ZAMBIA CONSOLIDATED COPPER MINES LIMITED AND NDOLA LIME COMPANY LIMITED *v* EMMANUEL SIKANYIKA AND OTHERS

Ngulube, CJ, Sakala and Chirwa, JJS
7th March, 2000 and 6th June, 2000
(SCZ Judgment No. 24 of 2000.)

Flynote

Company Law – Change of Shareholders – Effect.
Employment Law – Unilateral Variation – Basic conditions of service – Effect thereof.

Headnote

The respondents were unionised employees of the second appellant which is a wholly-owned subsidiary of the first appellant. The workers launched proceedings in the Industrial Relations Court against their employer and the holding company requesting for a declaratory relief that they are entitled to payment of terminal benefits prior to transferring their contracts of employment to those that would buy the second appellant under the privatisation programme.

Held:

(i) Change of ownership of shares cannot result in the corporate entity becoming a new employer; it will be still the same employer and will be bound by the contracts of employment.

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

Cases referred to:

1. *Salomon* v *Salomon* [1897] AC 22.
2. *Marriot* v *Oxford and District Co-operative Society Limited* No. 2 [1970] 1 QB 186.
3. *Kabwe* v *BP Zambia Limited* (1995-1997) Z.R 218.

P Chamutangi, Legal Counsel of ZCCM Limited for the appellant.
L K Mbaluku (Mrs) of L K Mbaluku and Company for the respondents.

Judgment

NGULUBE, CJ, delivered the judgment of the court.

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to those that would buy Ndola Lime Limited, their employer, under the privatization programme. The workers likened their position to that of their counterparts working for the first appellant whose assets in the various divisions were being sold to buyers who had or had formed their own companies which would therefore literally be their new employers. The appellants resisted the claims arguing that there could be no parallel between the position of the workers in the first appellant which would cease to exist and those in the second appellant which would continue in existence having only changed the shareholders.

The Industrial Relations Court determined that, although the two appellant companies were separate legal entities but since they shared some of the staff who all enjoyed the same conditions of service, they were in substance and in truth exactly the same thing and the question in the action would be dealt with by treating the two companies as the same company in different tunics. The Court considered the two companies to be one commercial entity so that the sale of the shares in the second appellant would mean that it would cease to be the alter ego of the first appellant. That being the case, it was the finding of the Court that a declaration do issue that the complainants were entitled to be paid terminal benefits whenever ZCCM will have sold all its shares in Ndola Lime Limited because the workers were in fact ZCCM employees though employed by the subsidiary and in keeping with the payment of terminal benefits effected in relation to other direct ZCCM employees.

The action was a truly quia timet action: The workers feared what would happen to their accrued benefits when new shareholders bought Ndola Lime Limited and opted to treat the company as then becoming a new employer so that the previous employment should be treated as at an end and terminal benefits be paid regardless whether there would be actual termination of employment or not. In effect and in essence, the Industrial Relations Court agreed with the workers. Of course, the Court has not suggested that it is ZCCM to pay the terminal benefits. The appellants have lodged this appeal and have advanced a number of grounds.

The central question arising in the appeal concerned the finding that the two appellants were in essence one company so that the sale of shares would warrant the payment of terminal benefits to the employees prior to entering upon what would amount to new contracts of employment with new employers. The grounds of appeal included those that criticized any finding of fact used to justify the finding that the companies were one commercial entity and in fact one in essence. Thus, the first ground of appeal alleged error in the finding that the workers in Ndola Lime enjoyed ZCCM conditions or that even ZCCM employees were transferred to work for Ndola Lime. The heads of argument relied upon asserted that there was no evidence on record to support the finding that employees were transferred from ZCCM to Ndola Lime. This submission flew in the teeth of the evidence of the appellants' own witness Jacob Njovu who swore the affidavit in support of the respondents' answer to the complaint and who deposed how he had been seconded.

The other grounds of appeal were more relevant and concerned the separate identity of the companies at law and the different consequences between mere sale of shares in contrast with the sale of assets leading to ZCCM ceasing to exist as the employer for the affected workers. We were treated to elaborate submissions and arguments both in their written heads of argument and in oral submissions on both sides on the legal consequences of incorporation and the relationship between a shareholder and the company and indeed between a holding company and a subsidiary company. We had to revisit *Salomon* v *Salomon (1)* and various later decisions and texts. We were taken through the authorities and reference materials dealing with the situations when it would be necessary or permissible or warranted to lift the veil of incorporation. Ultimately, we were puzzled what was the need or point of lifting Ndola Lime's corporate veil when no order was intended or could be made against ZCCM itself such as that they should come and do the actual paying of the claimed terminal benefits at the future time envisaged. Under the terms of the judgment below, the employer Ndola Lime would still be the one to pay.

The point with something in it was whether on the facts and in the circumstances, it was appropriate to treat the sale of shares as altering the employer and bringing about new

contracts with new people. We heard learned submissions: Mr Chamutangi maintained that the employer would still remain the same corporate entity. Mrs Mbaluku on the other hand drew attention to the information that had been circulated and which had triggered the workers' apprehension. In this regard, she pointed out some of the circulars on record which suggested that there was no guarantee the new shareholders would maintain the same terms and the threat that the employees might suffer loss of accrued benefits caused them to be apprehensive. The declaration was required to put the minds of the employees at rest.

We have given this matter due consideration. We must affirm right away that a change of ownership of shares cannot result in the corporate entity Ndola Lime becoming a new employer; they will still be the same employer and they will be bound by the contracts of employment which they already have with each of their workers individually and collectively. We must also dispel the notion held by some that new shareholders are at liberty to breach with impunity existing contracts of employment without sanction or redress for the employees: While a contract of employment – just like any other contract – can be varied, any unilateral variation to an important term which is non-consensual and which is unacceptable to the workers would justify the aggrieved workers treating the same as a repudiation and breach of the contract by the employer which terminates the employment and which warrants the payment of redundancy or other terminal benefits, as appropriate. This is the principle which is established by such cases as *Marriot* v *Oxford and District Co-Operative Society Limited (*2) and *Kabwe* v *B.P (Z) Limited* (3). The adverse alteration to the important conditions is what brings about the termination. In the case at hand, there is no such terminating event, only apprehension that it may occur in future. The attempt to make a change of shareholding itself a terminating event cannot be entertained and terminal benefits cannot be paid for employment which has not terminated. The litigation based on future apprehension was premature in the absence of any actual terminating event. If any futuristic declaration could have been competent, it should have been one that said that the employers must come and pay terminal benefits should they try to alter in an unacceptable way any of the important terms already accrued or being enjoyed.

It follows from what we have been saying that this appeal is allowed and the declaration that terminal benefits be paid merely upon sale of shares is set aside. Since this quia timet action was provoked by some unhelpful statements in circulars publicized by the employers and emanating from the authorities, there will be no order for costs here and we do not disturb any orders in that regard which were made below.

Appeal allowed