are wrongful, illegal and the Plaintiffs are entitled to be reinstated and paid all their benefits.*
- f) *An order for specific performance of the said employments compelling the Defendants to discharge all its obligations as employer under the terms and conditions of employment*

While the other Defendants namely General Pharmaceuticals Limited, Zambia Privatization Agency, and Agnes Ngoma (Liquidator of General Pharmaceuticals Limited) entered appearance and filed a Defence in accordance with the rules of court, the second Defendant namely the Attorney General did not.

Accordingly, the Plaintiff took out summons for leave to enter judgment against the second Defendant in default of defence. Pursuant to this application the trial court then entered judgment in default against the second Defendant on 4<sup>th</sup> September 2001. After that the second Defendant was inactive for almost two years before taking out an application to set aside the judgment in default on 6<sup>th</sup> January 2004. In the interim period the learned trial Judge heard the case as between the other parties and delivered Judgment on the 31<sup>st</sup> October, 2002. The Supreme Court heard the application to set aside the default

judgment after the trial Judge found the delay by the second Defendant to be inordinate and unreasonable and the application to set aside the judgment in default as an abuse of court process since the judgment in the matter as between the Plaintiff and the other Defendants had already been delivered two years ago. For these reasons the learned trial Judge dismissed the second Defendant's application to set aside Judgment in default with costs.

The Supreme Court agreed with Counsel for the Plaintiff that there was an inordinate and unreasonable delay on the part of the second Defendant to make an application to set aside the default judgment. The Supreme Court also agreed with Counsel's arguments on the matter and acknowledged that Counsel's arguments reflect the correct position of the law. The Supreme Court went on to state as follows:

*"But it is clear to us that this particular case standing on its own from the usual case of setting aside a judgment obtained in default of pleading. In the event we must decide this case on its own facts. We accept the submissions of Mr. Lukwasa, the learned Principal State Advocate, that there is a triable issue in this case. The nature of the triable issue in this case cannot be overlooked. The triable issue is whether the second Defendant was at fault at all to be sued.*

The Supreme Court went on further to state that:

*“Mrs. Mutti raised the issue of prejudice to the Plaintiff if the default judgment against the second Defendant was set aside. We do not agree with this submission because the setting aside of the default judgment against the second Defendant does not affect the Judgment which the Plaintiff have already obtained. The trail involving the Plaintiffs and the second Defendant will only determine the liability of the second Defendant and not that of the other Defendant (s) against whom the Plaintiff have obtained judgment. In our view, this is a proper case where despite the unreasonable delay, the default judgment should have been set aside and the Plaintiff compensated by an award of costs.”*

The Supreme Court concluded by stating that:

*“For these reasons, we allow the appeal, set aside the ruling of the High Court and remit the matter between the Plaintiffs and the second Defendant to the court below to be heard on merit and determined according to law. Costs will abide the event.”*

The 2<sup>nd</sup> Defendant filed their defence on the 13<sup>th</sup> April 2012.

Hearing before me started on the 1<sup>st</sup> December 2015. Mr. Darius Chikulu Katukwa Kafusha gave evidence on his own behalf and on behalf of sixty five former work mates all who had once worked for General Pharmaceuticals Limited in different capacities. It was his testimony that he left his employment by virtue of being retired. He testified that he has brought this action against the Attorney General as contained in the Amended statement of claim.

According to the witness what he knew about the Privatization Agency and General Pharmaceuticals is that the Company where he worked was earmarked for privatization in 1992. The Company was wholly owned by the Republic of Zambia. As far as this witness was concerned the Company was essential and viable before privatization was done.

The court was informed that the Company was publicly advertised for sale through bids. This meant the general public was free to put in bids for the Company. As employees they also participated in the bid on an employee buy out basis. The witness referred the court to a document which the witness said was a bid proposal for employees buy out; it was a lay out of a business plan for the purpose of purchasing the Company.

The witness shared with the court the reasons why the employees participated in the bidding, which was mainly the interest and their passion. **PW1** informed the court that the successful bidders were a company called Mutashi. He recalled that Mutashi took over the running of the company on the 22<sup>nd</sup> February 1994. It was his testimony that the taking over of the Company by Mutashi included taking them over as employees.

**PW1** went on to testify that they were surprised by what they began to experience once the takeover was done. He described

these experiences as strange. Strange because there were experiences that they never went through in the past. He gave as example of this as work stoppages without cause, being sent on forced leave without proper reasons given and nonpayment of salaries and when they were paid they were not paid on time.

**PW1** testified how they would sometimes go for months without pay, not only was this strange to them it also presented challenges because before the company was taken over by Mutanshi they enjoyed good conditions of service and never experienced what they were going through. The Plaintiffs began to question the criteria the Government or the Agents of the Government used when they delivered the bid to Mutashi. Morale was low amongst the work force. **PW1** referred to a letter at page 3 of the bundles dated the 16<sup>th</sup> January 1995. The document he identified as a letter addressed to him from the Human Resource Department putting him on forced leave for 31 days. According to the witness this was done without cause or any offence committed to warrant being forced to go on leave without pay. He learnt that the forced leave was a decision made by management. He referred the court to other letters of his workmates who were also forced to go on leave.

**PW1** complained further that they were not getting their salaries. They were evicted from Company houses where they were sitting Tenants by virtue of working for the Company. The witness

referred to a document at page 15 of the bundles. He identified it as a statement; a circular to all employees by Human Resource Manager on salary dates. The same was dated 8<sup>th</sup> March 1995. The witness went on to inform the court that as result of this there was a change in the activities as regards their conditions of service.

On the houses the employees occupied, the witness informed the court that when the Company was owned by the Government they occupied the houses as part of their conditions of service. After the Company was privatized they were told that the houses were sold hence they should vacate. They resisted vacating the houses they also viewed themselves as sitting tenants who were supposed to purchase the houses. The selling of the houses left them homeless and they became destitute.

**PW1** referred to a document at page 2 of the same bundles. He identified it as a letter dated the 12<sup>th</sup> January 1995 addressed to works committee chairman Mr. Molowa. The subject matter was sale of Company houses. Evictions followed the sale of the houses. There was a notice to vacate Company houses dated 15<sup>th</sup> February 1995 which letter was referred to by the witness. According to the witness he was to buy the house, he felt deprived by not being sold the house he had lived in. It was his testimony that in the end the military forced them out of their



houses. He learnt that the houses belonged to the military personnel.

The witness referred the court to a document which he said was a sales agreement of General Pharmaceutical houses to Zambia Army dated the 23<sup>rd</sup> February 1995 found at page 33 – 41 of the Plaintiffs supplementary bundle. He went on to testify that the Attorney General is mentioned as the lawyers for the purchasers (referring to page 41 of the sales agreement). The Plaintiff compared the Company they worked for to Kabwe Industrial Fabrics where employees who lived in Company houses were given an opportunity to buy houses by virtue of being workers of that Company. He referred to a document at page 42 of the bundles in support of his testimony. The witness referred to a document at page 43. This was a sales agreement where the parties were Ministry of Finance and Norman Mbazima in his capacity a Liquidator Mamibisir (PTY) Limited and Knights bridge Industrial Investment Zambia Limited. He went on to state that what was being purchased was shares in Kabwe Industrial Fabrics. The court was referred at page 89 whose subject matter was sale of General Pharmaceuticals Limited Housing Units to Zambia Army. The same was from the Plaintiff's advocates to the Attorney General.

The court was referred to other correspondence a letter from Mak Associates appointed as Agents by the Presidential Housing

Initiative. In it Mr. Philipp Zulu was offered to purchase properties namely plot No. 857/858 known as 3 Mc 17 Lukanga Kabwe. The offer made was because Mr. Zulu was a sitting tenant and on the basis of first refusal.

The court was further referred to a letter of offer Mr. Mwachende Adam to purchase plot 863 known as 3LC1 Lukanga Kabwe. In addition, the witness referred to the document on page 95-98, a Law Association of Zambia Contract and Conditions of Sale. The contract was dated 25<sup>th</sup> day of July, 2001 and was made between Kabwe Industrial Fabrics Limited and Adam Mwachende. The reason for bringing these documents before court was because the Plaintiffs wondered why they were treated differently from their colleagues who were given an opportunity to purchase houses. The witness informed the court that both companies were sold on the same basis that is 10 000 shares in the Company were sold.

The Attorney General according to the Plaintiffs was negligent in that the Attorney General did not investigate whether Mutashi as a Company was viable and able to run General Pharmaceuticals. The witness referred to the documents related to the registration of Mutashi. The witness alleged that he was not paid his benefits after he was retired in January, 1996 upto the date of liquidation. He referred to others who were in the same boat as he was. He informed the court that the number of the Plaintiffs

is sixty-four. The witness referred to some sample letters of termination in the bundle filed on the 28<sup>th</sup> February, 2000 from the liquidator Ages Ngoma. He was not aware of anyone who was paid their terminal benefits.

The Attorney General according to the Plaintiffs is the one to blame for the predicament the Plaintiffs found themselves in. That he should be liable for selling shares to Mutashi who did not have capacity to run the Company and had no experience to manufacture pharmaceuticals.

When cross examined **PW1** informed the court that before privatisation he was a Clinical Officer/Lab Technician and after privatisation he remained in the same position. It was his testimony that the Company under new management began to experience problems three months after the takeover. It was his testimony that prior to privatisation the Company was managed by management headed by a Managing Director and that the same was the case after new management took over.

**PW1** recalled signing a contract when he first started work. He did not sign another contract after privatisation he just continued working. He denied being part of the negotiations team for the privatisation of the Company. It was his testimony that he was not part of the negotiating team for the privatisation of Kabwe Industrial Fabrics. It was his testimony that though he

had neither formed a Company before nor did he know who set up Mutashi Company and their experience he came to the conclusion that they did not show that they had the ability to run the Company.

**PW1** testified that before the privatisation process the shareholders of the Company were the Government. He denied that it was the Government that runs the Company and that there was management in place. He admitted that he was employed by General Pharmaceutical Company and that Government did not pay him his salary prior or after privatisation.

**PW2** was **Patrick Ngoma** who once worked for General Pharmaceutical from 1980 to 1999 as a Machine Operator. It was his testimony that he left the Company because the Company folded up meaning the Company stopped operating. He attributed this to the new owner's incapacity to run it. He went further stating that if the Company's new owners had the capacity to run the Company it would not have sold the assets it found. **PW2** informed the court that before privatisation the Company was run smoothly and salaries were paid on time. There were no unnecessary closures of the production line and workers continued to live in their houses provided by the Company.

However after privatisation closures of production were experienced. Workers were sent on forced leave and evictions were conducted of workers from the houses provided by the Company. He learnt that the new Company had sold the houses they occupied. The union made an effort to engage management. Mr. Joseph Kasonde a Director of the Mutashi Company when asked about word going round that the houses were being sold informed them the position of the Company. Mr. Kasonde informed those present including the witness that what they heard was not a rumour but a reality. On their fate Mr. Kasonde informed them that if employees wanted they could buy the houses but that they should not ask the Company for money but seek funds from financial establishments. **PW2** testified that he did not approach financial establishments. That they did not have the capacity to do so.

On payment of salaries **PW2** testified that they could go three months without pay; when money was paid it was paid in installments. **PW2** informed the court that he was paid a lump sum of K200.00 his accrued service was not paid. He blamed the Government for the problems the Plaintiffs faced. Reason being that the Government did not scrutinize the one buying the Company because if the Government had done so the Company would not have gone into liquidation. **PW2** believed that at the time of privatisation it was the Government running the Company. He admitted that there was management in place. He

further admitted that after privatization there were changes in Management. **PW2** seeks that his benefits as well as benefits for the other Plaintiffs be paid.

When cross examined **PW2** informed the court that prior to privatization he was employed by General Pharmaceuticals Limited. That was the Company that he entered into a contract with and who paid his salary. The same Company paid his salary after privatization, sent him on forced leave, he however, wants the Government to pay his benefits. It was his testimony that the house he continued to occupy was by virtue of being employed by General Pharmaceuticals. **PW2** admitted that if the Company that paid his salary, looked after his welfare and did not go down would have paid his benefits.

He testified that after the Company went into liquidation he did not approach anyone to pay him his benefits. That when they were told that the Company was going under liquidation they were paid a lumpsum. He agreed that after privatization he continued to receive a salary because of the contract in place. It was his testimony that General Pharmaceuticals paid the lumpsum. Further that during the running of the Company by Mutashi after privatization the Government did not interfere with the running of the Company.

Counsel for the Plaintiffs filed submissions on the 23<sup>rd</sup> June, 2016. Despite several commitments no submissions were filed by the Attorney General. Counsel submitted that the sale of shares to Mutashi was done by Government through General Pharmaceuticals Limited and the third Defendant the Zambia Privatization Agency (now the Zambia Development Agency) this was done knowing that Mutashi Limited had no previous knowledge on how to run the Pharmaceutical business and as such there was negligence on its part.

Counsel further submitted that the negligence extends to the failure of General Pharmaceuticals Limited to obtain the consent of all employees over the change of rights entitled to the Plaintiffs by virtue of their employment to General Pharmaceuticals. After the transfer of share to Mutashi Limited Counsel submits that salaries, terminal benefits and housing benefits the Plaintiffs were entitled to were not realised. According to Counsel Zambia Pharmaceuticals Limited owed a duty to ensure unanimity with the Plaintiffs before privatisation. The court was referred to the case of *ER Dorset County Council (1994) ZWLR 554*,<sup>1</sup> where it was stated that:

***“It is essential to an action in tort that the act complained of should under the circumstances be legally wrongful as regards the party complaining that is it prejudicially affect him in some legal right. Merely that it will however, directly, do a man harm in his interests is not enough.”***

With reference to the above Counsel drew the court's attention to **Section 35 of the Employment Act Chapter 268 of the Laws of Zambia** which provides:

*"Rights arising under any written contract of service shall not be transferred from one employer to another unless the employee bound by such contract consents to the transfer and the particulars thereof are endorsed upon the contract by a proper officer.*

*Before endorsing any particulars of transfer on a written contract of service; the proper officer shall satisfy himself ...that the employee fully understood the nature of the transaction and has freely consented to the transfer and that his consent has not been obtained by coercion or undue influence or as the result of misinterpretation or mistake."*

Counsel referred the court to another case of **Zambia Consolidated Coppermines Limited and Ndola Lime Limited V Emanuel Sikanyika and Others (2000) ZR 105<sup>2</sup>** where the court held as follows:-

***"Change of ownership of shares can not result in the co-operate entity becoming a new employer. It will be still the same employer and will be bound by the contracts of employment.***

***While a contract of employment just like any other contract can be varied, any unilateral variation to an important term which is non consensual and which is non acceptable to the workers, would justify the aggrieved workers treating the same as repudiation and breach of contract by the employer which terminates the employment and which warrants the payment of repudiation or other terminal benefits as appropriate."***



Counsel argued that in this case any unilateral variation to an important term needs to be communicated to the employees and as such failure to communicate is a breach of a legal duty of the employer resulting in the breach of a legal right of the employees.

By way of illustration of his point Counsel referred the court to the case of *Peter Ngangwe and Others V Zamox Limited and Zambia Privatisation Agency (1999) ZR 90<sup>3</sup>* where it was held that:

*“If an employer varies the 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 on the dates of such variation and must get redundancy payment if the conditions of service so provide for such payment. If the conditions of employment provide for an early retirement and not redundancy, then the employee should be deemed to be placed on early retirement.”*

The court’s attention was drawn to what the authors of *Clarkson and Lindsell on Torts 17<sup>th</sup> Edition on page 25* state, that is –

*“Outside of duty and breach thereof is of primary importance, to say that commission of a tort requires the Plaintiff establishes a breach of duty...”*

Further regarding breach of a statutory duty *Clark and Lindsell* states (at the same page 25) that:

*“...breach of the relevant provision must be established and the Plaintiff must show that his injury resulted from that breach and not solely from his own act.”*

The court was urged to note that as a result of the transaction of selling shares to a Company Counsel stated lacked capacity to run the Company, the company was liquidated and therefore the loss of employment by the Plaintiffs.

On the responsibility of the third Defendant the court was referred to **Section 5(3)(e) of the Zambia Development Agency Act No. 11 of 2006** which provides the functions stating that:

*“In the exercise of its functions the Agency shall regard the need to protect the inherent of industries, employees, consumers and the community.”*

The court was asked to find that the Zambia Development Agency had a duty to –

- I. Protect the interest of the employees.*
- II. Make sure the employees are informed of the essential changes in their employment contracts*
- III. Manage, plan, implement and control the privatization*
- IV. Oversee all aspects of the privatisation.*

In making a case for the award of damages the court was referred to the Case Book on **Contract Law 11<sup>th</sup> Edition at page 308** which states that:

*“A breach of contract entitles the injured party to damages to compensate for the loss suffered as a result of the breach.”*

Further that at page 309 in the same book the following is stated:

*“The primary obligations are the performance obligations in the contract. Breaches of these obligations give rise to secondary obligations to pay damages.”*

The court was referred to the case of **Photo Production Limited v Securicor Transport Limited (1980) AC 827 (HC)** Lord Diplock held as follows:-

***“Breaches of primary obligation give rise to substituted or secondary obligations on the part of the party in default, and in some cases, may entitle the other party to be relieved from further performance of his own primary obligation. Every failure to perform a primary obligation is a breach of contract. The secondary obligation of the common law is to pay monetary compensation to the party for the loss sustained by him consequence of the breach’; but with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged.”***

In conclusion Counsel submits that the Zambia Government through General Pharmaceuticals Limited and the Zambia

Privatisation Agency, were grossly negligent in performance of their national duties for housing sold all the shares of General Pharmaceuticals Limited to Mutashi Limited, without assessment of their capacity of the said purchaser of shares. This risked both the assets and contracts of General Pharmaceuticals Limited and thus having a damaging effect on its employees upon liquidation of the Company. The Plaintiffs prayed that they be awarded-

- I. *Damages for loss of employment and agonizing consequences of such.*
- II. *Payment of arrears of salaries amounting to one hundred and ninety million two hundred and ninety-eight thousand six hundred and fifty one kwacha (190,298,651.00).*
- III. *Payment of arrears of salaries arising out of the liquidation of General Pharmaceuticals Limited Nine Hundred and one million three hundred and twenty two thousand five hundred and twelve kwacha (K901,322.512.00)*
- IV. *Damages for forceful eviction of the Plaintiffs who lost the continued use of General Pharmaceutical's residential properties that the Plaintiffs used to occupy by virtue of their employment under General Pharmaceutical Limited.*

V. *Damages for lost opportunity to purchase the residential properties that the Plaintiffs were evicted from which they were occupying by virtue of their employment under General Pharmaceuticals Limited, which houses the Plaintiffs were entitled to purchase as sitting tenants.*

The Supreme Court in its Judgment between General Pharmaceuticals Limited (1<sup>st</sup> Appellant) Zambia Privatisation Agency (3<sup>rd</sup> Appellant) and Agnes Ngoma (Liquidator of General Pharmaceuticals Limited) gave this Court direction. The second Defendant (The Attorney General) appealed to the Supreme Court. The ground of appeal before the court was that the learned trial Judge in the court below misdirected herself in dismissing the second Defendant's application to set aside Judgment in default when the second Defendant had a defence on the merits. The triable issue which the Supreme Court referred to is whether the second Defendant was at fault at all to be sued.

The comfort given to the Plaintiffs by the Supreme Court was that the setting aside of the default Judgment against the Defendant did not affect the Judgment which the Plaintiffs have already obtained. The Supreme Court went on to state that the trial involving the Plaintiffs and the second Defendant will only determine the liability and not the other Defendant(s).

On whether or not the 2<sup>nd</sup> Defendant was at fault to be sued. The sale of agreement is evidence that the Company General Pharmaceuticals Limited was privatized by the sale of 100 percent of the Company's shares by Government to Mutashi Limited. The shareholders of General Pharmaceutical Limited on that day became Mutashi Limited instead of Zimco Holding for the Government of the Republic of Zambia.

In her Judgment Honourable Madame Justice Chibomba referred to the settled principle of Company law that a Company is a separate legal entity from its shareholders. The Honourable Judge referred to the renowned case of *Salmon v Salmon (1897) AC 225* and the Zambian case of *Zambia Consolidated Coppermines, Ndola Lime Company Limited V Emmanuel Sikanyika and Others SCZ Judgment No. 24 of 200.*<sup>6</sup>

I have considered the evidence adduced on behalf of the Plaintiffs. I have also carefully examined all the documents before me including the sale agreement of shares in General Pharmaceutical Limited.

There is no evidence before me to suggest that the Defendant was at fault at all to be sued. There is no evidence that the Government was negligent in any way.

I adopt what was said by The Honourable Madam Justice Chibomba at page 14 of the Judgment that:

*“In any event the Government had the right to sale its shares in General Pharmaceuticals to any person it so wished including Mutashi Limited. The only people who could possibility complain of any negligence on the part of Zambia Privatization Agency or bring this type of action are the people of Zambia not an individual employee who had a personal contract with the Company that employed them. Contracts of employment are private and personal between the employer and the employee. In this case it would be between the Plaintiffs and General Pharmaceutical Limited (in liquidation).”*

As such the Plaintiffs’ prayer falls by the way side.

The decision of this Court does not affect the Judgment which the Plaintiffs have already obtained in the Judgment delivered on the 31<sup>st</sup> day of December, 2002.

For avoidance of doubt the parties are referred to pages J13 to J18 of the Judgment.

**DELIVERED AT LUSAKA THIS 31<sup>ST</sup> DAY OF OCTOBER, 2017.**

  
**G.C.M. CHAWATAMA**  
**HIGH COURT JUDGE**