

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

2011/HPC/0263

(Civil Jurisdiction)

IN THE MATTER OF : SECTION 238 OF THE COMPANIES ACT, CAP 388
OF THE LAWS OF ZAMBIA

IN THE MATTER OF : SECTION 239 (3) (C) OF THE COMPANIES ACT
CHAPTER 388 OF THE LAWS OF ZAMBIA

IN THE MATTER OF : RULE 56 OF THE SECURITIES (TAKEOVERS AND
MERGERS) RULES, STATUTORY INSTRUMENT NO.
170 OF 1993.

B E T W E E N:

REYNOLDS CHANDA BOWA

APPLICANT

AND

PUMA ENERGY (IRELAND) HOLDINGS LIMITED

RESPONDENT

**BEFORE HON. MRS. JUSTICE F. M. CHISHIMBA ON THE 11th DAY OF
OCTOBER, 2011**

For the Applicant : Mr. M. Mundashi SC, - Messrs Mulenga Mundashi &
Company

For the Respondent : Mr. A. Chewe – Messrs MNB Legal Practitioners

J U D G M E N T

CASE AUTHORITIES REFERRED TO:

1. *Anderson Kambela Mazoka, Lt. General Christopher S. Tembo, Godfrey K. Miyanda Vs Levy Patrick Mwanawasa, The Electoral Commission of Zambia, The Attorney General (2005) ZR 138 P.159*
2. *Shimonde and Freight and Another Vs Meridian BIAO Bank (Z) Limited 1993 SC*
3. *Bank of Zambia Vs Anderson, and Another (1993) ZR (SC)*
4. *Commonwealth Shipping Vs Peninsular Branch Services (1922) ALL ER 207*
5. *Shamwana and Others Vs The People (1985)*
6. *Exxon Corpri Vs Exxon Insurance Consultants Ltd (1981) 2 ALLER 495 at 502*

LEGISLATION AND OTHER WORKS;

1. **High Court Rules Chapter 27 of the Laws of Zambia**
2. **Companies Act, Cap. 388 of the Laws of Zambia**
3. **Securities (Takeovers and Mergers) Rules, Statutory Instrument No. 170 of 1993**
4. **Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia**
5. **Rules of the Supreme Court (RSC) 1999 Edition**

The Applicant by way of Originating Summons pursuant to **Order XXX Rule 11 (c)** of the **High Court Rules Chapter 27 of the Laws of Zambia** applied for the construction of the Statutory Provisions of the following Sections;

- (i) **Sections 238 and 239 (3) (c) of the Companies Act, Cap. 388 of the Laws of Zambia.**
- (ii) **Rule 56 of the Securities (Takeovers and Mergers) Rules, Statutory Instrument No. 170 of 1993.**

The Applicant seeks the following Orders.

- (i) *An Order that the Respondent, on acquisition of 75% of the issued shares of BP Zambia Plc (“**the Company**”) be compelled to acquire 3,800,000 shares held by the Applicant in the Company on the basis of an offer given to the Respondent and dated 19th April, 2011.*
- (ii) *An Order directing the Respondent to acquire the shares held by the Applicant in the Company at the price of **K1,145** per share being the last traded price then prevailing on the Lusaka Stock Exchange on the date of the Applicant’s offer.*
- (iii) *Any other equitable relief the Court may deem just.*
- (iv) *Costs*

The Application is supported by an Affidavit in Support sworn by the Applicant filed herein on the 8th of May, 2011.

It is stated by the deponent that he is a Minority Shareholder in BP Zambia Plc having a Shareholding of 3,800,000 shares. On the 4th of April, 2011 BP Zambia Plc issued an announcement in the Local Press stating that BP Africa Limited had completed the sale of its 75,000,000 shareholding in the Company to the Respondent Company and that it intended to apply to the Securities and Exchange Commission hereinafter referred to as "SEC" under the provisions of the ***Securities (Takeover and Mergers) Rules Statutory Instrument No. 170 of 1993*** for a waiver in regard to the requirement to undertake a mandatory offer to minority shareholders.

On the 19th April, 2011 the Applicant wrote to the Respondent requiring it to purchase his shareholding pursuant to Section 238 of the ***Companies Act Cap 388*** of the ***Laws of Zambia***. The Respondent refused to purchase the said shares on the basis that it has applied to SEC seeking a waiver exempting it from undertaking a mandatory offer to minority shareholders. It is further stated that the provisions of the Statutory Instrument (S.I.) cannot override the provisions of a Statute and the Applicant seeks an Order directing the Respondent to purchase his shares at the last traded price of K1,145 per share.

The Respondent opposed the application and relied upon the Affidavit in Opposition dated 4th August, 2011 and written submissions of 4th October, 2011.

It is deposed by one Grant William Henderson that the transfer of shares that BP Africa Limited are in the process of selling to Puma Energy (Ireland) Holdings Limited has not been finalised as the

purchase price has not been concluded due to the post-completion price adjustment mechanism for the working capital.

It is stated that the Respondent has made an application to SEC for a waiver exemption regarding the mandatory offer to minority shareholders and awaits a response from them. It is further stated that even if the Respondent were in a position to accept the mandatory offer of the Applicant, the price at which the shares would be purchased would be impossible to determine because the price at which Puma Energy (Ireland) Holdings Limited are purchasing the shares from BP Africa Limited is not yet determined. It is the said price at which any mandatory minority offers can be accepted in the event that the waiver from SEC is not concluded. The application is therefore prematurely before this Court.

The Applicant by way of response relied upon its Affidavit in Reply dated 30th August, 2011 and referred to exhibit "RCB1" of the Affidavit in Support which is an announcement in the Local Press dated the 4th April, 2011 advising of the completion of sale of the shareholding and referred to exhibit "RCB2" a notice calling for an Extra Ordinary General Meeting to consider a resolution for change of name. On the 30th of June, 2011 the Registrar of Patents and Companies Registration Agency issued a replacement of Certificate of Incorporation for change of name to Puma Energy (Z) Limited. It is stated that the Lusaka Stock Exchange daily stock news of 8th July, 2011, confirmed a trade in 75,000002 shares at K1,166 per share which represent shares acquired by the Respondent.

The parties filed into Court respective submissions. It is submitted by the Applicant that the Case is anchored on the provision of **Section 238 (1) (3)** of the **Companies Act** as regards an entity acquiring more than seventy five per cent shares in a company and the said provision is clear in it's interpretation of the words.

The Applicant submits that in the first instance the Respondent contends that the transfer of property in the shares is in the process of being sold and has not been finalised, hence the non compliance of the Applicant's offer. In the second instance that the Respondent has applied for a waiver to SEC for exemption from making an offer under the **Securities (Takeover and Mergers) Rules**.

It is contended that the reason relating to non completion of transfer of property shares is not factual in view of the evidence on record.

As regards the non acceptance of the offer due to the waiver applied for it is submitted that the offer by the Applicant is made under the rights vested in him pursuant to the provisions of Section 238 of the **Companies Act** and not under the provisions of the **Securities (Takeover and Mergers) Rules**.

It is submitted that the Court makes a determination on the two conflicting provisions of the law namely the **Companies Act** and the **Security (Takeover and Mergers Rules)** pursuant to the **Security Act Chapter 354 of the Laws of Zambia**.

I was referred to **Section 20 (4)** of the **Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia** and the Case of **Anderson Kambela Mazoka, Lt. General Christone S. Tembo, Godfrey K. Miyanda Vs Levy Patrick Mwanawasa, The Electoral Commission of**

Zambia, The Attorney General (2005) ZR 138 P.159 ⁽¹⁾ regarding the interpretation of legislations.

The gist of the Applicants arguments is that the **Securities (Takeovers and Mergers) Rules** cannot override the substantive Law of the **Companies Act** and that an application for a waiver by the Respondent Company does not extinguish the rights of minority shareholders stipulated under the **Companies Act**.

Section 39(1) of the **Securities Act** was referred to and it is contended that under the said provisions an entity having acquired shares up to a certain threshold is required to make a compulsory offer to the remaining minority shareholders or may apply for a waiver of exemption. It is further contended that under **Section 238** of the **Companies Act** the position is the reverse upon a company having acquired more than seventy five per cent shares the right of the minority shareholder to make an offer to the entity is triggered and there is no provision for a waiver under the said section.

It is submitted that **Section 39** of the **Securities Act** from which the **Securities Takeovers and Mergers Rules** derive legitimacy is intended to govern **Takeovers and Mergers** and the **Companies Act Section 238** deals with the rights invested in minority shareholders. In a nutshell it is contended that where there are inconsistencies between the two **Acts**, effect is given to the latter statute in this case is the **Companies Act**.

In regard to the price of the shares of the Company not being determined due to post completion issues in the sale agreement between the Respondent and BP Africa, it is submitted that this position is not factual and in any event is immaterial to the Applicants claim under **Section 238** of the **Companies Act**. This is so as the price offered to the Respondent constituted an offer as per subsection (3) of **Section 238** and the Respondent is bound to accept the offer on the terms given or on such terms as the Court may set.

The Respondent in their submission quoted the provisions of **Section 238 (1) and (3) of the Companies Act**, **Section 39** of the **Securities Act Cap 354** of the **Laws of Zambia**, **Rule 56 (a)** of the **Securities (Takeovers and Mergers) Rules Statutory Instrument No. 170 of 1993**, and **Section 9** of the **Provisions of the Interpretation and General Provisions Act Cap 2** which I will revert to in details in due course in order to avoid repetitions.

It is submitted that written Law includes Statutory Instruments and any acts done pursuant to Statutory Instruments must be considered as done pursuant to the written law under which the Statutory Instrument is made. Rule 56 must therefore be read with **Securities Act Chapter 354** of the **Laws of Zambia**.

In support of the above arguments, the Cases of **Shimonde and Freight and Another Vs Meridian BIAO Bank (Z) Limited 1993 SC (2)** and **Bank of Zambia Vs Anderson, and Another (1993) ZR (SC) (3)** were cited in support of the argument above.

It is contended that though **Rule 56** of the **Securities (Takeovers and Mergers) Rules Statutory Instrument No. 170 of 1993** deals with instances where a Company should make a mandatory offer to buy shares of minority shareholders and **Section 238** of the **Companies Act** deals with an instance where a minority shareholder has a right to offer for sale his shares in the transferee Company which has acquired more than three fourths of shares, both provisions of the law essentially deal with one and the same thing that is the sale of shares, therefore the provisions can be read in harmony.

The gist of it's arguments is that the waiver under **Rule 56 (Takeovers and Mergers) Rules** does extend to offers made by minority shareholders to the transferee Company. Further that the said rules are not inconsistent with each other and the waiver by SEC covers both offers.

It is submitted that should the Court be of the opinion that the Respondent is bound to purchase the Applicants shares, the shares must be purchased at a price as provided under **Section 238 (3)**. The Respondent it is contended objects to the Applicants offer of K1,145 per share and requests the Court to take into consideration the price at which the Respondent purchased each share from BP Zambia Plc which price shall be communicated to the Court after the post-completion price adjustment mechanism.

In the alternative it is prayed by the Respondent that the Court make a share purchase price determination not based on the Applicant's offer but on the price at which the Respondent acquired it's shares from BP Zambia Plc.

In response to the argument that **Section 238** of the **Companies Act** and **Rule 56** of the **Rules (Takeovers and Mergers)** should be read together, it is submitted that the same has no legal basis.

Section 238 (i) and **(3)** is mandatory and that **Section 39** of Chapter 354 as read with **Section 56** of the **Securities (Takeover and Mergers) Rules** relates to situation where a company takes over thirty five per cent of Securities of a Company and that the two provisions apply to different situations and are not in conformity with each other.

The Applicant invited the Court to take Judicial Notice of the fact that the Respondent has now decided not to make an application to the Securities and Exchange Commission requesting for the grant of waiver in respect of the undertaking of a mandatory offer to minority shareholders as published in an official announcement by the Respondent in the Daily Mail of 12th October, 2011.

The Cases of **Commonwealth Shipping Vs Peninsular Branch Services (1922) ALL ER 207** ⁽⁴⁾ and **Shamwana and Others Vs The People (1985)** ⁽⁵⁾ were referred to where the principle of Judicial notice was defined as;

“Judicial notice refers to facts which a Judge can be called upon to receive and to act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer”.

It is submitted that this is a proper case for the Court to take Judicial notice of and that the argument relating to waiver therefore falls away.

In response to the argument relating to the price at which the shares are to be purchased the Court was referred to **Section 238 (3)** of the **Companies Act**.

It is contended that the purported post-completion price adjustment is immaterial in the determination of price and is aimed at preventing the Applicant from obtaining a just and equitable price for his shares. **Section 58 of the Rules (Takeovers and Mergers)** was referred to and it is submitted that the Applicant's shares be purchased by the Respondent at a fair price of K1,166 per share being the price the Respondent acquired its shareholding in the Company from BP Africa on the Lusaka Stock Exchange (LUSE).

I have carefully considered the application together with the Affidavit evidence on record, the authorities cited and the submissions by the Learned Advocates for the Parties. The issues in this matter revolve around the provisions of **Section 238 (1) (3) of the Companies Act Chapter 388 of the Laws of Zambia** and **Section 56 of the Securities (Takeover Mergers) Rules**. Before proceeding to deal with the main issues, I will proceed first with the Judicial Notice issue raised by the Applicant as it relates to the argument by the Respondent that it cannot comply with the Applicant's offer on the basis that they have made an application to the Securities Exchange Commission for a waiver exempting them from making mandatory offers to minority shareholders.

I have read and studied the announcement published by the Respondent in the Daily Mail of 12th of October, 2011. The said announcement states as follows;

“Further to the last cautionary announcement dated 4th August, 2011; shareholders and the market were informed of the completion of the sale of BP Africa Limited’s interest in BP Zambia Plc to Puma Energy (Ireland) Holdings Limited (“Puma Energy”) via Announcement of completion of sale issued on 4th April, 2011.

In the same announcement of 4th April, 2011, it was stated that “Pursuant to the provisions of the Securities (Takeovers and Mergers) Rules, 1993 of the Securities Act, Cap 354 of the Laws of Zambia and the Listing Rules of the Lusaka Stock Exchange, Puma Energy intends to apply to the Securities and Exchange Commission of Zambia to request for the granting of a waiver in regard to undertaking a mandatory offer to minorities”.

Puma Energy now understands that a waiver may not sufficiently address the expectations of some of the minority shareholders. Accordingly Puma Energy will not proceed with its earlier intention of applying to the SEC for a waiver and instead it will proceed with the mandatory offer. The mandatory offer will take place after Puma Energy has concluded its post completion price adjustment with BP Africa Limited.

Therefore, it could be sometime before the final position is known and the likely completion of this exercise will be advised in due course.

Accordingly all shareholders are advised to continue to exercise caution when dealing in the company’s securities until a final announcement regarding the mandatory offer is made”.

Judicial notice has been defined as a Court's acceptance for purposes of convenience and without requiring a party's proof, of a well known and indisputable fact. The fact that the Respondent will not proceed with its earlier intention of applying to SEC for a waiver is a conclusive fact which the Court has power to accept.

I am of the considered view that Judicial Notice be taken note of the announcement. I have therefore taken Judicial notice of the announcements by the Respondent *vis-à-vis* the decision not to apply for a waiver in shares held by the Minority holders.

The arguments therein in respect of the application for waiver will not be dwelt on nor belaboured upon.

I now move on to the arguments relating to the Statutory Provisions in issue. I find it pertinent to quote the said provisions in order to appreciate the arguments advanced by the parties.

Section 238 (1) and (3) of the Companies Act provides that:

“Where

(a)an offer is made to the shareholders of a company (in this section called “the transferor company”) or any of them for the purchase of their shares;

(b)in pursuance of the offer, shares in the transferor company are transferred to another body corporate (referred to in this section as “the transferee company within the meaning of this Act or not; and

(c) After the transfer of shares; the transferee company holds more than three-fourths of the shares in the transferor company or in a class of those shares.

Then,

- (i) the transferee company shall within one month after the date of the transfer, unless after a previous transfer it has already complied with this requirement, give notice of that fact to the holders of the remaining shares or of the remaining share of that class, as the case may be; and**

- (ii) any such holder may, within three months after the giving to him of the notice require the transferee company to acquire all or any of his shares.”**

Section 238 (3) provides that **“where a shareholder under subsection (1) requires the transferee company to acquire any shares, the transferee company shall be entitled and bound to acquire those shares on the terms of the offer or on such other terms as may be agreed or as the court, on the application of either the transferee company or the shareholder, thinks fit to order.”**

The Applicant contends that the requirement under Section 238 (3) is mandatory whereas, the Respondent on the other hand contend that the price has not been determined and concluded due to post

completion price adjustment in order for them to comply with the provisions therein.

The issues before this Court as I see them are as follows:

- (1) Whether there is a conflict between the provisions of Section 238 (1) and (3) of the Companies Act and Section 56 of the **Securities (Takeover and Mergers) Rules**.
- (2) Whether the Applicant's right to offer for Sale his shares to the Respondent places on the Respondent Company as a transferee company a mandatory obligation to purchase the said shares.
- (3) If so, the price at which the shares ought to be purchased at.

I have studied the statutory provisions of Section 238 (1) and (3) of the Companies Act and Section 56 of the Rules. Section 56 provides that:

“subject to the granting of a waiver by the Commission, if

(a) any person acquires, whether by a series to transactions over a period of time or not, thirty-five percent or more of the voting rights of a company;

(b) ... that person, or the principal members of the concert group, as the case may be, shall extend offers, on the basis set out in this rule, to the holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital in which such person, or persons acting in concert with him, hold shares. Offers for different

classes of equity share capital must be comparable and the Commission shall be consulted in advance in such cases.”

The parties have urged the court to address the issue of conflict in the provisions of section 238 (i) and (3) of the Companies Act and Section 56 of the Rules.

My understanding of the two provisions is that they address different scenarios. I am of the considered view that the two statutes do not conflict and relate to different situations. Sections 238 (i) & and (3) of the Act relates to a situation where a transferee company acquires;

- i) More than three – fourths (75%) of shares in an entity
- ii) Upon such acquisition a share holder requires the entity to acquire his/her shares
- iii) Then the transferee company shall be entitled to acquire the said shares and under section 238 (3) is bound to acquire the share.

Rule 56 on the other hand is applicable to a situation where upon acquisition of 35% or more voting rights in a company, the transferee company makes (extends) an offer to the shareholders.

The moment the threshold of three quarters is reached its section 238 of the Act that applies. In this case before court Puma (Z) Limited acquired three quarters of the shares in BP (Z) Limited. If the shares acquired had been 35% or more voting rights then the provision of section 56 of the rules would have been applicable.

The arguments therefore relating to conflict in the provision do not arise. Even assuming by large that they do conflict subsidiary legislations do not override provisions of the principle legislation which in this case is the Companies Act.

I now move on to the main cardinal issue of whether the Applicant is entitled to have his shares acquired by the Respondent Company. The Respondent's main contention to the Applicants application is that the transfer of shares has not been finalised because the purchase price has not been completed due to the post completion issues in the sale agreement between it and BP Africa Limited.

From the evidence on record particularly exhibit "RCB4" in the Affidavit in support which is an Announcement of the completion of the sale of BP Africa Limited's interest in BP Zambia Plc, it is clear that the Sale of the Shares to the Respondent is completed. There is further on record a circular to shareholders exhibited as "RCB1" in the Affidavit in Reply calling for the Extraordinary General Meeting whose purpose was to approve the change of name to Puma Energy (Z) Limited. There is also exhibited on record as "RCB3" a Replacement Certificate of Incorporation for Change of name Certification for Puma Energy Zambia Plc having been known before 30th of June 2011, by the name of BP Zambia Plc.

From the above evidence, I hold as a fact that the Sale of BP Zambia Limited to Puma Energy (z) Plc was and is completed.

I am of the considered view that the Sale was completed as regards acquisition of shares. The Respondent is merely attempting to be

evasive and not being sincere when it contends that the sale is not complete.

Having held that the Sale was completed, I am of the considered view that the Respondent is mandatorily required to acquire the Applicant's shareholdings of 3,800,000 shares pursuant to Section 238 (3) of the Companies Act. This is so because the requirements of section was compiled with. The facts on record show that a notice of completion of sale of 75% shares was issued. Thereafter the Applicant within the prescribed three months after notice wrote to the Respondent requiring it acquire all its shares.

The issue that remains then is the determination of the price at which the said shares ought to be purchased at.

The Applicant contends that the price should be at K1,145.00 per share being the price then obtaining at Lusaka Stock Exchange (LUSE) at the time of the offer. In the Applicant's Affidavit in Reply, he further contends that the price that the shares should be purchased at should be K1,166.00 per share being the price the Respondent acquired the majority shareholding in the company from BP Africa on LUSE as per exhibit "RCB4".

The Respondent objects to the price of K1,145.00 per share and contends that the price be determined taking into account the price at which the Respondent purchased each share from BP Zambia Plc which price awaits the post completion price adjustment mechanism. I must comment in this case that the Respondent has not exhibited nor produced before court the Purchase Agreement of

Sale of the Shares between the BP Zambia Plc and itself, neither have they attempted to define what this post – completion price adjustment mechanism is.

The starting point in resolving the issue of the price at which the shares ought to be purchased is Section 238 (3) of the Companies Act which provides the manner in which the Transferee Company shall acquire the said shares as follows:

- i) On the terms of the offer by the Minority Shareholders
- ii) On such terms as may be agreed by the parties
- iii) As the Court thinks fit to Order.

Although section 58 (1) of the Securities (Takeovers or Merger) Rules provides for shares to be purchased **“in cash or be accompanied by a cash alternative of not less than the highest price paid by the offeror or any person acting in consent with it for voting rights of the offeree within the proceeding six months”**, I am of the considered view that the applicable provision is Section 238 (3) of the Companies Act in the case in Casu.

It's not in dispute that the Applicant made an offer to the Respondent at the price of K1,145.00.00 per share. As at 19th April 2011, when the Applicant made an offer to the respondent to require it purchase the shares, the last traded price was K1,145.00 per share.

By the 8th of June 2011, there is evidence on record by way of a LUSE daily Commentary of even date showing a trading activity by

BP Zambia at a volume of 375,000,001 share at a price of K1,666.00.00 per share.

I am of the considered view that the price at which the Respondent should purchase the Applicants shares is the sum of K1,145.00.00 being the price offered by the Applicant to the Respondent Company. This in my considered view is a fair price.

The Respondent Company is bound to purchase the said shares at the price offered. The argument canvassed by the Respondent relating to post completion price adjustment mechanism is misconceived and has no legal basis whatsoever.

For the foregoing reasons it is hereby Ordered as follow:

- i) That the Respondent do hereby acquire the Applicant's 3,800,000 shares held in the company.
- ii) That the said shares be acquired at the price of K1,145 per share being the last traded price prevailing on the date of the Applicant's offer.
- iii) The said shares be acquired within 30 days from the date hereof.
- iv) Costs to the Applicant to be taxed in default of Agreement.

Leave to appeal Granted.

Delivered this 11th day of November, 2011

**F. M. Chishimba
HIGH COURT JUDGE**