

## **JOHN PAUL MWILA KASENGELE AND OTHERS v ZAMBIA NATIONAL COMMERCIAL BANK LIMITED**

Supreme Court  
Chirwa, Muzyamba and Lewanika, JJS  
8th March, 2000 and 16th May, 2000  
(SCZ Judgment No. 11 of 2000.)

### **Flynote**

*Company Law - Shareholders - Enjoy overriding authority over a company's affairs.*

### **Headnote**

This is an appeal against a decision of the Industrial Relations Court that the appellant be paid terminal benefits in accordance with the shareholders directive dated 28th March 1995. The undisputed facts of the case were that the appellants were employed by the respondent; a subsidiary of ZIMCO and wholly owned by government, the Minister of Finance being the sole shareholder. The appellants were retired on various dates but between 18th March 1995, and 30th November, 1996.

On 28th March 1995, the then Minister of Finance the late Ronald Penza wrote to the then Director-General Mr. Bwalya, with a copy to the President of the Republic of Zambia, Mr F.T.J. Chiluba that at its 87th Meeting of ZIMCO Board of Directors held at State House on August 26th 1994, it was decided that the allowances be merged with salaries and that the decision be implemented without further delay. Upon their retirement the appellants were paid terminal benefits not based on the Ministers directive but on ZIMCO conditions of service then applicable. The appellants then filed a complaint in the court below which was unsuccessful.

The appellants appealed.

#### **Held:**

- (i) Shareholders enjoy as a matter of right overriding authority over company affairs, even over the wishes of the Board of Directors and Managers.
- (ii) Inability to pay has never been and is not a defence to a claim. It is not a bar to entering judgment in favour of a successful litigant.

#### **Cases referred to:**

1. *Bank of Zambia v Chibote Meat Corporation Limited*, SCZ Judgment No. 14 of 1999.
2. *Re: Pan Electronics* (1988-1989) Z.R 19.
3. *Van Boxel v Kearney* (1987) Z.R 63.

*M. L. Mukande of M L Mukande and Company for the appellants. C D Mabutwe of Mabutwe and Associates and A. Siwila, Legal Counsel, Zambia National Commercial Bank Limited for the respondent.*

## **Judgment**

**MUZYAMBA, JS**, delivered the judgment of the court.

This is an appeal against a decision of the Industrial Relations Court. The appellants' complaint is that they be paid terminal benefits in accordance with the shareholder's directive, dated 28th March, 1995.

The undisputed facts of this case were that the appellants were employed by the respondent, a subsidiary of ZIMCO and wholly owned by government, the Minister of Finance being the sole shareholder. The appellants were retired on various dates, but between 28th March 1995 and 30th November 1996. On 28th March 1995, the then Minister of Finance, the late Ronald Penza wrote to the then Director-General of ZIMCO, Mr Bwalya, with a copy to the President of the Republic of Zambia, Mr F.J.T. Chiluba, that at its 87th Meeting of ZIMCO Board of Directors held at State House on August 26th 1994, it was decided that the allowances be merged with salaries and that the decision be implemented without further delay. Upon their retirement, the appellants were paid terminal benefits not based on the Minister's directive, but on ZIMCO Conditions of service then applicable. The appellants then filed a complaint in the court below which was unsuccessful. There was evidence in the court below and the court found as a fact that employees at ZIMCO Headquarters benefited from the Minister's directive and got terminal benefits on merged salaries and allowances.

In dismissing the appellants complaint this is what the court below had to say at page 32 of the record:—

*"In this case, we are satisfied that by its omission, on the merger, the respondent fully complied with the ZIMCO directives and hence had no authority or ability to go ahead with the merger. We agree with the respondent that what they paid the complainants was what was due to them on the conditions existing at that time."*

There are five grounds of appeal viz:

1. The trial court recognizes the fact that ZIMCO Board of Directors at its 87th Board Meeting did resolve to merge allowances with salaries unconditionally. It therefore follows that the court below erred in law and in fact by taking into account conditions attached to the ZIMCO Board resolution by ZIMCO Management.

2. The lower court recognizes that payment of terminal benefits based on the merger were effected at ZIMCO Headquarters. The lower court erred in law and in fact by failing to hold that this changed the ZIMCO conditions of service which were applicable throughout the ZIMCO group of companies. Consequently, the holding company and subsidiary companies being one entity payment of terminal benefits should have been effected in subsidiary companies too and that not doing so is discriminatory to employees serving in subsidiary companies.

3. The court below erred in law and in fact by recognizing the conditions attached to the ZIMCO Board of Directors' resolution by ZIMCO management in the absence of evidence that ZIMCO management has power to alter or vary or change resolutions from its

Board of Directors when to the contrary the complainants did adduce evidence that the role of ZIMCO Management was to implement Board resolutions by passing information to the Subsidiary Companies using circulars.

4. Throughout their various periods of service the appellants were enjoying the allowances which they now seek to recover. The lower court misdirected itself by departing from the current juridical trend which emphasizes that all allowances payable to an employee during the employees period of service ought to be incorporated into the employees salary for purposes of computing terminal benefits, i.e., redundancy or retirement packages.

5. The lower court misdirected itself by holding that the respondent has no ability to pay and yet the respondent during the same period embarked on an ambitious programme of modernising its information technology systems and spent a colossal K12 billion which was not even budgeted for, an act which goes to show that the respondent was financially sound and could have managed to pay the complainants either at once or in small groups.

We propose to treat grounds 1 and 2 as 1, and deal with it first and depending upon what we say on this ground we shall then turn to other grounds.

On this ground Mr Mukande argued that the ZIMCO Board of Directors had no powers to alter or qualify the Shareholder's decision to merge salaries with allowances. That all employees in ZIMCO and its subsidiaries enjoyed the same conditions of service and therefore that since those at ZIMCO Headquarters were paid merged salaries and allowances other employees should also be paid merged salaries and allowances. That to decide otherwise would be discriminatory.

For the respondent it was argued by Mr. Mabutwe and Mr. Siwila that ZIMCO Board of Directors were competent to give policy guidelines to the subsidiaries of Zimco and that in so doing they were not watering down the Shareholders decision. That all subsidiaries were directed by the Board to implement the shareholder's decision subject to each Subsidiary's ability to pay. That the respondent's Board of Directors did not approve payment of merged salaries and allowances as the respondent had no capacity to pay and in so doing it was merely complying with Zimco Board's guidelines. In response to questions and comments by the court both Mr Mabutwe and Mr Siwila conceded that the alleged guideline would or did in fact create an absurdity in that employees of subsidiaries with ability to pay got or would get better and higher terminal benefits than those in subsidiaries without ability to pay, as in the instant case where ZIMCO employees at the headquarters got more than the appellants and yet the conditions of service were uniform.

We have considered the evidence on record, the judgment of the court below and the arguments by learned Counsel on both sides. The letter of 28th March, 1995 reads as follows:

"28th March, 1995

Mr R.L. Bwalya  
Director-General  
ZIMCO  
LUSAKA

Dear Mr Bwalya,

RE: INCORPORATION OF ALLOWANCES INTO THE BASIC SALARY

I write in connection with the above, particularly with relevance of the minutes of the 87th Meeting of the Board of Zambia Industrial and Mining Corporation Limited held at State House on Thursday August 26, 1994. Reference is also made to Minute No. 16/94 Section 41 and 42, to your letter of February 16th, 1995, addressed to all Chief Executives of ZIMCO Subsidiary Companies.

I have also made reference to your letter of 30th January, 1995, addressed to Mr A. Adamson, Secretary to the Cabinet and the Secretary to the Cabinet's letter of 31st January, 1995, to the Chief Accountant of ZIMCO. In this letter I have advised President Chiluba in his capacity as Chairman of ZIMCO that the demand to integrate basic salary and benefits is contained in the minutes of the 87th Board Meeting. The President has agreed and accordingly directed to have this matter implemented without any further delay.

Yours sincerely

.....  
Ronald D.S. Penza, MP  
MINISTER OF FINANCE

c.c. Mr F.T.J. Chiluba  
President  
State House,  
LUSAKA

This letter was never revoked and there can be no doubt from this letter that government and/or the Minister of Finance, the sole shareholder in ZIMCO and its subsidiaries decided that employees' salaries and allowances be merged. The decision was unqualified and embraced all Companies.

In the case of *Bank of Zambia V Chibote Meat Corporation Limited*, (1) the facts were that Meridien BIAO Bank (Zambia) Limited ran into some difficulties. They were overdrawn at the Bank of Zambia to the tune of K6.7 billion in its current account. When it became apparent that Meridien Bank was in some difficulty, the Bank of Zambia acceded to a request from that Bank that the overdraft be transformed into a loan which would carry a relatively smaller amount of interest. The Bank of Zambia as the regulating authority for the commercial banks was quite agreeable provided that the amount transformed into a loan was secured. One Mr Andrew Sardanis promised the Central Bank that suitable security would be offered from various sources including from sister Companies and so it was that the Central Bank was offered as part of the security the proceeds of sale of an abattoir belonging to Chibote Meat Corporation Limited. To this end, a charge document was prepared and which was signed by two of the directors of the respondent company. Eventually Meridien Bank went under and the Central Bank seized it under the Banking and Financial Services Act. In order to realise the security which had been offered the Bank of Zambia commenced an action in order to enforce the security by taking possession of the mortgaged property. In resisting the claim it was alleged on behalf of the respondent that the mortgage or charge had been procured by duress and undue influence exercised by Mr Sardanis on the Directors who executed the document and who were simply instructed or directed to sign the document. It was contended on behalf of the respondent that execution of the security was procured by fraudulent concealment of the true state of Meridien Bank which was already insolvent and which, had the directors of the defendant known the full facts, would not have justified signing the security. The evidence showed that Mr Sardanis

was the majority shareholder in Meridien BIAO and that the respondent company was a subsidiary of Meridien BIAO. The learned Commissioner who heard the matter dismissed the action on grounds of misrepresentation, illegality, undue influence and bad faith on the part of Mr Sardanis.

On appeal and in allowing the appeal we said, at pages 12-13:

*“The learned trial Commissioner made much of the relationship between a subordinate and a superior in the persons of Mr Sardanis vis-à-vis Mr Longwe and Raghuraman. The corporate entities engaged in these transactions indeed could only have had knowledge or ignorance or fear or influence through the human beings managing their affairs; and the question which was not discussed but which was in fact staring the court in the face was whether those with a controlling voice and interest in a company could not bind the corporate entities which in common language they “own”. In other words it was not discussed, it seems to us, whether the beneficial owners of a company, that is, the beneficial owners of shares have or do not have overriding authority over the company’s affairs and even over the Board of Directors. See for example Van Boxtel v Kearney (3). This question arises not only because of the provisions of the Companies Act which we have set out but also because the complainants in the case were clearly nominees and were clearly subservient and under the domination of Mr Sardanis and others at the head office who appeared to assert and exercise an overriding authority. The case of Van Boxtel and also the case of Re: Pan Electronic (2) are authority for the proposition that the beneficial owners especially shareholders, enjoy as a matter of right overriding authority over a company’s affairs. Theirs is the controlling voice over the wishes of mere directors and nominees.”*

We also said, at page 19:

*“Thus, we affirm that those with a superior claim and title such as the beneficial owners of the company have overriding authority over the company’s affairs. Even over the wishes of the Board of Directors.”*

The law is therefore settled and we need not say any more except perhaps to emphasize that in corporate law, Directors and Managers must dance the Shareholder’s tune. They have no powers to fetter, change or modify a Shareholder’s decision. We do not therefore agree with Mr Mabutwe and Mr Siwila that the ZIMCO Board of Directors gave mere guidelines to the respondent and other subsidiaries. What they did in fact amounted to modifying or qualifying the shareholder’s decision, which they were not entitled to do and in so doing created an absurdity which we discussed above. The absurdity cannot be allowed to stand.

We wish also to comment on the respondent’s ability or non-ability to pay. There is evidence at page 88 of the record of appeal from DW1, Edward Mutale, the respondent’s accountant that if the Board had ordered the Bank to pay it was going to be done. Moreover, inability to pay has never been and is not a defence to a claim. Neither is it a bar to entering judgment in favour of a successful litigant. For the foregoing reasons we allow the appeal and enter judgment for the appellants for terminal benefits based on merged salaries and allowances, less whatever has been paid to them, with interest at average short-term bank deposit rate from the date of the complaint to the date of judgment and thereafter at current bank lending rate determined by the Bank of Zambia until payment.

In case of dispute regarding computation of the terminal benefits there shall be liberty on either side to apply to the Registrar of the Industrial Relations Court.

We award costs in this court and in the court below to the appellants to be taxed if not

agreed upon.

Before we rise we wish to say that we take judicial notice of the fact that the respondent is the biggest Commercial Bank in this country with branches in every province. We also take Judicial notice of the fact that a number of banks have, in the recent past, gone into liquidation and that this has had an adverse effect on our economy.

From the evidence on record it would appear to us that the amount involved in this case is colossal and if the respondent was called upon to pay this sum immediately, we have no doubt that it would be forced to go into liquidation and this would have a devastating effect on the government, who is the sole shareholder and on our economy which is already experiencing untold constraints. In the public interest therefore we order and direct payment over a period of time under a scheme to be proposed by the respondent and to be approved by the Industrial Relations Court. We further order that there be no enforcement of the judgment by writ of fieri facias without leave of the full bench of the Industrial Relations Court, not necessarily the bench which heard the complaint.

There shall be liberty on either side to apply to that court.

*Appeal allowed.*