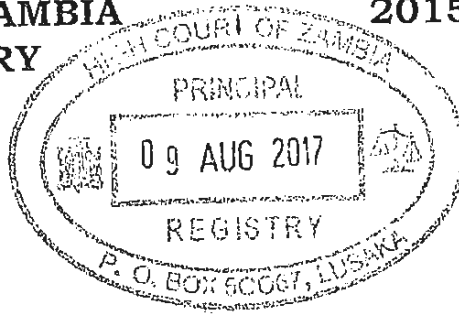


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2015/HP/0678

**B E T W E E N:**

JULDAN MOTORS LIMITED

1st PLAINTIFF

JULY DANOBO

2nd PLAINTIFF**AND**

NASSER IBRAHIM

1st DEFENDANT

OLYPA SIBONGILE DANOBO

2nd DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 9th
day of August, 2017**

For the Plaintiffs : Mr. H.H. Ndhlovu SC, Messrs H.H. Ndhlovu & Co,
Mr. J. Zimba, Mr. N. Botha, Mrs. M. M. Nkunika,
Messrs Makebi Zulu & Advocates

For the Defendants : Mr. G. Phiri, Messrs PNP Advocates, Mr. K.
Mweemba, Mr. S. Mbewe, Ms. M. Mwiinga,
Messrs Keith Mweemba Advocates

J U D G M E N T

Cases Referred To:

1. *Masauso Zulu v Avondale Housing Project Ltd.* (1982) Z.R 172
2. *Khalid Mohamed v The Attorney General* (1982) Z.R 49 (S.C)
3. *Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership), Charles Haruperi* (2005) Z.R 78 S.C
4. *Associated Chemicals Limited v Delmain (Zambia) Limited and Another* (1998) Z.R 9
5. *Re Bird Precision Bellows Limited* (1985) 3 ALL ER 537
6. *Pan Electronics Limited and Savvas Panayiotides and Others v Andreas Miltiadous and Others* (1988-1989) Z.R 19 (S.C)
7. *Macaura v Northern Assurance Company Limited* (1982) A.C 619
8. *Pangea Renaissance Securities Limited v Lilayi Development Limited* (2013) Z.R 58

Legislation Referred To:

1. *Companies Act, Chapter 388*

Other Works Referred To:

1. *Learned Authors of Halsbury's Laws of England 4th Edition Volume 16*

By Writ of Summons, the Plaintiff seeks the following reliefs:

- i. *A declaration that the allotment of 12,500 shares in the 1st Plaintiff Company to the 2nd Defendant by the 1st Defendant was fraudulent and therefore invalid or void ab initio.*
- ii. *A declaration that the 1st Defendant's increase of this shares in the 1st Plaintiff Company from 20,000 shares to 25,000 shares was fraudulent and therefore invalid or void ab initio.*
- iii. *In the alternative, a declaration that the Defendant's increase of his shares in the 1st Plaintiff Company and the allotment of 12,500 to the 2nd Defendant were invalid on grounds that there was no requisite increase in the share capital and number of shares in the 1st Plaintiff Company.*
- iv. *A declaration that the removal of Raymond Danobo as shareholder of the 1st Plaintiff Company and replacement with the 2nd Defendant was illegal, fraudulent and therefore invalid or void ab initio.*
- v. *An order reversing all fraudulent acts of the 1st Defendant from (1) to (4) above particularly the resignation of the 2nd Defendant as Director of the 1st Plaintiff Company and reinstatement of the said Raymond Danobo as Director and*

the surrender by the 2nd Defendant of the 12,500 shares allotted to her by the 1st Defendant.

- vi. An Order compelling the 1st Defendant to surrender all the shares he holds in the 1st Plaintiff Company which to date remain unpaid.*
- vii. An Order compelling the 1st Defendant to disclose and or account for the source of the financing for his business, as the Plaintiffs have reasonable cause to believe that the same are proceeds from the embezzlement and fraud perpetrated by the 1st Defendant against the Plaintiff Company.*
- viii. Costs*
- ix. Any other relief as the Court may deem fit.*

The Statement of claim discloses that the 2nd Plaintiff incorporated the 1st Plaintiff Company (the Company) on 19th August, 2004, and invited the 1st Defendant and Raymond Danobo to be Directors and shareholders in the Company. At incorporation, the Company issued 2,000,000 shares wherein the 2nd Plaintiff held 1,960,000 shares while the 1st Defendant and Raymond Danobo each held 20,000 shares. The shareholders were supposed to pay for the shares which had a nominal value of K1 at the time. The Statement of Claim further discloses that in March, 2008, the 1st Defendant by a misrepresentation to the 2nd Plaintiff fraudulently caused the removal of Raymond Danobo and replaced him with the 2nd Defendant. The 1st Defendant took advantage of the 2nd Plaintiff who is neither literate nor conversant with the modalities of the Patents and Companies Registration Agency (PACRA), and made him sign a Notice of Change of Directors (Form 45) and a Resolution.

The 2nd Plaintiff states that he thought that the documents were on the change of mandate of Directors of the Company, when in fact not. Further, he was not aware or conscious of the true nature of the documents or the effect of appending his signature. In short, he was misled by the 1st Defendant and had no intention of removing Raymond Danobo as Director. The 2nd Plaintiff states that, by the same resolution, the 2nd Defendant was allotted 12,500 shares in the Company under false representation. The Plaintiffs further state that the 1st Defendant by fraud and misrepresentation increased his shareholding from 20,000 shares to 25,000 shares when the share capital of the Company remained at the initial 2,000,000 shares. The share capital later increased to K50,000,000 in June, 2009, with 50,000,000 shares valued at K1 per share. The Plaintiffs state that the 1st Defendant's increased shares and the allotment of shares to the 2nd Defendant were invalid. There was no increase in the share capital and subsequent allotment to support the transactions.

The 2nd Plaintiff states that the 1st Plaintiff Company lost colossal sums of money under the 1st Defendant's management believed to have financed his life style. The particulars of fraud are that:

- (a) **Sometime in March, 2008, the 1st Defendant by fraudulent misrepresentation to the 2nd Plaintiff caused Raymond Danobo to be removed as Director and replaced by the 2nd Defendant.**
- (b) **The 1st Defendant represented to the 2nd Plaintiff who is not literate or conversant with the modalities of the Patents and Companies Registration Agency (PACRA), Notice of Change of Directors (Form 45) and a Resolution for the removal of Raymond Danobo as Director for his signature. The 1st**

Defendant at the time of making the representations knew that they were false and made the 1st Plaintiff sign the document.

- (c) By the same Resolution, the 1st Defendant fraudulently allotted to the 2nd Defendant 12,500 shares in the 1st Plaintiff Company.
- (d) The 1st Defendant represented to the 2nd Plaintiff that the documents in (b) above were documents changing the mandate of the Directors of the 1st Plaintiff Company when in fact not.
- (e) The 1st Defendant also by fraud and misrepresentation increased his shareholding in the 1st Plaintiff Company from the initial 20,000 shares to 25,000 shares.
- (f) The 2nd Plaintiff had no intention of removing Raymond Danobo as Director in the 1st Plaintiff Company and replacing him with the 2nd Defendant or that the 12,500 shares be allotted to the 2nd Defendant or further that the 1st Defendant's shareholding in the 1st Plaintiff Company be increased from the initial 20,000 shares to 25,000 shares.
- (g) Since the 1st Defendant assumed management of the 1st Plaintiff Company, he embezzled and autocratically spent Company funds and proceeds for his personal use and benefit, without accounting to the 2nd Plaintiff. As a result, the 1st Plaintiff lost colossal sums of money.

The Defendants settled a Defence where they admit that the 2nd Plaintiff, 1st Defendant and Raymond Danobo were the founding and first directors and shareholders of the 1st Plaintiff Company. They deny that the shares were supposed to be paid for at K1 per share. The 1st Defendant denies that he fraudulently caused Raymond Danobo to be removed as Director and replaced by the 2nd Defendant. He also denies that he presented to the 1st Plaintiff a corporate body, a Notice of Change of Directors and a Resolution for the removal of Raymond Danobo. He further, denies the 2nd Plaintiff's alleged illiteracy and unfamiliarity with the modalities of the PACRA, when he incorporated the 1st Plaintiff Company.

The 1st Defendant avers that he did not influence the 2nd Plaintiff into signing the Change of Directors forms and that he removed Raymond Danobo from the Company after irreconcilable differences. The 1st Defendant contends that he never allotted 12,500 shares to the 2nd Defendant but she legitimately acquired 12,500,000 fully paid shares, of which July Danobo freely transferred 12,000,000, while Raymond Danobo gave her 500,000 shares. The 1st Defendant avers that the act of increasing his shares was initiated by the 2nd Plaintiff because he was concerned that as a Zimbabwean national, he could not hold majority shares in the 2nd Plaintiff Company. The Defendants state that there was nothing fraudulent about the increase in the nominal share capital in the Company and their shares. They also aver that the increase of their shares by way of allotment and transfer were concomitant with increases in the share capital and number of shares in the Company. In addition, the 2nd Plaintiff conceded that he signed the PACRA documents.

The 1st Defendant avers that the 2nd Plaintiff has repeatedly accused him of fraudulent activities without any proof and even involved the Police. The Defendants state that the special resolution of the Company passed on 16th November, 2005, altered the nominal capital and increased the share capital from K2,000,000 to K50,000,000 divided into 50,000,000 shares of K1.00 each and the Registrar of Companies was notified of the change. On 20th May, 2009, at a meeting attended by the 2nd Plaintiff, the 1st Defendant and Mr. Arthur Kazhila, the transfer of 12,000,000 shares to the 2nd

Defendant and 24,500,000 shares from the 2nd Plaintiff to the 1st Defendant was confirmed. Mr. Arthur Kazhila was appointed and confirmed as Company Secretary of the 1st Plaintiff Company. In June, 2013, the 2nd Plaintiff forcibly barred and excluded the Defendants from accessing the Company premises and carrying out their duties as directors. He also denied them remuneration as directors and dividends as shareholders in the Company without lawful cause and justification.

The 1st Defendant states that the 2nd Plaintiff without his agreement as a co-signatory to Kwacha Account No. 62280343098 and Rand Account Number 62342526441 both held at the Industrial Branch of First National Bank Limited (FNB), mysteriously transferred huge sums of money to unknown parallel accounts that the 2nd Plaintiff secretly set up without the concurrence of the Defendants. Further, without the authority of the Defendants he has caused the daily and other periodical cashing from the buses of the Company to be banked in secret accounts set up without Company approval. He has further unilaterally or arbitrarily transferred staff out of the Company's office in Johannesburg, South Africa and replaced them with unknown individuals.

Using about K2,800,000.00 of the Company's money and without authority, the 2nd Plaintiff purchased the former Bread of Life Church property along Chinyunyu Road in Emmasdale on Plot

No. 136 where double storey blocks of flats were constructed. The Certificate of Title is not drawn in the Company's name. Further, the 2nd Plaintiff registered about seven (7) buses purchased from Company funds in Raymond Danobo's name instead of the Company. The buses are registered as: ALR 1412, ALR 1413, ALR 1414, ALR 5942, ALR 8111, ALR 8112 and ALR 8113. The 2nd Plaintiff, with Mr. Kataka of the Fraud Division at Zambia Police had been intimidating the Defendants whom he reported to have stolen from him. Mr. Kataka threatened the Defendants with physical harm and spied on their properties.

The Defendants claim to have suffered loss and damage, while the Company has suffered diminution of business. The Defendants counterclaim:

- 1. A declaration that the 1st and 2nd Defendants are bona fide directors and shareholders in the 1st Plaintiff Company and legitimately holding 25,000,000 and 12,500,00 shares respectively.*
- 2. A declaration that the 2nd Plaintiff's institution of this apparently derivative action is incompetent and misconceived as he has no standing to sue for the wrongs occasioned to the 1st Plaintiff and only the 1st Plaintiff can sue to vindicate wrongs against it.*
- 3. An order that the Defendants herein, upon assessment, be paid Directors' remuneration for their service to the 1st Plaintiff Company which have been unreasonably withheld by the 2nd Plaintiff.*
- 4. An order that the 2nd Plaintiff does render an account of all sums received by the 1st Plaintiff as cashing in respect of passenger buses from 1st June, 2013, to date.*
- 5. An order for all necessary and proper inquiries and directions as to the manner in which the 2nd Plaintiff should render the account.*
- 6. An order for the payment by the 2nd Plaintiff to the 1st Plaintiff of the amount found due on the taking of the account.*

7. *An order for the payment of such interest on the sums found due to the 1st Plaintiff as the Court thinks fit.*
8. *An order of preservation of 1st Plaintiff property from being dissipated or dispossessed until determination of this matter or further order of court.*
9. *An injunction restraining the 2nd Plaintiff or his agents, servants or any person howsoever from interfering with the operations, duties and functions of the 1st and 2nd Defendants as directors and shareholders of the 1st Plaintiff including not hindering them from accessing the 1st Plaintiff's office premises at Plot No. 737/152, Bimbe Road and Plot No. 737/47/C, Mansa Road, Emmasdale, Lusaka or wheresoever the same may relocate (or such other place as the 1st Plaintiff's records may be kept including garages and any other property owned by the 1st Plaintiff Company.*
10. *An injunction restraining the 2nd Plaintiff from accessing all bank accounts of the 1st Plaintiff without the agreement and signature of the 1st Defendant who is a co-signatory until final determination of this matter or until further order of the Court.*
11. *Damages*
12. *Such other further relief that the Court may deem fit*
13. *Costs*

At trial, the Plaintiffs called five witnesses. **July Danobo** testified as **PW1**. His evidence was that he used to work for UBZ as driver while running a parallel business. He later acquired big buses and coaches under the name JD and set up the 1st Plaintiff Company (the Company) where he registered himself, his biological son, Raymond Danobo and his step son Nasser Ibrahim as directors and shareholders. PW1 testified that he held 1,960,000 shares (98%), while the other two shareholders were allotted 20,000 shares each (2%) as shown in the PACRA Declaration of Consent to Act as Director or Secretary. PW1 testified that he never increased the

shares in the Company and was not aware of what was stated in the Company's annual returns which were handled by the Company's Accountant, Mr. Kazhila. PW1 stated that he discovered that the shares in the Company had been altered without his consent. His shares reduced, while those of the 1st Defendant increased. After the changes, he held 49,000,000, while Raymond Danobo and Nasser Ibrahim each held 500,000, according to the shares certificate filed at PACRA on 27th December, 2006.

It was PW1's evidence that on 23rd November, 2011, the Company directors' shares changed without his consent and Olypa Sibongile Danobo replaced Raymond Danobo as Director. According to PW1, the new share structure showed that he had 12,500,000, Olypa Sibongile Danobo had 12,500,000 while Nasser Ibrahim had 25,000,000 shares. PW1 stated that as Managing Director, he was not aware of the changes made to the shareholding structure and had not been consulted by Mr. Arthur Kazhila. PW1 stated that when he discovered the share alteration, he reported the Defendants to the Police, who investigated the matter and produced a report. PW1 testified that Mr. Kazhila told him that his ex-wife Ms. Zubeda Mulla engineered the alteration of shares in the Company. PW1 added that the Defendants never paid for the shares and he wanted them back. He did not give his shares to the Defendants and never attended any meeting to alter the shares.

In **cross-examination**, PW1 stated that the letter at pages 150 and 151 of the Defendant's Bundle, dated 6th July, 2013, set out that Raymond Danobo freely pulled out of the Company and transferred his shares to the 2nd Defendant. At page 154 of the Defendant's Bundle, PW2 testified that he allotted the 2nd Defendant shares. PW1 stated that the Nasser Ibrahim never appointed himself as a shareholder and director and he had not adduced evidence showing that the shares had to be paid for. He also stated that he did not lead evidence to show that the 1st Defendant removed Raymond Danobo from the Company. PW1 testified that the Company's annual returns were filed by Mr. Arthur Kazhila and not the Defendants.

PW1 further testified that there was no evidence to show that his shares in the Company were fraudulently altered. PW1 stated that the shares in the Company increased from K2,000,000 to K50,000,000. However, he insisted that there was no board resolution supporting the increment, although he signed the resolution. PW1 also stated that the minutes dated 24th June, 2009, in the Defendant's Bundle confirmed the removal of Raymond Danobo as director and his replacement by Olypa Sibongile Danobo. PW1 testified that he signed the form of transfer of fully paid shares giving Olypa Sibongile Danobo 12,000,000 shares. He could not recall transferring 24,500,000 shares to Nasser Ibrahim, although at page 33 of the Plaintiff's Bundle, he confirmed his signature on the share forms. He added that he signed the blank forms, which were given to him by Mr. Kazhila.

PW1 went on to state that Raymond Danobo transferred 500,000 shares to Olypa Danobo. After the share transfers, Nasser Ibrahim became the majority shareholder of the Company. PW1 stated that he did not produce audited accounts of the Company to enable the Court determine the loss. Further, the statement of Claim did not disclose the sum of money alleged to have been stolen or embezzled. PW1 stated that he did not adduce proof of Nasser Ibrahim's businesses nor lifestyle. PW1 testified that the Board only held one meeting from the time of incorporation and it never paid dividends or profits. PW1 stated that he had never read the Articles of Association of the Company but was competent to run the Company. In further cross-examination, PW1 stated that Mr. Kataka did not give him the police report since he reported the Defendants in 2015. He stated that the Drug Enforcement Commission did not find the Defendants liable for fraud. PW1 told the Court that Mr. Arthur Kazhila was his accountant and in charge of the 1st Plaintiff's funds. He also stated that Mr. Arthur Kazhila was still in his employment.

PW1 testified that the Company had separate legal personality and he was literate enough to incorporate a Company. PW1 testified that the Defendants were not arrested for fraud or money laundering. He denied that he expressed anxiety over the number of shares he held in the Company because he is a Zimbabwean. PW1 conceded that he withdrew huge sums of money from the Company without the 1st Defendant's consent because he made the money in

the Company. He could withdraw it at any time. He added that he authorized Raymond Danobo to spend money because he was his son and he bought the buses registered ALR 1412, ALR 1413, ALR 1414, ALR 5942, ALR 8111, ALR 8112 and ALR 8113.

In **re-examination**, PW1 testified that he did not know why Raymond Danobo left the Company. He did not pay the Defendants money because they were his children and none of them ever applied for employment. He signed the share transfer forms even if he did not know their contents. PW1 testified that the meeting referred to at page 29 in the Plaintiff's Bundle did not take place. He did not know when Olypa Sibongile Danobo joined the Company.

PW2 was Raymond Danobo. His evidence was that in 2004, he attended a meeting at PW1's home together with Nasser Ibrahim, Mr. Arthur Kazhila and the late Edson Siwawa on the intended incorporation of the 1st Plaintiff Company. PW2 stated that he and Nasser Ibrahim were eventually made directors in the Company and allotted 2% shares, while 98% shares were taken up by PW1. He testified that sometime in 2009, Mr. Kazhila called him to PW1's office, where he signed blank documents for the Company. It was PW2's evidence that in 2013, PW1 summoned him to his house to find out why he had surrendered his shares to Olypa Sibongile Danobo. PW2 testified that he was shown the share transfer forms and agreed to signing them but he never intended to part with his

shares. It was PW2's further evidence that PW1 and Nasser Ibrahim differed on misappropriation of funds and on the rehabilitation of the Company's building on Freedom Way. He also stated that he was called to Police Headquarters where he gave a statement.

In **cross-examination**, PW2 stated that he voluntarily signed the documents given to him by Mr. Kazhila. He did not file a complaint against Mr. Kazhila to the Police. He did not transact with Olypa Sibongile Danobo on the transfer of shares but Mr. Kazhila who still works for the Company. He transferred 500,000 shares to Olypa Sibongile Danobo. PW2 signed blank share transfer forms without details because he trusted Mr. Kazhila. PW2 stated that the fraud in the Company was committed by Mr. Kazhila.

PW2 testified that he owned the buses listed in the Defence except for ALR 5942. He did buy them using Company money, but his resources. PW1 stated that he received a salary of K1,500,000 from PW1. He had a lease agreement with Hazida and estimated the cost of the buses at US\$350,000.00. PW2 testified that he had a tendency of signing documents without reading them. He owned Youngstar Trucking, which he formed in 2006, after he had taken a break from the 1st Plaintiff Company. His Company owns twenty-two trucks and eighteen trailers and also runs a business called Jaruzu Motors, which owns nine buses. PW2 denied that he left

the Company to run his own business after he differed with PW1. PW2 stated that PW1 paid his children salaries and money at the end of the year, which resembled a dividend. At page 209 of the Defendants' Bundle, PW2 stated that the Company made a Bank transfer to Neo Africa Bus and Coaches of K2,960,000.00 for the purchase of buses. He could not confirm if the Bank transfer was for the purchase of his buses.

In **re-examination**, PW2 testified that the money he received at the end of each year was in appreciation for the work done. PW2 blamed Mr. Kazhila for the loss of his shares in the Company, and only realized in 2013 that he had been removed as a shareholder after the misunderstanding between Nasser Ibrahim and PW1. He stated that the Bank payment to South Africa through FNB was for the purchase of spare parts.

PW3 was **Lewis Chilufya**. His evidence was that sometime in 2012, PW1's building along Freedom Way got partially burnt. PW1 awarded him the contract for the work and asked him to deal with Nasser Ibrahim over the finances. PW3 testified that the contract was worth K820,000,000. The payments for the work were set against the quotations presented by PW3. He executed the works until Nasser Ibrahim failed to give him the last payment of K50,000 for wages and electrical fittings. PW3 testified that he was surprised to learn that Nasser Ibrahim told PW1 that he spent K1,500,000.00 on the building as opposed to K820,000,000. PW3 told the Court

that Nasser Ibrahim failed to produce the original receipts against his duplicate copies on the payments. According to PW3, PW1 was infuriated by Nasser Ibrahim's behavior and an argument ensued, which led to Nasser Ibrahim leaving the office. PW1 paid the balance of the outstanding works.

In **cross-examination**, PW3 testified that his duplicate receipts were not before Court. He did not produce the contract between Frahendricks Construction his Company and the 1st Plaintiff Company for the repair works. PW3 stated that he was one of PW1's tenants at the Freedom Way building but had no lease agreement to show. PW3 denied that he gave Nasser Ibrahim his Toyota Vitz vehicle because he owed him money. PW3 testified that Olypa Danobo bought his Toyota Vitz at K35,000. He also stated that his Company was registered with the National Construction Council and not the Engineering Institute of Zambia.

In **re-examination**, PW3 stated that he lost the duplicate receipts when his company moved offices.

Senior Superintendent **Kozhi Kataka** CID, Police Service Headquarters, testified as **PW4**. His evidence was that on 8th October, 2014, he investigated the complaint laid by PW1 in which he alleged that K4,000,000,000 was embezzled from the 1st Plaintiff Company and that the shares were fraudulently altered. PW4 stated

that as part of his investigations, he collected documents from the Company and PACRA. At PACRA, Mr. Mukelabai Mukelabai told PW4 that the procedure of share transfer was not followed. PW4 testified that PW1 told him that he signed the share transfer forms but could not recall the contents. PW1 also told PW4 that Mr. Kazhila, the Company Accountant was responsible for filing documents with PACRA.

PW4 went on to state that he recorded a warn and caution statement from Mr. Kazhila, who confessed that he transferred the shares without PW1's consent and upon the instructions of Nasser Ibrahim, Zubeda Mulla and Olypa Danobo. He recorded warn and caution statements from them and they all denied the allegations. PW4 testified that Nasser Ibrahim told him that when he worked for the Company, PW1 authorised him to get cashings for Company bus no. 24, ABG 126 from 2005 to 2013 and he never embezzled funds from the Company. PW4 stated that after his investigations, he concluded that the shares in the Company had changed with PW1 and Olypa Sibongile Danobo holding 12,500 each, while the 1st Defendant had 25,000 shares. He also found that the procedure for transfer of shares was not followed.

PW4 further stated that during the course of his investigations, he went to the 1st Plaintiff Company premises to verify the ownership of bus no. 24 ABG 1226. Further that he collected form 42 dated 10th March, 2008 and alleged that it was

altered on 20th May, 2009. According to PW4, the 2nd Defendant became a director and shareholder before the documents were filed. He added that he submitted the file on the Company to the Director of Public Prosecutions for further instructions.

In **cross-examination**, PW4 stated that Mr. Kazhila wrote the letter at page 71 of the Plaintiff's Bundle in 2013, when he had already suffered a stroke. Mr. Kazhila was escorted to the Police Station in 2015, by his son. PW4 stated that he never made any arrests and maintained that he submitted the file to the Director Public Prosecutions in 2016.

PW4 testified that Olypa Sibongile Danobo and Nasser Ibrahim were not responsible for the documents at PACRA. However, since they were mentioned by Mr. Kazhila, they could be held partially responsible for the wrong information submitted to PACRA. PW4 stated that there was no final police report prepared. He also stated that DEC concluded that the Defendants were not involved in money laundering. PW4 testified that Mr. Kazhila told him that a meeting was held on 20th May, 2009, and minutes signed by him and PW1 on the transfer of shares. PW4 stated that his investigations did not reveal that K4,000,000,000 was stolen from the Company.

PW4 stated that he never checked on the accounts at FNB to establish if the money had been embezzled. He did not examine the 1st Plaintiff's Company's accounts. PW4 did not arrest Mr. Kazhila because he is ill. PW1 never complained that his signature was forged. PW4 testified that PW1 wrote his letter of complaint in English and appeared literate. PW4 testified that PW2 never told him that Zubeda Mulla told him to surrender his shares to Olypa Sibongile Danobo. He was not aware that PW1 offered to buy out Olypa Sibongile Danobo from the Company. He was aware that Zubeda Mulla was neither a director nor a shareholder in the Company. He stated that Mr. Arthur Kazhila still worked for the Company. PW4 stated that there was no final report of his investigations.

PW4 also testified that according to Mr. Arthur Kazhila the meetings of the shareholders and directors took place. He also stated that Mr. Kazhila and PW1 signed the documents although PW1 could not remember whether the meetings took place. PW4 confirmed that Mr. Arthur Kazhila was responsible for filing Annual Returns. PW4 told the Court that his investigations did not reveal that anyone stole K4,000,000.00 from the 1st Plaintiff Company. PW4 stated that he never checked the Company accounts to verify whether the Company was defrauded. PW4 testified that PW2 told him that he did not own any property. He stated that if money was withdrawn from the Company account for private purposes, then it was unlawful. PW4 stated that he would arrest PW1 if he found that he unlawfully used the 1st Plaintiff's Company money. PW4

told the Court that he should have arrested Mr. Kazhila but did not because the latter was unwell.

Under further cross-examination, PW4 testified that there was nothing wrong with Companies Form 27 at page 26 of the Defendant's Bundle. PW4 stated that PW2 was a member of the 1st Plaintiff Company and according to the Defendants' Bundle, he transferred his shares to Olypa Sibongile Danobo. He confirmed that Mr. Kazhila was responsible for filing Annual Returns and that any issues arising in them ought to have been to be answered by him. PW4 testified that the transfer of shares was done in 2008 and the 2nd Defendant was not a shareholder. However, she was a shareholder in 2009. When referred to the proxy letter in the Plaintiffs' Bundle, PW4 stated that Olypa Sibongile Danobo was a shareholder by 19th February, 2008. He stated that the transfer was done in May, 2009 but suspected that it was fraudulent. PW4 testified that only Mr. Arthur Kazhila could explain the issue of shares for Olypa Sibongile Danobo for the years 2008 and 2009.

In **re-examination**, PW4 testified that Juldan Motors Limited before incorporation, was known as Juldan Motors. The period for the transfer of shares was not known.

PW5 was **Liywali Mukelabai**, an Inspector of PACRA. He repeated the earlier evidence on incorporation of the Company and

shareholding. PW5 testified that on 7th March, 2008, Olypa Sibongile Danobo became a new shareholder in the Company and the Declaration of Consent to act as Director or Secretary was submitted to PACRA on 24th June, 2009. Her membership was confirmed by a board resolution dated 20th May, 2009. She was allotted 12,500,000 shares. The Company filed annual returns in February, 2008, even though they were dated December 2006.

It was PW5's evidence that the Notice of Resolution of the Board of Juldan Motors Limited was lodged on 24th June, 2009, following an extraordinary meeting held on 16th November, 2005. PW1 transferred 12,000,000 shares to Olypa Danobo, while Raymond Danobo transferred 500,000 shares. The Company's shares increased from 2,000,000 to 50,000,000. According to PW5, the Company was required to lodge Company Form 28 on allotment of shares with PACRA, after increasing the nominal capital. This was not done but Company shares were transferred. PW5 stated that ordinarily, a transfer of shares was normally done among shareholders and when there were excess or hanging shares in the Company, which could be allotted to existing or incoming shareholders.

PW5 stated that the Company did not file Form 28 and as a result, the effect is that no shares were allotted. According to PW5, since the procedure was not followed, the transfer of shares was null and void. PW5 testified that Olypa Sibongile Danobo appointed

her mother Zubeda Mulla as proxy by a letter dated 19th February, 2008, addressed to PACRA. PW5 stated that there was a contradiction between the documents of share transfer and the proxy letter, because it was written much earlier than the allotment of shares.

In cross-examination, PW5 stated that he gave a statement to the Police on 8th January, 2015. The resolution to change the directors in the Company was done in accordance with the Companies Act and the correct forms were submitted. PW5 stated that PACRA has a duty to receive correctly stated forms and if wrong forms were filed, then PACRA bore the responsibility. PW5 further stated that the Company was not informed that it had filed wrong documents. PW5 testified that failure to comply with Form 28 had no legal consequences. He added that the Company could still submit Form 28 to regularize the allotment but there was no guarantee that PACRA would accept the form. The penalty for non-compliance was a fine.

PW5 testified that PACRA never lodged a complaint on the transfer of shares to any law enforcement agency. He stated that it did not matter how much capital a person put into a company. Further, there was nothing wrong with Olypa Sibongile Danobo appointing her mother as a proxy. Also there was nothing wrong with the letter of proxy. PW5 testified that the resolution to increase the nominal share capital was passed in 2005. The

decision to appoint a director and allotment of shares was the prerogative of a Company. A Company had authority to remove a director by resolution. PW5 testified that the Company complied with the legal requirements on the increase of shares. Further, Form 28 was guided by practice and not law.

In **re-examination**, PW5 testified that PACRA Form 45 dealt with resolutions on the removal of a director. He stated that Olypa Sibongile Danobo who became a shareholder on 24th June, 2009 could not have appointed Zubeda Mulla as her proxy on 19th February, 2008. He added that PACRA should not have accepted the documents from the Company on the share transfer because the procedure was not followed.

The Defendants' only witness was **Nasser Abdul Ibrahim** who testified as **DW1**. His evidence was that on 4th December, 2014, he gave an ordinary statement to PW4 and on 27th January, 2015, he gave a statement under warn and caution over the shares in the Company. DW1 stated that certain facts in the warn and caution statement were untrue and he attended the meeting of 20th May, 2009 referred to in the Defendants' Bundle. DW1 also stated that he was shocked to learn that PW4 handed over the investigation file to the Director of Public Prosecutions. DW1 testified that he, Olypa Sibongile Danobo and Zubeda Mulla were alleged to have stolen company shares. DW1 also testified that PW4's investigations were based on PW1's unsubstantiated claims that he embezzled huge

sums of money from the Company. He was also accused of altering the share capital of the Company with the aid of Mr. Kazhila.

DW1 further testified that all his transactions in the Company were authorized by PW1 and yet PW4 did not investigate him. DW1 told the Court that he reported PW4's harassment to the Inspector General of Police and he was later transferred to another office. Afterwards, PW4 stopped harassing the Defendants but never availed them the police report. It was DW1's evidence that in the past, PW1 acknowledged him as a hardworking and dedicated director and that the duo shared a very close relationship. DW1 stated that PW2 left the Company in 2007 after PW1 removed him following a quarrel. PW1 replaced him with Olypa Sibongile Danobo who at the time was studying in South Africa. According to DW1, PW1 allotted him with more shares and gave some to Olypa Sibongile Danobo. DW1 stated that PW1 never allowed his children to own businesses whilst working for him. It was DW1's evidence that PW1 signed all the Company documents, while he represented him at stakeholders meetings.

DW1 told the Court that as Company Secretary and Accountant, Mr. Kazhila was well acquainted with his job and facilitated all the paper work in the Company. DW1 testified that he acquired his assets from the weekly bus cashings of ABG 1226, which were between K26,000 – K30,000; contracts with DHL and EMS (Post Office) which gave him a monthly income of K13,500;

and selling 15 – 20 used bus tyres per week at K350 – K450. He was given these privileges by PW1. He added that as head of the station crew at intercity bus terminal, he received a daily ration of K500. DW1 testified that he never instructed Mr. Kazhila to transfer the shares in the Company because he got all his instructions from PW1. He denied that he stole K4,000,000,000 billion from the Company.

DW1 testified that PW1 told him that he was concerned that he was of foreign national and could not hold majority shares in the Company. Accordingly, PW1 transferred more shares to DW1 because he trusted him. He also stated that he desired to hand over the Company to one of his children. DW1 went to state that sometime in 2013, as he was routinely counting money at his office, PW1 rebuked him for supporting his sick biological paternal grandfather and disowned him. PW1 cut all ties with him and chased him from the Company.

DW1 stated that he remained a shareholder of the Company but had not been to the office since 2013. He never collected dividends. He also stated that he and PW1 were the signatories to the Company accounts held at FNB, Industrial branch. At the time he left the office in July 2013, there was over K28,000,000 million in the Kwacha account and R3,000,000 in the Rand account. From the time he was sued, he discovered that PW1 had been withdrawing from the accounts without his signature to buy new

buses in PW2's name. DW1 testified that the Board never met to pass a resolution for the purchase of the new buses. He stated that PW1 had no right to withdraw funds from the Company account because Juldan Motors is a limited Company whose directors are supposed to be consulted.

DW1 testified that the Defendants wanted the Court to recognize their rights as shareholders and the payment of Director's fees and dividends. They also wanted the Company accounts to be rendered to them. DW1 testified that the allegations made by PW3 against him were false. He stated that PW3 was PW1's employee and works at the Company's town station since 2012. DW1 testified that he and PW1 argued over PW3's employment because the latter was not qualified to repair the Freedom Way building. DW1 stated that he paid PW3 money for the works as instructed by PW1 but never visited the site in protest. According to DW1, PW3 never submitted all the receipts for the repair work. By the time DW1 was barred from the office, PW3 was still working on the building and he was not aware who took over supervision.

On the allegations of theft, DW1 testified that sometime in August 2013, he handed PW1 the expense books, where PW3 signed for all the money he was given. DW1 stated that when the allegations of theft surfaced, he tried to retrieve the books, but PW1 refused. DW1 testified that he never gave PW1 a blank share

transfer or change of director's forms to sign. The person who was responsible was Mr. Kazhila.

In cross examination, DW1 testified that he owned a Range Rover NAS 11, BMW vehicle and Toyota Hiace Mini bus. He also owned a house and farm in Chongwe, a plot in Jesmondine, a house in Kabulonga and Chudleigh and a plot in the area called 15 miles. DW1 stated that he owned Leo Link, which had four buses and a truck. He estimated his assets at K3,000,000 million, when the Plaintiffs commenced the action. DW1 maintained that Mr. Kazhila handled the transfer of shares in the Company. He attended a meeting on 9th August, 2004, but the minutes were not before Court.

At page 23 of the Plaintiff's Bundle, DW1 stated that Olypa Sibongile Danobo did not sign the Declaration of Consent to act as Director or Secretary but her proxy Zubeda Mulla. Further, Olypa Danobo was appointed director in 2008 but was officially recognized in 2009 and a letter consequently written to PACRA in 2009. DW1 stated that the annual returns of December, 2006 showed that Olypa Danobo was a shareholder with 12,500,000 shares. At page 54 of the Plaintiff's Bundle, DW1 testified that the minutes of the reconciliation meeting did not disclose that PW1 disowned him for supporting his biological grandfather because they were fabricated and not adopted by the parties. DW1 testified that he never

complained about the Hazida Motors transaction during the meeting.

DW1 stated that at the time of incorporation, Juldan Motors Limited had six new buses which were not leased from Hazida. He travelled to Cape Town with PW2 and Mr. Sinkala to collect Bus No. ALZ 6311, which was bought from a cash transaction. The other buses bought in similar fashion were ABZ 2477 and AAZ 9911. DW1 testified that the Company's initial buses were owned by PW1. He stated that he never paid money for the shares and PW1 never wrote him a deed of transfer of shares. DW1 testified that PW1 accused Zubeda Mulla of stealing from the Company. It was DW1's evidence that it was impossible to steal from the Company because PW1 authorised all the transactions.

DW1 stated that the contracts between EMS and DHL were with the Company and the used tyres were acquired from the Company's buses. Further, bus no. 24 was serviced by the Company. DW1 maintained that PW1 authorised him to get the bus cashings and other privileges. DW1 testified that he was holding on to a Ford Ranger vehicle which he bought from the EMS and DHL contracts. DW1 also testified that he was not aware that Mbaso Corporate Resources issued a receipt to the Company for administrative and lodgment fees of annual returns for 2011, even though he was still in office. He did not know who paid Mbaso

Corporate Resources K210,000 for administrative and lodgment fees for the annual returns for 2009.

DW1 stated that he attended the meeting of 20th May, 2009 whose agenda was on the transfer of shares. Meetings in the Company were only held when PW1 decided. In reference to page 72 of the Plaintiff's Bundle, DW1 stated that Mr. Kazhila informed PACRA of the fraudulent transfer of shares but did not agree with the letter.

In **re-examination**, DW1 testified that he owned Neo Link Investments Limited. He stated that the date of December 2006 on the annual returns was altered and the returns bore a different date stamp. He maintained that he attended the meeting on the transfer of shares.

Learned Counsel for the parties filed written submissions for which I am indebted. I shall not reproduce them but refer to them in the judgment.

I have anxiously considered the pleadings, evidence adduced and submissions filed herein. The facts of this case are substantially not in dispute and they disclose that the Plaintiff Company was incorporated on 19th August, 2004 by PW1. The

initial shareholders of the Company were PW1 as majority shareholder, PW2 and DW1. The shareholding in the Company later changed when Olypa Sibongile Danobo replaced PW2. The facts also disclose that the share capital of the Company increased. Later DW1 became the majority shareholder with PW1 and Olypa Sibongile Danobo as minority shareholders, both holding the same number of shares. There is general agreement that PW1 is in control of the affairs of the Plaintiff Company as Managing Director. Further, the Company Secretary and Accountant is Mr. Arthur Kazhila and he handles all the Company's documents. It is not in dispute that the Defendants have no access to the Plaintiff Company premises, even if they are shareholders and directors.

In my considered view, the issues that fall for determination are the following:

- 1. Whether the increase of share capital and allotment of shares to DW1 and Olypa Sibongile Danobo was fraudulently done and is invalid?**
- 2. Whether the Defendants caused PW2 to be removed as a shareholder and director in the Company?**
- 3. Whether the 1st Defendant embezzled funds from the Company to support his lifestyle?**
- 4. Whether the Defendants are bonafide directors and shareholders in the Company and entitled to dividends or remuneration?**
- 5. Whether PW1 is under an obligation to render an account of the Company to the Defendants?**

It is trite law that he who alleges must prove. In the case of **Masauso Zulu vs. Avondale Housing Project**¹ it was stated that where a Plaintiff makes any allegation, it is generally for him to prove those allegations. That a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case. Further in **Khalid Mohamed v The Attorney General**² it was held that a Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. It follows that for the Plaintiffs to succeed in the present case, it would not be enough to say that the Defendants have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to the required standard of proof, being a balance of probabilities.

1. Whether the increase of share capital and allotment of shares to DW1 and Olypa Sibongile Danobo was fraudulently done and is invalid?

Learned Counsel for the Plaintiffs submitted that the allotment and increase of shares in the Company was fraudulently done and without their knowledge. Learned Counsel further submitted that under Clause 25.1 of the Articles of Association, a transfer of shares required the approval of the directors. It was Counsel's further submission that there was no approval given for the allotment of the shares and that prior to the transfer, the increase of shares was not supported by a Company resolution and the filing of form 28 with PACRA. Counsel added that the result of the fraudulent

actions was that the increment of share capital and subsequent transfer of shares was null and void.

Learned Counsel contended that the dates relating to the transfers did not match the date that Olypa Sibongile Danobo appointed her proxy. Further, that Olypa Sibongile Danobo's appointment as director was done contrary to section 151 (1) of the Companies Act. Counsel further contended that since Olypa Sibongile Danobo was not a director at the material time, her appointment of a proxy was a nullity at law.

In response, Learned Counsel for the Defendants submitted that the alleged fraudulent transfer of shares was only reported by the 2nd Plaintiff to the DEC and the Zambia Police in October, 2014. This represented a period of five (5) years after the shares had been transferred and annual returns consistently filed during that period. Counsel contended that the complaint regarding the alleged fraudulent transfer of shares was an afterthought and was only raised after DW1 'left' the Company. Counsel further contended that there was no proof tendered into Court to show that PACRA Form 28 on allotment of shares was never filed by the 1st Plaintiff. The only issue was that it was not found at PACRA. Counsel submitted that in the event that Form 28 was not filed by the 1st Plaintiff, it could still be submitted at anytime and the only penalty would be the payment of a fine. He added that PACRA never

requested the 1st Plaintiff to file Form 28 but received payments for the lodgment of annual returns..

Counsel went on to submit that the alleged fraudulent increase of DW1's shares in the Company and the alleged fraudulent allotment of 12,500,000 to Olypa Sibongile Danobo was fundamentally flawed for three reasons. Firstly, because DW1 did not solely increase his shares in the Company granted that they were given to him by PW1. Secondly, that PW2 transferred 500,000 shares, while PW1 transferred 12,000,000 shares to Olypa Sibongile Danobo, giving her a total of 12,500,000 shares. Thirdly, there was evidence adduced to show that the Company increased its share capital from 2,000,000 to 50,000,000 shares. Counsel submitted that in all these transactions, the Defendants did not play any role.

2. Whether the Defendants caused PW2 to be removed as director and shareholder in the Company?

Learned Counsel for the Plaintiffs submitted that PW2 did not leave the Company on his own accord but was made to sign blank forms under false misrepresentation by Mr. Kazhila acting on DW1's and Ms. Zubeda Mulla's instructions. By so doing, Counsel contended that PW2 was fraudulently removed from the Company. Counsel referred the Court to Mr. Kazhila's letter to PACRA dated 10th April, 2015, wherein he confessed that the shares in the Company were fraudulently transferred. He also called in aid the case of **Nkongolo Farm Limited v Zambia National Commercial**

Bank Limited, Kent Choice Limited (In Receivership), Charles Harupei³ where the Supreme Court stated *inter alia* that:

“Where it was pointed out that the loss occasioned by the fault of a third person, ought to fall upon one of the two parties who clothes that person as agent with authority by which he was enabled to commit the fraud.”

He contended that the loss suffered by the Plaintiffs had to fall on the Defendants because the fault was caused by their agent, the third person, Mr. Kazhila who fraudulently transferred the shares in the Company.

In response, Learned Counsel for the Defendants submitted that Olypa Sibongile Danobo was appointed Director in the Company in 2008 before PACRA was formally notified of her appointment in 2009. He stated that the contention that PW2 was removed as a shareholder and director in the Company had no legal basis because a shareholder cannot be removed. Counsel submitted that a shareholder could only cease to be such when, *inter alia* he or she transferred or sold their shares. In this case, PW2 transferred his shares to Olypa Sibongile Danobo as evidenced by Companies Form 27.

I shall deal with the issues raised in the first and second questions at the same time, because they are interwoven and depend on a common response. To begin with, I find that the facts

of this case have a strong bearing on the management of the Company. There is more human interest in this dispute than that of the Company as a metaphysical being. To illustrate my point, it is apparent that the distinction between the Company and its shareholders and directors is impaired. It also appears that some of the directors and shareholders have more personal authority than others in the management of the Company. In general the style of management does not generally accord with section 22 (1) of the Companies Act which provides that:

"22. (1) A company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual."

I also observe that the management style does not draw any parallel with the legal principles stated in the case of **Associated Chemicals Limited v Delmain (Zambia) Limited and Another**⁴, which upheld the holding in **Salomon v Salomon and Company Limited [1897] A.C.22**, where it was held that:

" A company is....not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law, it is a person distinct from its members, or shareholders, a metaphysical entity, or function of law with legal but no physical extension."

In the case of **Re Bird Precision Bellows Ltd**⁵, the Court quoted the following passage:

"As to the first, there is a well-known passage in the speech of Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492 at 500, [1973] AC 360 at 379 where his Lordship, having observed that it is not enough that the company is a small one, or a private company, identifies three typical elements, one, or probably

more, of which will characterize the company as a quasi partnership. They are, firstly, an association formed or continued on the basis of a personal relationship involving mutual confidence, secondly, an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business, and, thirdly, restrictions on share transfers. No doubt these three elements are the most familiar, and perhaps the most important, but they were not intended to be exhaustive. In my view there may be other typical and important elements, in particular the provision of capital by all or some of the participants."

In my considered view, the elements in the case of **Re Bird Precision Bellows Ltd**⁵, typifies the structure of the Plaintiff Company. From the evidence adduced it is obvious that the Company was formed on the basis of a personal relationship and mutual confidence that was shared amongst PW1, PW2 and DW1. At the material time, it did not appear necessary to create a formal management structure and this is deduced from the evidence of the said witnesses. It also appears that there was no agreement or understanding on the participation of the shareholders in the conduct of the business. However, from the evidence, it can be concluded that PW1 had overarching control in the decision making processes of the Company as opposed to the other shareholders and directors.

It is incontrovertible that the relationships soured amongst the shareholders and directors and PW2 was the first to leave the Company followed by DW1. Because of the strained relationship especially between PW1 and DW1, this action was commenced by PW1 to assert the Plaintiff Company's rights.

Clause 37 (a) of the Company's Articles of Association provides that:

"37. The Company may be resolution:

(a) Increase its authorized share capital by the creation of new shares of such amount as is specified in the resolution;.."

The clause is the engine through which the share capital of the Company can be increased and it requires a resolution of the directors.

In the case of **Re Bird Precision Bellows Ltd⁵**, the Court held that:

"...Broadly speaking, shares in a small private company are acquired either by allotment on its incorporation or by transfer or devolution at some later date. In the first category it is a matter of common occurrence for a company to be incorporated in order to acquire an existing business or to start a new one, and in either event for it to be a vehicle for the conduct of a business carried on by two or more shareholders which they could, had they wished, have carried on in partnership together.

Clause 2 of the Company's Articles of Association provides that:

"2. Without prejudice to any rights previously conferred on the holders of any existing shares or class of shares, but subject to the Act, shares in the Company may be issued by the directors and any such shares may be issued with such preferred or other special rights or such restrictions, whether with regard to dividends, voting

return or capital or otherwise as the directors subject to a resolution determine."

In my view, the clause entails that the Company can issue different types of shares including preferred, deferred or shares with special rights. These can be limited by the restrictions imposed by a resolution of the directors on dividends, voting returns, capital or other considerations.

The question therefore, is whether the share capital increase and allotment or transfer of shares was fraudulently done by the Defendants? Evidence was produced to demonstrate that PW1, PW2, DW1 and subsequently Olypa Sibongile Danobo acquired shares in the Company. In the case of the first three witnesses, the shares were acquired at incorporation, while Olypa Sibongile Danobo acquired her shares much later on. There was no evidence led to show that any of the directors or shareholders paid for their shares, and may have probably been given gratis and at Company expense.

The evidence shows that there was an alteration of share capital in the Company and a letter was written by the Company Secretary, Mr. Kazhila to the Registrar of PACRA on 17th June, 2009 stating that the authorized share capital of the Company had been increased from K2,000,000.00 to K50,000,000.00. It was reinforced by a Notice of Alteration in Capital filed on 24th June, 2009 and a Notice of Resolution dated 24th June, 2009 signed by PW1 and the

Secretary, wherein it was resolved that the "...the authorized Nominal Capital of the Company be increased from K2,000,000.00 to K50,000, 000.00 shares of K1.00 each."

The authenticity of these documents was never challenged nor were the signatures on the documents belonging to PW1 and Mr. Aurther Kazhila. Having considered the evidence, I find that the increase of share capital of the Company was done with the approval and occurrence of the directors. I also find that PW1 freely signed the documents and that there was a meeting held on the increase of share capital. I cannot accept PW1's claim that the meeting never took place when it is quite possible that PW1 might have just forgotten that fact. Albeit, PW1's poor recollection does not subtract from the fact that he signed the resolution and his confirmation that his signature was not forged on the documents. Moreover, the Company complied with the Companies Act by issuing the Notice of Alteration in Capital and Notice of Resolution, which were filed with the Registrar at PACRA validly creating an additional 48,000,000.00 shares in the Company. All in all, I am satisfied that the share capital was validly increased by the Company.

The Plaintiff led evidence through PW5 that PACRA Form 28 on allotment was not filed by the Company. Thus, the allotment was null and void.

Section 66 of the Companies Act provides that:

"66. (1) A company shall, within two months after the allotment of any of its shares or after the registration of the transfer of any shares, deliver to the registered holder thereof a certificate under the common seal of the company

(3) If a company fails to comply with this section, the company, and each officer in default, shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding three monetary units for each day that the failure continues.

As required by section 66 of the Act, there was no evidence adduced to show that the Company or its officers were found to be in default of the said section by PACRA. The fact that Form 28 was not found at PACRA, does not entail that the form was not filed. PW5's evidence on the failure to comply with Form 28 was inconceivable given that he tried to create an impression that the non-compliance would invalidate the allotment; when the penalty is only a payment of a fine. Unfortunately, Mr. Authur Kazhila who would have been a key witness was never called to the stand. It would therefore, be audacious for this Court, to conclude that Form 28 was not filed. Assuming that it has not been filed, then all the Company has to do is to comply with section 66 of the Companies Act.

The issue of transfer shares was vociferously contested by the parties, with the Plaintiffs contending that DW1 fraudulently caused the transfer of 24,500,000 shares from PW1 to himself. Further, that DW1 fraudulently caused PW1 and PW2 to transfer 12,000,000 and 500,000 shares respectively to Olypa Sibongile

Danobo. All this was done with the connivance of the Defendant's mother Ms. Zubeda Mulla and Mr. Authur Kazhila. Both PW1 and PW2 testified that they signed blank share transfer forms given to them by Mr. Authur Kazhila at the Defendants' instructions. I am curious that Mr. Kazhila is still employed by the Plaintiff Company when he is alleged to have committed such serious transgressions against his employer.

PW1 testified that he was illiterate but from my observation in Court, he was able to read basic documents written in the English language and at times during his testimony switched between Chinyanja, the language he was sworn in to converse in English. PW1 maintained that he was made to sign documents by Mr. Arthur Kazhila, while PW2 also harboured the same sentiments. DW1 testified that he never caused the fraudulent transfer of shares to himself and Olypa Sibongile Danobo. The shares were freely transferred by PW1 and PW2 after their differences and at PW1's instructions. DW1 also testified that Mr. Arthur Kazhila handled all the documents in the Company with the concurrence of PW1. He had no role to play.

Clause 25 of the Company's Articles of Association provides that:

"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 purposes of section fifty-seven of the Act or in any form that the directors approve.

(2) An instrument of transfer referred to in sub-regulation (1) shall be executed by or behalf of both the transferor or transferee."

Section 57 of the Companies Act States that:

"57. (1) The shares or other interest of a member in a company shall be personal estate and movable property, transferable by a written transfer in a manner provided by the articles of the company or by this Act.

(2) If an instrument of transfer of fully paid shares in a company is in the prescribed form, executed by both the transferor and the transferee, or by persons duly authorised on behalf of the transferor or the transferee, the company shall not refuse registration of the transfer on the ground of form."

PW1 and PW2's evidence was that they freely signed blank share transfer forms which they did not read. The documents were presented to them by Mr. Authur Kazhila.

In the case of **Nkongolo Farm Limited v Zambia National Commercial Bank Limited And Others**³, the Supreme Court held *inter alia* that:

"..I have looked at the pleadings filed herein, particularly the plaintiff's statement of claim and I find that no fraud is alleged in the said pleadings. I have also looked and considered all the evidence adduced in this case and I must say that I find that no fraud on the part of the 1st defendant has been proved. Indeed the decision in the case of **Joseph Constatine Steamship Line Limited v Imperial Smelting Corporation Limited** (7) supra, that there is no presumption for fraud and that it must be alleged and proved, is on all fours with this case on this issue..... I have already found as a fact above, that all these documents were signed by the plaintiff's directors voluntarily. That they chose not to read what they were signing because of the story or explanation that the 3rd Defendant gave them is certainly not evidence or ground to claim undue influence, neither can this be a basis to claim misrepresentation. The documents did not misrepresent any facts. They were clear.

A perfunctory examination of the Forms of Transfer of Fully-Paid Shares in a Company Limited by Shares in the bundles shows that they bear bold captions of the subject matter, which easily captures the attention of a recipient. The forms have a short content, which can be quickly and easily read. The share transfer forms do not misrepresent any facts, as they are very clearly written. Thus, I find it difficult to accept PW1 and PW2's evidence that they were unaware of what they signed. They must blame themselves for their actions and for blindly accepting blank documents from Mr. Kazhila. If they do desire to apportion any blame, then it should fall on Mr. Kazhila who presented the documents for their signature. I am satisfied that the Defendants had nothing to do with the transfer of shares in the Company.

I have not lost sight of the argument posited by the Plaintiffs that the date of filing of documents at PACRA does not coincide with the dates of the resolutions of the share transfers shares and appointment of Olypa Sibongile Danobo as director in the Company. In order to resolve, this contention, I will to rely on the guidance given by the Supreme Court in the case of **Pan Electronics Limited and Savvas Panayiotides and Others v Andreas Miltiadous and Others**⁶, where it held *inter alia* that:

"..An examination of the return of allotment filed with the Registrar was not a relevant method of deciding a question of fact which could only be received on the basis of the evidence tendered by the parties..."

In like manner, I find that the integrity of the share transfer forms, proxy letter, annual returns and other documents is not invalidated by the manner in which they were filed at PACRA. The fact that they were undesirably filed does not establish that there was any fraud or wrongdoing on the part of the Defendants. As regards PW2, I find value in the Defendant's assertion that a shareholder cannot be removed from a Company but ceases to be a member by either the transfer or sale of shares. In this case, PW2 ceased to be a member of the Plaintiff Company when he transferred his shares to Olypa Sibongile Danobo. Consequently the Plaintiff's claim that PW2 was fraudulently removed as a director and shareholder is technically flawed and misconceived.

As stated in the earlier part of the judgment a Plaintiff must prove any of the allegations he makes against a Defendant. A Plaintiff must not succeed on the failure of an opponent's case. Thus, I hold that the Plaintiffs have failed to prove their claims on the first and second questions.

3. Whether the 1st Defendant embezzled funds from the Company to support his lifestyle?

Learned Counsel for the Plaintiffs submitted that DW1 admitted in his evidence that he embezzled Company funds through the DHL and Zambia Postal Services Corporation contracts, bus no. 24 cashings and the sale of the Company's used tyres, without

showing any evidence that he was entitled to the privileges. Counsel cited section 215 (1) and 216 of the Companies Act on the powers of directors and the scope of resolutions to illustrate the Defendants' lack of authority for the privileges. He asserted that since there was no resolution passed for the disposal of assets, DW1 could not unjustly entitle himself to the privileges.

Counsel cited the **Learned Authors of Halsbury's Law of England 4th Edition Volume 16**, where they state at **paragraph 1219**:

".... that the Court has never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of statement that is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is a special duty to disclose it."

Counsel also called in aid the case of **Macaura v Northern Assurance Company Limited⁷**, where the Court held that:

".....no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. 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...."

In response, Learned Counsel for the Defendant submitted that there was no business of DW1 revealed to the embezzlement of K4,000,000.000 from the Company, neither was evidence adduced

regarding DW1's lifestyle. Counsel further submitted that there were no audited accounts of the Company produced in Court.

I have carefully considered the Statement of Claim and find the following plea on embezzlement at paragraph 18 (k):

"Additionally, since the 1st Defendant assumed management of the 1st Plaintiff Company, he has continued to embezzle funds and autocratically spend company funds and proceeds for his personal use and benefit, without accounting for the same to the 2nd Plaintiff and as a result, the 1st Plaintiff has and continues to suffer loss of colossal sums of money". (underlining my own)

It can be deduced from the Statement of Claim that the subject of embezzlement is Company funds. PW1 did not lead any evidence on DW1's lifestyle that was influenced by the embezzlement. PW3 testified that DW1 overpriced his contract for the Freedom Way Building repair works. He did not present the contract nor show how DW1 gained undue advantage for the works through his duplicate receipts. PW2's evidence was based on hearsay regarding an altercation between PW1 and DW2 on the embezzlement of Company funds. PW4's evidence was most underwhelming because never have launched his investigations from the Company's Bank accounts to show that funds had been embezzled. He largely relied on the reports of PW1 and PW5 as opposed to a empirical investigation that could have proved the claim on embezzlement.

During DW1's cross-examination, the Plaintiffs contended that the embezzlement was established by DW1's unjustified entitlement to the cashing of bus no. 24, the DHL and Zambia Postal Services Corporation contracts and the re-sale of used bus tyres. DW1 testified that PW1 authorised him to collect the cashings of bus no. 24, the DHL and Zambia Postal Services Corporation contracts and the re-sale of used bus tyres as a reward for his hard work.

In the case of **Pangea Renaissance Securities Limited v Lilayi Development Limited**⁸, Hon. Justice Kajimanga J., as he then was, held *inter alia* that:

"In determining the existence or otherwise of an agreement where there is nothing in writing, the court has to among others look at the facts of each case..."

I have carefully evaluated the evidence adduced and find that I can infer from the facts of this case that PW1 authorised DW1 to collect the cashings from bus no. 24, the entitlements in the two contracts and the re-sale of used tyres. PW1 never testified that he disapproved of DW1's benefits. The spin of embezzlement from Company funds to the privileges given to DW1 by PW1 came as an afterthought in cross-examination and very late in the day, to prove a claim that was not pleaded. The view I take is that DW1 never obtained an undue pecuniary advantage from the Company. This claim accordingly fails.

4. Whether the Defendants are bonafide directors and shareholders in the Company and entitled to dividends or remuneration?

Learned Counsel for the Plaintiffs submitted that the Company never declared dividends and money could not be paid to the shareholders. In response, Learned Counsel for the Defendants submitted that the Defendants were bonafide directors and shareholders of the Company and were entitled to remuneration. I have already held that the allotment and transfer of shares to the Defendants were valid. Therefore, I have no hesitation in holding that the Defendants are bona fide directors and shareholders in the Company and are entitled to dividends and remuneration.

5. Whether the PW1 is under an obligation to render an account of the Company to the Defendants?

Learned Counsel for the Defendants submitted that it was not in controversy that PW1 withdrew huge sums of money from the Company without the concurrence of the other directors and shareholders, one of whom is a signatory to the accounts. Thus, the Defendants were on firm ground to seek a Court Order compelling PW1 to render an account of all money received by the Company. This issue does not call for a difficult legal discourse.

Having determined, that the Defendants are bonafide shareholders and directors, I hold that PW1 must render an account of the Company to the Defendants.

All in all, I hold that the Plaintiffs have failed to prove their claims against the Defendants and I accordingly dismiss their action.

On the other hand, **I find favour in the Defendants counterclaim and hold as follows:**

- i) I declare that the Defendants are bonafide shareholders and directors in the Plaintiff Company with DW1 holding 25,000,000 shares and Olypa Sibongile Danobo holding 12,500,000 shares.
- ii) I order the Plaintiff Company to pay the Defendants their remuneration and dividends upon assessment and I award them interest thereon.
- iii) PW1 must render an account of the Company's income from the date that the Defendants were excluded from the Company up to the date of the final reconciliation. This must be done without further recourse to Court.

Before I conclude, I wish to state that the issues regarding the Plaintiff Company accounts held at First National Bank are the

subject of Cause No. 2015/HP/1139. I will therefore not make any pronouncements on the issues.

Costs shall abide the event to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 9th day of August, 2017.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE