

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT KITWE
Civil Jurisdiction**

2019/HKC/001



BETWEEN:

**JORDAN MBULO
TUESDAY BWEMBYA
MWABA CHARLES MAKANDO**

**1st PLAINTIFF
2nd PLAINTIFF
3rd PLAINTIFF**

AND

**PETER NDHLOVU
JENNIFER NYENDWA
NATHAN SAKALA
BARCLAY NYAMBE NASILELE
BERNARD ZULU
JOHN NENGA
JOSEPH MOYO
ROBERT ULULI
ALFRED KASOKA
GEMPRIDE MINING LIMITED**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT
5th DEFENDANT
6th DEFENDANT
7th DEFENDANT
8th DEFENDANT
9th DEFENDANT
10th DEFENDANT**

Before Lady Justice Abha Patel, SC. this 4th day of June, 2020

For the Plaintiffs: Mr. E. Chibeluka of Messrs Douglas & Partners

***For the Defendants save the 6th and 9th: Mr. K. Musukwa of Messrs
Nyirongo & Co.***

For the 6th & 9th Defendants: Mr. M. Kapukutula of Legal Aid Board

JUDGEMENT



Cases Referred to:

1. ***Krige and another vs Christian Council of Zambia (1975) ZR 152;***
2. ***Salomom v Salomon & Co. (1897) AC 22;***
3. ***Tata Engineering and Locomotive Company Limited vs State of Bihar 1965 AIR 40;***
4. ***ZCCM and Ndola Lime Company Limited vs Sikanyika and others, SCZ Judgment No. 24 of 2000;***
5. ***Associated Chemicals Limited vs Hill And Delamain Zambia Limited and Ellis and Company (Third Party) 1998 ZR at 9;***
6. ***Pouwels Construction Zambia Limited and Another vs Inyatsi Construction Limited (2016) 2 ZR 1;***
7. ***Christopher James Thorne vs Christopher Mulenga, Edgar Hamuwele and Zambia National Commercial Bank Plc (2010) Z.R vol. 1 at 221;***
8. ***Muyawa Liuwa vs The Attorney General SCZ Judgment No. 38 of 2014***

Legislation and Other Material Referred To:

1. ***The Companies Act, No.10 of 2017;***
2. ***Halsbury's Laws of England, 4th Edition***
3. ***Palmer's on Company Law***
4. ***Zambian Civil Procedure – Commentary and Cases –Hon. Dr. Patrick Matibini SC.***

1. Introduction

The 1st, 2nd and 3rd Plaintiffs issued a Writ of Summons and Statement of Claim on 8th January 2019 claiming the following:

- 1.1 An Order that the 3rd through to 9th Defendants are not shareholders and Directors in Gempride Mining Limited, the 10th Defendant Company herein (the company).
- 1.2 An Order that the allotment of shares to the 2nd through to 9th Defendants in Gempride Mining Limited is null and void ab initio.
- 1.3 An Order of Injunction restraining the 3rd through to 9th Defendants either by themselves or their agents or servants from holding themselves out as shareholders, directors or agents and servants of the company and from dealing with the assets of the 10th Defendant company and attending company meetings.
- 1.4 An order of payment to the 10th Defendant company of the sum of K20,000.00 withdrawn by the defendants from the company account at FNB Kitwe branch.
- 1.5 Costs and any other relief the Court may deem fit.

2. Facts and Background

- 2.1 The 1st, 2nd, 3rd Plaintiffs and the 1st and 2nd Defendants were the subscriber shareholders and directors in the 10th Defendant Company (the company).
- 2.2 The 10th Defendant company was incorporated under the Companies Act of Zambia on the 18th day of December 2006, under Registration Number 120060064692 with a nominal capital of Kwacha 5 million divided into 5 million shares of K1 each. This is noted to be pre re-basing.
- 2.3 The original subscriber shareholders and directors were as follows:

Jordan Mbulo	1.5 million shares
Tuesday Bwembya	1 million shares
Charles Makando	200,000 shares.
Peter Ndhlovu	2 million shares
Jean Nyendwa	300,000 shares

The office of secretary was originally held by the 1st Plaintiff.

The application for incorporation, the accompanying companies forms and the declaration of compliance were duly lodged at PACRA by Peter Ndhlovu, the 1st Defendant. This information is reflected in *the Plaintiffs Bundle of Documents* produced and marked at *pages 19 to 25*. (hereinafter referred to as the Plaintiffs Bundle).

2.4 The Court has noted that the subscriber shareholders, (named above), held the following shares after re-basing:

Jordan Mbulo	1,500 shares
Tuesday Bwembya	1,000 shares
Mwaba Charles Makando	200 shares
Peter Ndhlovu	2,000 shares
Jennifer Nyendwa	300 shares

3. Claims by the Plaintiffs

By a series of changes, submissions at the Patents and Companies Registration Office (PACRA), the defendants in *casu* are reflected as shareholders allotted with varying shares each. The Plaintiffs have challenged the allotment of shares to the 2nd through to 9th Defendants by the 1st and 2nd Defendants, and appointments of some of the defendants as directors on the grounds of illegality and being in contravention of the *Companies Act No.10 of 2017* (hereinafter referred to as 'The Companies Act'). Details of the alleged illegal transfers are pleaded in *paragraph 7* of the Statement of Claim.

3.1 It is further pleaded for the Plaintiffs that sometime in 2018, the 1st and 2nd defendants, without issuing a notice to the plaintiffs, purported to convene a company meeting at which meeting, a resolution was passed by the 1st and 2nd defendants allotting a total of 3,200 ordinary shares

to the 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants, and increasing the number of shares held by the 2nd defendant from 300 to 700 ordinary shares. It has been pleaded that the allotments were made without passing a special resolution, and that they have been excluded from the management of the company and have consequently suffered loss and damage. They have claimed the reliefs as set out in *paragraphs 1.1 to 1.5* afore.

4. The contentions of the Defendants

- 4.1 The Defendants have denied all of the Plaintiffs claims and have pleaded that due notice was circulated of all meetings and appropriate resolutions passed in accordance with the law. They also maintain that the 1st Plaintiff was not the appointed secretary of the 10th Defendant company and that the allotment of shares to the 2nd through to 9th defendants was done in good faith and in accordance with the law.
- 4.2 The defendants further plead that the 1st and 2nd defendants were always shareholders and directors of the 10th Defendant company, and that the Plaintiffs claims be dismissed with costs.
- 4.3 The Court has noted that the Plaintiffs had moved the Court for an interim Order of Injunction restraining the

defendants and had invited the Court to grant an injunction to restore the status, which existed before the allotment of shares to the 3rd to 9th defendants, and prior to their appointment as directors, pending the determination of the main matter.

4.4 This Court has also noted that by its *Ruling*, of 23rd May 2019, the erstwhile Court, under the hand of my Judicial sister, Hon. J. B. G. Shonga, declined the order of interim injunction, and by further order of the Court, the counter-claim filed by the defendants be tried separately and upon determination of this action.

4.5 The Court noting the issues in contention had invited Counsel to file an agreed list of issues in dispute for determination by the Court. Counsel however, failed to agree on the said issues and left those to be determined by the Court.

4.6 This is the status in *casu*. The matter proceeded to trial with Parties having filed the requisite skeleton arguments, witness statements, some of which were subsequently amended and their Submissions.

It is noted that no submissions were received for the 6th and 9th defendants. Suffice it to state that all pleadings are on record. The Court has anxiously considered all the

material placed before it, though may not repeat or restate the evidence of the Parties in its entirety.

The Court acknowledges the industry of Counsel and thanks them for their diligence.

5. The Issues for determination

The Court now considers the following issues that require determination:

i. Whether the 3rd to 9th defendants are shareholders and directors in the company;

ii. Whether the allotment of shares to the 2nd to 9th defendants in the company are illegal, null and void ab initio; and

iii. Whether there was an improper withdrawal, from the company bank account held at FNB, of the sum of K20,000 by the defendants.

6. The Evidence of the Plaintiffs

6.1 The 1st Plaintiff Jordan Mbulo, relied on his witness statement filed on 30th May 2019, which was admitted into evidence and marked *Plaintiff's Witness Statement 1*. It was his evidence that in December 2006, he and the

other two Plaintiffs, and the 1st and 2nd Defendant were the original shareholders in the company. He referred to the *Plaintiffs Bundle on pages 19 to 23* as proof of the incorporation of the company and its listed shareholders. It was his evidence that he together with the 2nd and 3rd Plaintiffs held 2,700,000 shares, while the 1st and 2nd defendant together held 2,300,000 shares of the 5 million shares, and thereby they (the Plaintiffs), formed the majority shareholding of the company. It was further his evidence that the shareholding structure remained the same till sometime in 2016. He referred to *page 33* in the *Plaintiffs Bundle* to show the same shareholding structure, for the five shareholders, save for the re-based value of shares. His evidence in chief was that sometime in 2018, and without his knowledge or consent or that of the 2nd and 3rd Plaintiffs, the 1st and 2nd Defendants purported to pass a special resolution allotting shares to one *Bernard Zulu* and *Robert Ululi* (the 5th and 8th Defendants). He referred to *pages 54, 55 and 56* of the *Plaintiffs Bundle* , in support of his evidence. It was further his evidence that that he and the other two Plaintiffs only became aware of this when they conducted a search at PACRA sometime in April 2019.

His evidence in chief was that he was the company secretary from incorporation, and he called in aid *pages 22, 23, 33 and 34* of the *Plaintiffs Bundle*. He reiterated

that as company secretary, he was the custodian of the books of records of the company, and at no time was there a meeting of 21st September 2018 and no resolution was passed allotting shares to the 5th and 8th Defendant. (*page 54 of the Plaintiffs bundle*). He further testified that at no time was he made aware of the additional shares allotted to the 2nd Defendant and indeed of any allotments of shares to the 3rd to 9th defendants. And that he and the Plaintiffs were shocked to discover the contents on *page 64 to 66 of the Plaintiffs Bundle* naming all the shareholders of the company. His evidence was that the 1st and 2nd Defendant together, did not represent the required two-third majority, to pass a special resolution, nor did they have the capacity to appoint Messrs Nyirongo and Co, to represent the Company in Cause No. 2018/HKC/0015, or to withdraw the sum of Kwacha Twenty Thousand (K20,000) from the company's account at First National Bank without his knowledge.

He further referred to *pages 67 to 70 of the Plaintiffs Bundle* in support of his evidence of the suspension of the Plaintiffs and maintained that his suspension, and that of the 2nd and 3rd Plaintiffs was without charge, and not supported by the law.

6.2 The 2nd Plaintiff *Tuesday Bwembya*, equally relied on his witness statement (PWS2), filed into Court on the same

day, and his evidence was in all material regards the same as that of the 1st Plaintiff. It was his evidence that after the 3rd to 9th Defendants became shareholders in the company, they altered the signatories to the Bank Account held at FNB Bank in Kitwe and withdrew the sum of Kwacha Twenty thousand (K20,000.00). He also reiterated that the quorum for passing a special resolution allotting shares to the 2nd to 9th defendants was not met and that none of the 3 Plaintiffs received notice of any such meeting.

6.3 The 3rd Plaintiff *Mwaba Charles Makando*, similarly relied on his witness statement (PWS3), and his evidence was similar to that of the 1st and 2nd Plaintiffs. In addition, he has stated that at the material time, he was serving as Councillor in Mungwi District of Northern Province, and may have missed any meetings called for the purpose of allotting shares to the Defendants, save that the 1st and 2nd Plaintiffs confirmed that no such meetings having been called, the transfer of shares to the 2nd through to 9th defendants was not valid and lacked the force of law.

7. Under cross examination, the 1st Plaintiff was referred to the *Defendants (save the 6th and 9th) Bundle of Documents*, (referred to as the *defendants bundle*), and at page 6 thereof. He was referred to a document entitled '*Minutes*

of Special Ordinary Meeting Held at Gempride Mining Limited. He confirmed being in attendance at that meeting held on 31st October 2016 in his capacity as Operations Director, and that the 3rd to 9th defendants were also shown in attendance as shareholders of the company. He was referred to *page 7* under *item 5* and asked to read it out, which read as follows:

“A committee of 4 members of Gempride was appointed to look into various grievances pertaining to shares. Thus the chairman, Mr Mbulo, Mr Zulu and Mr Nyendwa were given that task.”

The 1st Plaintiff was also asked to confirm the share capital of the company, which he stated to be 5 million, which was subsequently changed to 5,000 after re-basing. He was referred to *page 3 paragraph 4* of the *Plaintiffs Statement of Claim*, and conceded that the company had 15,000 and not 5,000 shares as was his evidence in his witness Statement. He further conceded that he together with the 2nd and 3rd Plaintiffs held 2,700 shares which did not give them the majority shareholding in the company. He was also referred to *page 34* of the *Defendants Bundle* and confirmed that it was a letter dated 19th September 2018 addressed to PACRA at Kitwe, and that it was to confirm that the company’s share capital was Kwacha Fifteen Thousand and to introduce two new shareholders as listed on Companies Form 28, which was shown on *pages 35 and 36*. He also confirmed that the letter was

signed by himself and the Chairman (Peter Ndhlovu), and referred to the addition of more shareholders. He was also referred to pages 38, 39 and 40 of the same bundle being a document entitled *Final Allocation of Shares* dated 16th July 2014. He confirmed his signature on the document and maintained that the use of the word 'shares' was misapplied, as it was not intended to confer shareholding in the company, but was to re-pay friends of the company from the proceeds of sale of the small mine that they had sold. He was referred to *page 60* of the same bundle and questioned on the reference to the word '*percentage*', in the document entitled '*Gempride Mining Limited Shareholder Final Payment Schedule*'. His explanation was that the percentages reflected the agreed pay-outs for themselves and their friends.

He was also referred to *page 68* and confirmed it to be a letter of instruction to FNB Bank in Kitwe dated 31st August 2018, which introduced 3 new signatories to the account. He confirmed that the letter had been signed by him.

He was also referred to *page 79* being a document dated 25th September 2010 entitled *General Meeting* and was asked to read out the resolutions therein contained. When asked whether he had proceeded to issue share certificates to the new members, he responded in the negative stating that they had not paid for the shares.

He was also referred to *page 94* in support of the proposition that he attended the meeting of 25th July 2011 in his capacity as Director Operations, and Charles Makando as Secretary, and could not refer to any document where he had acted as secretary of the company.

8. Under cross-examination by Counsel for the 6th and 9th defendant, he confirmed that the two had been dealing with the company for a long time and their interactions were of a financial nature extended to the company and to the shareholders. He was referred to the *6th and 9th defendants bundle of Documents* and confirmed that the 6th defendant was owed sums of monies stated therein by both the company and the shareholders in their individual capacity. He was also referred to *pages 79 and 80* of the *Defendants bundle* which showed the 6th and 9th defendants names listed as shareholders on *page 80*, a fact he confirmed.
9. Under re-examination, the 1st Plaintiff attempted to clear his understanding of the share capital of the company from the original Kwacha five million, to Kwacha five thousand after re-basing, which was subsequently raised to Kwacha fifteen thousand. His explanation for *pages 6 and 7* of the *Defendants bundle* was that the reference to

the word 'shareholders' was not meant to suggest shareholders, but persons who assisted the company from time to time. He was referred to *pages 38, 39 and 40* of the same bundles and his understanding was that the company had agreed to pay out funds to those that had assisted in the operations of the company, not that they were to be treated as shareholders.

His explanation when referred to *page 68*, was that although he had signed the letter, the resolution to be signed by all 5 shareholders was never issued to give effect to the change in signatories for the bank mandate. It was his understanding that the power given to the Chairman and the 3rd Plaintiff in terms of the document on *page 94* was to deal with the general business of the company, while the issues of shareholding should revert to the original five shareholders. With respect to the 6th and 9th defendants, he stated that they had rendered assistance to the company, and that if the 5 shareholders had sat to discuss the matter, they, (the 6th and 9th defendants), would have been allotted shares in the company. In conclusion, it was his understanding that the 3 plaintiffs combined had a total of 2,700 shares as opposed to 2,300 shares held by the 1st and 2nd defendants, and that even when the share capital was enhanced to Kwacha Fifteen thousand, their shareholding equally stood enhanced in the same proportion, giving them the majority.

10. The *2nd Plaintiff, Tuesday Bwembya* relied on his Witness Statement and his cross examination was essentially the same as that of the 1st Plaintiff. Similarly counsel for the 6th and 9th defendant's cross examination elicited the evidence that both the 6th and 9th defendants were long time financiers of the company and he confirmed the indebtedness as shown on *page 2* of the *6th and 9th Defendants Bundle of documents*. He was also referred to *page 93* of the *Defendants Bundle* and confirmed that resolution no. 1 referred to a reduction in the shareholding of the 6th and 9th defendant. He also confirmed that he attended the said meeting on 12 August 2010.

11. The *3rd Plaintiff, Charles Makando* relied on his Witness Statement. He denied having been appointed the company secretary and that he only acted whenever instructed by the Chairman but did not have any document to confirm that position. He was shown several documents, which were also shown to the 1st and 2nd Plaintiffs. He was also referred to *pages 79 and 80* of the *defendants bundle* and confirmed that the names shown of people were to be issued with share certificates and that the resolution was passed at a meeting held on 25th September 2010, and which meeting he attended. Under cross examination by Counsel for the 6th and 9th Defendant, he confirmed the

primary mode of interaction of the 6th and 9th defendant was to assist in the finance of the operations of the company.

During re-examination, he said that the document on *page 17* of the *defendants bundle* was not an official document, and was not on a letterhead. He was also referred to *page 15* of the *defendants bundle* and confirmed that he had signed the letter on the instruction of the Chairman. He was referred to *page 6 and 7* of the *defendants bundle* to proffer the explanation that the meeting was held in his absence and that he was not aware of *item 5* on the appointment of a committee to look into grievances pertaining to shareholding.

This marked the close of the case for the Plaintiffs.

12. Evidence of the Defendants

12.1 The Defendants first witness was *Peter Ndhlovu DW1*. He produced his witness statement and the bundles, which were admitted into evidence and marked *DWS1* and the *Defendants Bundle of Document 1*.

Under cross examination, he was referred to *pages 9, 19, 20 and 22* to confirm that Jordan Mbulo, *PW1* was the company secretary as per documents lodged at PACRA on 10 December 2006. He responded to deny that he had appointed him to be company secretary.

He was subsequently referred to *paragraph 6 and 7* of the defence on *page 9* of the *Plaintiffs bundle of documents*, and could not refer to any Notices issued by the Company, nor could he confirm that the meeting at which the special resolution were passed as per *page 54* of the *Plaintiffs bundle* were attended by the three Plaintiffs. He also confirmed that the 2nd defendant, Jennifer Nyendwa is his wife. He confirmed that at the said meeting, they introduced two new shareholders, namely *Bernard Zulu* and *Robert Ululi*, the 5th and 8th defendants respectively. He further confirmed that they attended the meeting in their capacity as shareholders at which meeting the resolution to support their appointment was made. The document he was referred to was lodged at PACRA on 24 September 2018. He was also referred to *page 31* of the *defendants bundle*, and confirmed that the resolutions stated in the said document were passed in the absence of the three Plaintiffs and in the presence of all the people listed on *page 32* and who were all shareholders in the company. According to him, by 2018, there were 16 shareholders in the company.

He was referred to *page 1* of the *Agreed Supplementary bundle of documents* which was a copy of the amended Articles of Association of the company, filed at PACRA on 26th March 2018, and which reflected the original five shareholders.

He was also referred to *page 6* of the defendants bundle of documents, and questioned about a set of minutes of a meeting held on 31st October 2016, listing the various names cited as shareholders, and asked to compare it with documents on *pages 54 to 56* of the *plaintiffs bundle* being a letter to PACRA and Companies Forms 5 and 45 dated 24 September 2018 purporting to advise PACRA of new shareholders in the company. His response was they were all already shareholders from 31 October 2016.

He was not able to refer to any documents in the bundles to show that the 3rd *defendant*, Nathan Sakala received his shares by operation of the law and following the passing of his father, who was stated to hold 300,000 shares in the company. He was referred to *page 36* of the *defendants bundle* and confirmed that he signed that document purporting to give 300 shares to the 3rd defendant, which was lodged at PACRA on 21 September 2018, but maintained that those shares were by way of inheritance. He could not refer to any documents in the defendants bundles pointing to a special resolution allotting shares to *Barclay N Nasilele, John Nenga, Joseph Moyo or Alfred Kasoka, the 4th, 6th, 7th and 9th defendants* respectively.

He was questioned extensively in relation to the share capital, the increase in share capital, and his explanation was that the share capital had been increased to K15,000 prior to the 21 September 2018, (*page 54 of Plaintiffs*

bundle) and that they had created additional shares for allotment.

On the issue of Notice convening meetings as per *paragraph 6* of the defence, he maintained that notice was given by phone calls.

12.2 Under cross examination by Counsel for the *6th & 9th defendants*, he confirmed that they had rendered financial assistance to the company for a long time and that he regarded them both as shareholders.

He clarified his evidence that documents duly filed at PACRA, were being removed and that the *3rd Plaintiff Charles Makando* was the company secretary for the company.

12.3 The defendant's second witness was *Bernard Zulu*, the *5th defendant*. He relied on his witness statement which was admitted into evidence and marked *DWS2*. Under cross examination, he named the original five shareholders and explained that only the said shareholders could pass a special resolution to allow other members to join the company. His understanding was that 3 out of 5 members could vote to pass a special resolution. It was further his explanation that although all five million shares were subscribed, the company later diluted its shares to offer shares to additional shareholders. He could not however,

refer to any such resolution to support the dilution of shares. He placed reliance on a letter dated 21 November 2017, at *page 17* of the *defendants bundle*, being a hand written, un signed letter allotting him 150,000 shares.

His evidence was also that the company had 16 shareholders and was referred to *pages 113 to 115* of the *defendants bundle of documents* and was questioned as to why several names who were listed as shareholders were not party to the action.

On the issue of change of signatories to the company's bank account, he was referred to *page 68* of the *defendants bundle* but could not refer to an resolution to confirm that all shareholders had consented to the instruction as requested by the Bank. He also maintained that he had discovered that his name had been removed in 2009 or 2010, but that he did not commence any action against the company.

He was questioned on the various documents similar in nature to the questions posed to the *1st Defendant*, and his answers were essentially similar to the answers of the *1st defendant*. Central to the answers being that all meetings were properly convened, resolutions properly passed, and that lodgements made at PACRA were being removed by the *1st Plaintiff* thereby necessitating re-filing. He conceded that this issue had not been pleaded in the defence.

He also confirmed that the 6th and 9th defendants had rendered financial assistance to the company and had been associated with the company for a long time.

12.3 The defendant's third witness was *Alfred Kasoka*, the 9th Defendant in the proceedings. His witness statement was admitted and marked DWS 3. He stated that he was a business partner John Nenga, the 9th Defendant. His evidence was that in the year 2017, he together with the 9th defendant was approached by the 1st, 2nd and 3rd Plaintiffs and the 1st and 2nd Defendants to finance the operations of the company.

He was referred to the list of names as appearing on pages 31 & 32, 66 & 67 and 95 & 96 of the *defendants bundle* and confirmed that he was not in attendance at those meetings of August and November 2018. He narrated that most names of people who were supposedly shareholders but not listed were friends of *Peter Ndhlovu*, the 1st defendant.

He was questioned in like manner as the 1st and 2nd defendant witnesses, and confirmed that he had not seen any document allotting shares to him.

This marked the close of the case for the defence.

13. The Law

An opportune place for the Court to start to unravel the evidence of the Parties, is by reflecting on the law in relation to Registered Companies. *The Companies Act No. 10 of 2017* (hereinafter referred to as *The Companies Act*), regulates companies in Zambia. It is noted that this Act repealed and replaced the *Companies Act of 1994*. Registered Companies are primarily governed by the provisions of the *Companies Act* and by the rules and regulations laid down in the Articles of the company and or any shareholders agreements entered into.

A company comes into existence when it is registered, and a certificate of incorporation issued to it, by the Registrar of Companies. In terms of *section 12(1)* of the *Companies Act*, any two or more persons associated for a lawful purpose may form a company by subscribing their names to an application in a prescribed format.

A company is in law regarded as a legal entity separate and distinct from its members. In terms of *section 11* of the *Companies Act*, a company is deemed incorporated on and from the date specified in the certificate of incorporation. By *section 22* of the *Companies Act*, a company is invested, subject to the Act, and to such limitations as are inherent in its corporate nature, the same capacity, rights, powers and privileges of a natural individual.

13.2 The celebrated case of **Salomom v Salomon & Co.**

settled the law on corporate personality. Because a company is distinct and separate from the persons making it up, it cannot be held liable for the acts of individuals in the company, nor can an individual claim a benefit due to the company, even if he holds a substantial interest in the company.

Lord Macnaughten in the *House of Lords* captured the corporate personality of the company in the following words:

".....The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

Similar reasoning has been applied in the Commonwealth Jurisdiction. The Indian Supreme Court in the case of **Tata Engineering and Locomotive Company Limited vs State of Bihar**, in pronouncing on the concept of corporate status said as follows:

'The corporation in law is equal to a natural person and has a legal entity separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to capital invested by them; similarly the creditors or members have no

right to the assets of the corporation. This position has been well established ever since the decision in the case of Salomon vs Salomon & co, which was pronounced in 1897 and indeed has been the well recognised principle of common law.”

14. The Zambian Supreme Court has approved the principle of corporate personality espoused by the Salomon case in several cases. In **ZCCM and Ndola Lime Company Limited vs Sikanyika and others**, the Court recognised the distinction between the company as a body corporate and the shareholders in that company.

This position was clearly expounded by this Court in the case of **Christopher James Thorne vs Christopher Mulenga, Edgar Hamuwele, and Zambia National Commercial Bank Plc**. The Court stated as follows:

“No shareholder has any right to any item or property owned by the company for he has no legal or equitable interest. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”

See also the case of **Associated Chemicals Limited vs Hill And Delamain Zambia Limited and Ellis and Company (Third Party)**.

A company's life ends when it is wound up and struck off the register in accordance with section 190(1) of the Companies Act.

It is worthy to note that where a shareholder of a company dies, the legal representative of the deceased shareholder

becomes entitled to shares by way of transmission. In other words, the company enjoys perpetual succession. Other notable features of corporate personality are the following, namely that a company:

*can own property in its own name;

*has limited liability, this is arguably the principle advantage;

*has the capacity to sue and to be sued; It is important to note that no action can be maintained in the company's name without authority of the company nor can a shareholder or director be a proper Plaintiff in an action to redress the wrongs committed to the company.

*can transfer shares freely like moveable property. *Section 188(1) of the Companies Act provides:*

‘subject to the articles, fully paid-up shares in a company may be transferred by entry of the name of the transferee on the share and beneficial ownership register and evidenced by registration with the Registrar.’

15. I must now move to an analysis of the Companies Act and the Articles of Association of the Company, being the governing instruments, to unravel the heap of conflicting evidence placed before the Court.

I have considered the provisions of *sections 141 (2) (a) (i), section 66 (a), (c) and (d), section 67 (1) (a), 67 (3) and section 78 (1) of the Companies Act.*

Section 141 (2) (a) (i) states that a share in a company confers on the holder the right to one vote on a poll at a meeting of the company on any resolution, including a resolution to appoint or remove a director or auditor.

Section 66 (a)(c) and (d) entitle, the following persons to attend and to speak at a meeting of a company: a member with the right to vote at the meeting; a director of the company; and the secretary of the company.

In terms of *section 67 (1) (a)*, a member shall have one vote for each share and whole unit of stock that the member is registered as holding, unless the articles provide otherwise. On the contrary, *section 67 (3)* disentitles a person who is not a member from voting at a meeting of the company.

Lastly, *section 78 (1)* of the Act obliges a company to, within twenty-one days after the passing of a special resolution, lodge with the Registrar a certified copy of the resolution.

I have scrutinised the Articles of Association of the Company (hereinafter referred to as *the Articles*), as provided in the *Agreed Supplementary Bundle of Documents filed on 23rd August 2019*, and quote the following to be relevant in my examination of the issues identified above:

16. *Article 1 on Interpretation* provides the following definitions:

‘Resolution’ means an ordinary resolution of the company
‘Secretary’ Means any person appointed to perform the duties of a secretary of the company

Article 2 on Share Capital and variation of rights provides:

(3) the directors shall not issue any rights or options to shares in favour of any persons unless the issue has been authorized at a general meeting by a special resolution.

*(8) (1) A person whose name is entered as a member in the register of members shall be entitled without payment to receive a certificate in respect of the share under the seal of the company in accordance with the Act.

* *Article 6 on Transfer of Shares* provides:

25 (1) subject to these regulations, a member may transfer all or any of his shares by instrument in writing in a form

prescribed for the purpose of section fifty-seven of the Act or in any other form that the directors approve.

(2) an instrument of transfer referred to in sub regulation (1) shall be executed by or on behalf of both the transferor and the transferee.

* Article 7 on *transmission of Shares* provides:

30. In the case of the death of a member, the survivor where the deceased was a joint holder, and the legal representative of the deceased where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares,

* Article 9 on *Alteration of Capital* permits changes to the company's share capital by way of increase, consolidation, subdividing or cancelling, as the case may be, by way of resolution.

* Article 10 on *General Meetings* provides *inter alia*:

41 (1) a notice of a general meeting shall specify the place, the day and the hour of meeting and, except as provided by sub regulation (2), shall state the general nature of the business to be transacted at the meeting.

It is worth noting (*paragraph 43 (a)*) that two members shall constitute a quorum at a general meeting.)

*Article 14 on *Proceedings of Directors* provides *inter alia* that at a meeting of directors, the quorum shall be two or such larger number as determined by a resolution of the company. Paragraph 65 (1) empowers the directors to delegate any of their powers to a committee or committees consisting of such of their number as they think fit.

*Article 17 on *secretary* provides that a secretary shall hold office on such terms and conditions, as to remuneration and otherwise, as the directors determine

*Article 25 on *capital* states that the capital of the company is Kwacha fifteen thousand divided into 15,000 shares of K1 each. The Articles end with details of the five subscriber shareholders with the shareholding structure as narrated in paragraph 2 above.

I pause to consider that the Articles are stated to be *Amended Articles of Association* and are filed at PACRA on 26 March 2018. To the extent, that these were filed in an agreed Bundle, and were amended, by operation of the law, I will lean on them extensively.

17. Analysis and application of the facts to the law

Having discoursed the law and the attributes of corporate personality, and having stated the issues for determination, I must now escalate my enquiry by applying the law to the facts in *casu*.

Having heard the evidence of the Parties, in chief and under cross examination, and having considered the submissions of Counsel, the following facts are not in dispute:

- i. The plaintiffs, and the 1st & 2nd defendants, in or around 2006, were the original subscriber shareholders and directors in the 10th defendant company;
- ii. The initial share capital was kwacha five million, made up of 5 million shares, all of which were fully subscribed between the five shareholders;
- iii. The 1st defendant, executed the requisite declaration of compliance at incorporation;
- iv. The plaintiffs together held 2.7 million shares, and the 1st & 2nd defendants held 2.3 million shares;

- v. The share capital was altered (by operation of the law), to kwacha five thousand, after the re-basing of the currency, in 2012 ;
- vi. The 10th defendant company was incorporated under the Companies Act of Zambia;
- vii. Several associates helped to finance the operations of the company;
- viii. The 1st defendant is the husband of the 2nd defendant;

18. The Court has noted the contested and conflicting evidence of the Parties. It is noted that *two camps of shareholders* have emerged in the dispute before Court, namely the Plaintiffs in the one camp, and the 1st and 2nd defendants, (along with the remaining defendants in *casu*,) in the other. The court has noted that each *camp* has lamentably failed to follow the provisions of the law and the Articles in all matters in contention. The evidence of the witnesses as recorded, speaks for itself.

19. Reverting to the first issue identified above:

Are the 3rd to 9th defendants shareholders of the company?

The Plaintiffs went to great lengths to testify that they were neither invited to, nor did they attend any meetings where the

defendants were offered shares in the company. They did not participate in any resolutions and alleged that no such resolutions were passed.

The 1st defendant, on the contrary, maintained that due notice was always given, and under cross examination, he stated that sometimes notice was by telephone, although, no records of such notice was produced.

He further testified that the company resolved, *inter alia*, to institute investigations on the company bank account after unexplained transfers of money and to dissolve the old executive. The resolutions were stated to have been passed after the general and board meetings held on 8th August, 2018. However, no evidence of notice convening the said meeting was produced.

In accordance with the provisions of the law, and the enabling Articles, the Court has noted the conspicuous absence of any share transfer forms duly executed by the transferor(s) and transferee(s), the proof of payment of tax to the national revenue authority, combined with the absence of share certificates.

Further, the Articles of Association as referred to by the Court above, and having been filed in an agreed supplementary bundle, and having been registered at PACRA on 26th March

2018, remains the only registered evidence of the shareholders of the company.

The defendants (save the 6th and 9th), have attempted to convince the Court that any and all changes made to the shareholding structure, and which changes were submitted to PACRA, had been removed by the plaintiffs. However, and as noted, in the absence of the documents required to prove a change in shareholders, such allegations must remain as they are, allegations.

Such findings must as a matter of procedure, and law, lead to a finding that any or all share transfers made are null and void. The Court is obliged to follow the law in its application to the facts before it.

20. I find as a matter of fact that the disputing parties may have been oblivious to the requirements of the Companies Act, and the Court is also minded that business men may in fact conduct business relations in an informal and not structured fashion. However, to arrive at any other finding, would render the Companies Act and the Articles of Association otiose and academic. The law is the law and must be applied with uniformity to he who seeks to come before it.

It is trite that ignorance of the law is no defence.

Counsel for the Plaintiffs attempted to show the Court, through vigorous cross examination, that *pages 32, 68 and 93* of the *defendants bundle* appeared to be the same second page, used at every meeting to purport to show attendance of the parties whose names were therein stated.

However, and in as much as the Court may be inclined to give a listening ear to the said submissions, it remains a fact that the Court is neither possessed with skills in analysing hand writing, nor claims to have specialised forensic training to make any findings, such as it was being invited to do. All such aspersions made by counsel, are to say the least, speculative and un-supported by the evidence placed before the Court.

In this case, evidence clearly demonstrates that the plaintiffs and defendants all have an interest in the company, which company is regulated under the Act. It is not in dispute that the plaintiffs are directors and shareholders, albeit currently on suspension. In their claims, the plaintiffs primarily seek to ascertain the rightful shareholders and directors of the company in terms of the Act.

That being the case, I have arrived at the conclusion that their claims are founded on the law. On the evidence before me, it has been demonstrated that the plaintiffs, 1st defendant and 2nd defendant were the original subscribers and directors of the 10th

defendant company, a company incorporated on 18th December, 2006. The evidence also demonstrates that as at 6th July, 2016 the plaintiffs, 1st defendant and 2nd defendant remained the only registered shareholders and directors of the company.

Further evidence reveals that as at 24th September, 2018 the 3rd to 9th defendants were added and reflected as shareholders of the company at PACRA. In addition, the 5th and 8th defendants were registered as directors. No minutes of the meeting at which the shares were said to have been allotted were adduced.

The defendants on the other hand, have countered that at a company meeting held on 31st October, 2016, as per *page 101/102* of the *defendants bundle*, at which the 1st and 2nd plaintiffs were in attendance, as were the 1st, 2nd, 4th, 5th, 6th, 7th and 8th defendants in their capacity as shareholders, with apologies noted from the 3rd plaintiff as the secretary, appropriate resolutions were passed.

Thus, the evidence before court is that the plaintiffs are directors and shareholders in the company. They have also demonstrated that there was a change in the ownership and management structure of the company sometime between July 2016 and September 2018.

However, there is a gap in the evidence to support the submission that the allotment of shares was within the confines of the law or articles of association.

21. As a consequence of the above determination, I find that from the evidence before the Court, there is no proof that the 3rd to 9th defendants are shareholders of the company.

It flows from the above, that the 2nd issue is equally answered in the negative.

22. I now move to the third issue to determine whether the sum of K20,000 was misappropriated by the defendants from the company's account held at FNB Kitwe, as alleged by the Plaintiffs. The Court has noted *page 68* of the *defendants bundle* and has noted that the 1st Plaintiff has signed the said letter, a fact equally confirmed by the 1st Plaintiff. However, and to the extent that there is no proof of any subsequent resolution having been passed, I am shackled by the provisions of the law, and do find that there was no proper authorisation for the transfer of the sum of Kwacha Twenty thousand (K20,000.00) from the company's account.

Having already found that none of the requirements for the passing of a resolution, or the convening of meetings by appropriate notice or indeed the allotment of shares was done

in accordance with the law, namely, the Articles and the provisions of the Companies Act, it is otiose, in my considered view, to proceed any further in the determination of this matter.

23. Although it is noted and evidence was led and accepted of attendance at some meetings, (see *page 79* of the *defendants bundle*) to demonstrate that the company acted on decisions made collectively by the plaintiffs and defendants, it is trite that two wrongs do not make a right.

Section 67 of the Companies Act, refers to conduct and voting rights and quorum at a meeting. However it becomes an academic exercise to examine this, and other provisions of the Act, as the Court has found as a matter of fact, that all purported meetings, whether annual general meetings, or meetings at which resolutions, special or ordinary, were proposed or any other meetings were not preceded by the mandatory notice required under *section 63* of the Act.

On the issue of valid resolutions, I am ably guided by the holding of the Supreme Court in the case of **Pouwels Construction Zambia Limited and Another vs Inyatsi Construction Limited**, wherein the Court stated as follows:

‘There can be no presumption of a valid resolution when the requirements of the law have not been satisfied. The resolution is patently invalid as only

one shareholder, signed it when the record of appeal shows that that the first appellant company had three shareholders.”

It is manifestly clear that the shareholders, and their cohorts, were ignorant of the distinction between the shareholders, the Board of Directors, and the issue of distinct corporate personality. They were all engaged in conduct as though they were running and operating a small family business, and reference to words and/or phrases such as ‘*resolution*’, ‘*shareholders*’, ‘*notice*’, ‘*share capital*’, and indeed ‘*company secretary*’, to mention a few, were employed loosely, and as understood by them, and not as defined by the authorities and the law.

The Court has gleaned, that following incorporation, all went well, people came and left, and ‘*shares*’ were ‘*allotted*’ at will, and without any semblance of compliance. It would appear from the evidence that discontent started to brew in or about 2016, when, for a litany of reasons, *inter alia*, the sale of the company’s small scale lining licence and then its large scale mining licence.

There was also evidence that the company (the 10th defendant) is dormant and has no assets, save for monies held by a Law Firm being the proceeds realised from the sale of the said licences. The Court cannot make any finding on this, as no

evidence was placed before the Court, such as an order for the striking off the Register at PACRA.

The disputes appear to have emanated when there were funds in the company's coffers, and the two camps of '*shareholders*' disagreed as to the distribution of the funds. There is also history of complaints to the Police of a criminal nature, for fraud and other such conduct, by and between the differing camps.

This in essence, in my considered opinion, is the crux of the dispute .

The defendants allege that documents at PACRA were removed and or substituted. However, the *5th defendant* in his evidence confirms that no action was taken for the rectification of the register, nor was this fact pleaded. PACRA is not a party to the proceedings either. This allegation must therefore rest here.

Further, it is noted that somewhere along the line of evidence, the authorised share capital of the company was altered from Kwacha five Million and which was fully allotted, (to Kwacha five thousand after re-basing), to Kwacha fifteen thousand.

The inference and the evidence to support it, is that this was adjusted to make way for new share allocation. However, issues of share dilution and increase in share capital, by their very nature, has to be in compliance, and as already determined, there was no compliance.

The defendants in their submissions, and further submissions have attempted to argue the doctrine of estoppel and have relied on several authorities that espouse the principle. The Court, however is inclined to agree with submissions of counsel for the Plaintiff that estoppel was neither pleaded, as per the requirements of *Order 18 rule 8 (14)* of the *Rules of The Supreme Court 1999* edition, nor can it be founded as a defence to a statute. This principle was echoed by the Supreme Court in the case of **Krige and another vs Christian Council of Zambia** .

24. Ruling

For avoidance of doubt, although the plaintiffs appear to have succeeded in their claims, and although such success may be termed technical, the issue of costs must be determined in light of the conduct of the plaintiffs, and the 1st & 2nd defendants.

I am ably guided by the Supreme Court in the case of **Muyawa Liuwa vs The Attorney General** where the Court states as follows:

“We must state here that Courts should not be used to vent out a litigant’s frustrations and desperation. We frown upon the applicants conduct in this matter. We will conclude by issuing a stern warning to the applicant and other litigants, that there are attendant consequences for persistently abusing court process in this manner.”

My finding therefore is that costs must lie where they have fallen.

Any other finding would be akin to the Plaintiffs and 1st and 2nd Defendants, having their cake and eating it too.

From their evidence and pleadings, the Plaintiffs appear to meander in their dealings with the company, namely, they accepted monies when required, and then defended the word '*shareholders*' to not refer to *shareholding* in the ordinary sense of the word.

The Defendants too, denied some of the documents, albeit in their own bundles, conceded to not having issued due notice, of meetings, attempted to appoint directors, shareholders, bank signatories at will, and weaved their way through the proceedings, convinced of their actions.

25. Summary of the Orders made by the Court:

- i. The shareholding structure and constitution of the Board, shall revert to that filed in the Amended Articles of Association filed at PACRA on 26th March 2018.
- ii. The finding above that meetings were not held in accordance with the instruments of governance, it follows that the suspension of the 1st, 2nd and 3rd Plaintiffs from being shareholders and directors of the company is lifted.

- iii. For the avoidance of doubt, and to prevent further litigation on this issue, the finding above shall not have retrospective effect, and will come into effect from the date of this Judgment.
- iv. By way of observation, it is noted that *Article 24* of the Articles of Association provides for arbitration. However, and be that as it may, this Court having taken conduct of the proceedings, mid-stream, and after the Ruling referred to in *paragraph 4.4* above, did bring notice of this to the respective Counsel.
- v. Counsel opted to proceed by way of consent to dispense of arbitration as the procedure of choice for the settlement of this dispute, and indeed others that may remain unresolved. Although this is regrettable, and although the Plaintiffs have added to the state of impasse, this Court has a duty to decide according to the law and on the facts of each case.
- vi. The Court, having noted that the parties listed as *3rd to 9th defendants*, having given monies to the company, under the mistaken belief that they were to be considered and treated as shareholders, and such that the Plaintiffs and *1st and 2nd defendant* do not benefit from their own non-compliance, does hereby order that the amounts due and

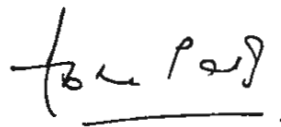
payable to them, be assessed and determined by the learned Hon Registrar.

- vii. The sums due to the *6th and 9th defendant* as filed in their *bundle of documents* of 29th August 2019, and the same having been confirmed by the Plaintiffs, and the 1st defendant, shall stand as the assessed sums due to them.
- viii. The Court having determined the absence of the requisite resolution to alter the bank mandate, it is further ordered that the sum of Kwacha Twenty thousand (K20,000.00) be retired to the company's account by the 1st and 2nd defendants.
- ix. Having noted that, there is still pending the determination of the counter claim, the Court accordingly orders that funds currently held to the benefit of the company, from the sale of its mining licence, be preserved in trust, with the Law Firm holding the said funds, or as otherwise agreed, till such time as the counter claim is heard and determined, or sooner settled, and the assessment as per *(vi)* above is concluded by the Learned Hon Registrar, or settled by consent of the Parties.

- x. The costs of this action must fall on the original five shareholders respectively, for their dilatory conduct. Such costs to be agreed or taxed in default of agreement.

Leave to Appeal is granted.

Delivered in Open Court, the^{4th} day of June, 2020.



Lady Justice Abha Patel, SC