

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2018/HP/848

(Civil Jurisdiction)

BETWEEN:



CHRISTOPHER CHILONGO

PLAINTIFF

(Suing as Secretary General of City of Lusaka
Football Club 1970)

AND

CAVMONT FMO CORPORATION LIMITED

1ST DEFENDANT

FORLI LIMITED

2ND DEFENDANT

Before the Honourable Lady Justice S. Chocho, on 9th December, 2024.

For the Plaintiff: Ms. C. Puta of Messers Robson Malipenga and Company

For the Defendants: Ms. B. Nachimba of Messers J & M Advocates

J U D G M E N T

Cases referred to:

1. *Zambia High Light Mining Investments Limited V Register and Chief Executive Officer Patents and Companies Regulations Agency (2021) ZMHC 50*
2. *Dunlop Pneumatic Tyres Company Limited V Selfridge and Company Limited 1912 AC*
3. *Rating Valuation Consortium and D.W. Zyambo and Associates (suing as a firm) V The Lusaka City Council Zambia National Tender Board (2004) ZR 183*
4. *Friday Mwamba V Sylvester Nthenge and Others (2010) SCZ 10*

5. *Kunda v. Konkola Copper mines Plc Appeal No. 48 of 2005*
6. *Marshlands Consortium Limited and Others v Felicitus Kabwe Chibamba Appeal No 154 of 2021*
7. *Gemistar Enterprises Limited v Afgri Corporation Limited [2017] ZMSC 159*
8. *Fibrosa Spolka Akcyjna v Pairbairn Lawson Combe Barbour Ltd (1943) AC 32*

Legislation and other authorities referred to:

1. *The Companies Act, Act No. of 10 of 2017*
2. *The Companies Act, 1994*
3. *The High Court, Chapter 27 of the Laws of Zambia.*
4. *Phipson on Evidence, 17th Edition (London; Thomson Reuter 2010*
5. *Murphy on Evidence 5th Edition (2002) Universal Publishing Company, New Delhi.*

1. INTRODUCTION

- 1.1. This Judgment is in respect of the Plaintiff's claim commenced by Writ of Summons and accompanying Statement of Claim dated 2nd May, 2018 which was amended by a consolidated Writ and amended Statement of Claim dated 20th September, 2020 for the following claims against the Defendants;

First claim

- i) An Order to change the directorship of the City of Lusaka Football Club (2000) Plc and reflect new trustees.
- ii) An Order to nullify the changes made to the shareholding of the City of Lusaka Football Club (2000) Plc, from its inception.
- iii) An Order that the Plaintiff never owed USD 562,000.00 to the 1st Defendant at the time the debt was sold to the 2nd Defendant.

- iv) An Order that the debt assignment of USD 562,000.00 by Cavmont FMO Corporation Limited to Forli the 2nd Defendant herein was illegal.
- v) An Order to nullify the sale of Cavmont FMO Corporation Limited shareholding in the City of Lusaka Football Club (2000) Plc to a third-party Forli Limited.
- vi) An Order to nullify the illegal or unlawful convention of all preference shares by Cavmont FMO Corporation Limited in the City of Lusaka Football Club (2000) Plc to ordinary shares.
- vii) An Order to nullify illegal or unlawful changes of registered secretaries of City of Lusaka Football Club (2000) Plc, Messers Chifumu Banda and Associates.

Second claim

- i) An Order of declaration that the Defendant having forged the lease agreement, the lease agreement be declared null and void.
- ii) An Order of payment of the sum of ZMW 500,000.00 being 5% rentals and hiring the stadium.
- iii) An Order of payment of 5% rentals and hiring of stadium from date of Writ to date of Judgement.
- iv) An Order of payment of the sum of ZMW10,000,000.00 demolished club house.
- v) An Order for cancelation of lease agreement.
- vi) An Order to demolish illegally built structures less what is owed to the Plaintiffs
- vii) An Order restraining the Defendant from interfering with the running of the football club by the Plaintiff and allowing them use woodlands stadium and handover the football team.
- viii) An Order that the city of Lusaka Football Club are equitable owners of both stand No. 3034 to the city of Lusaka football club 1970 as beneficial owner.

- ix) An Order for transfer of the certificate of title being Stand No. 2757 and stand 3034 and other important club documents.
- x) Damages.
- xi) Interest.
- xii) Any other reliefs as the Court may deem fit.

1.2. In response and defence to the Plaintiffs' claims, the Defendants filed a Defence and Counter claim on the 25th October, 2018 in which they denied that the Plaintiffs claims and counter claimed the following;

- i) Damages.
- ii) An injunction to restrain the Plaintiff by himself and all the members of the city of Lusaka football club (1970), their servants, agents or otherwise from and to prevent them from:
 - a) Committing a repetition thereof, inducing or procuring breaches or unlawfully interfering in contracts between the second defendant and city of Lusaka football club (2000) Plc; and the leases between the 2nd Defendant and its tenants on Stand No. 3034, Lusaka; the development of Lewanika Mall on Stand No. 2757, Lusaka;
 - b) Interfering in the affairs of City of Lusaka Football Club.
- iii) Interest on the amount that will be found due and payable to the 2nd Defendant
- iv) Costs occasioned by this action.

2. **EVIDENCE/TESTIMONY**

- 2.1. In aid of their case the Plaintiff called one Witness and Witness statement filed on 30th June, 2023.
- 2.2. PW1 Christopher Chilongo testified that the 1st Defendant without a valid meeting, valid resolution and consent of the Plaintiff increased the company's share capital.

- 2.3. PW1 testified that the 1st Defendant connived with one trustee and created preference shares which were subsequently converted into ordinary shares and the 1st Defendant allotted itself.
- 2.4. PW1 testified that the 1st Defendant also illegally increased the share capital of the company without a valid resolution through its trustee.
- 2.5. PW1 testified that the 2nd Defendant did not carry out due diligence and proceeded to buy illegal shares from the 1st Defendant.
- 2.6. PW1 testified under cross examination that he was appointed Secretary General of the Plaintiff Company in 201 at the ushering of the new executive after 2017 election.
- 2.7. PW1 testified under cross examination that prior to his appointment, the Secretary General was one Charles Tembo.
- 2.8. PW1 testified that as Secretary General, he was provided with the documentation relating to the records of the Plaintiff. However, PW1 testified that he was not aware that the Plaintiff had been deregistered as he did was not availed with documentation to that effect if any.
- 2.9. PW1 testified under cross examination that what was deregistered is a club called City of Lusaka Football club and that when the Plaintiff Company was formed, it was an unincorporated entity and was only registered in 2018.
- 2.10. PW1 further gave contradicting testimony under cross examination that the Plaintiff Company was in existence and incorporated as of the year 2000.
- 2.11. PW1 testified under cross examination that he was aware of the Shareholding structure of City of Lusaka Football Club 2000 PLC in 2000 and listed them as follows;
 - Mr. Henry Sichembe
 - Late Judge Lewanika
 - Late Judge Esau Nebwe

- Late Masiye Masiye
- Mr. Brilliant Muchima
- Mr. Yuyi Lishomwa
- Late Christine Mulundika
- State Counsel Chifumu Banda

- 2.12. PW1 testified further under cross examination that he was never a share holder of City of Lusaka Football Club 2000 PLC
- 2.13. PW1 testified under cross examination that there was a mortgage which was paid for by Cavmont Bank Limited.
- 2.14. PW1 testified under cross examination that City of Lusaka Football Club 1970 was facing financial challenges and Mr. Henry Sichembe in his capacity as interim Chairperson approached Cavmont Bank Limited seeking financial assistance.
- 2.15. PW1 conceded under cross examination that a duly convened meeting consists of 50% of the duly paid-up members and that he did not know who the fully paid-up members were at that time.
- 2.16. PW1 testified under cross examination that he was aware of the existence of a proposed subscription agreement between City of Lusaka Football Club PLC and the 1st Defendant but was not aware of any execution thereof.
- 2.17. PW1 was referred to pages 71 and 77 of the Defendants bundle of documents and he agreed that the subscription agreement referred to in 2.16 above was in fact executed.
- 2.18. PW1 testified under cross examination that the trustee that was being referred to as to have connived with the 1st Defendant was one Henry Sichembe and the basis of this suspicion is that Henry Sichembe is the only one documented to have dealt with the 1st Defendant.

- 2.19. PW1 conceded under cross examination that he was preview to minutes which suggested that other members of the Plaintiff Company in fact dealt with the 1st Defendant.
- 2.20. PW1 testified under cross examination that the evidence he has to establish that indeed the Plaintiff Company owns the property in question is contained in the 1st Defendants witness statement.
- 2.21. In reexamination, PW1 testified that there were two more shareholders in addition to the ones listed in 2.11 above namely;
- Late John Cruickshank
 - Thomas Fransis Ryan
- 2.22. The Defendants called one witness and filed a witness statement on 14th July, 2023.
- 2.23. DW1 Thomas Francis Ryan testified that the 1st Defendant was sometime in 1999 approached by the Executive committee of the City of Lusaka football club under Chairmanship of Mr. Henry Sichembe concerning the possibility of the 1st Defendant funding or investing in the club. DW1 referred the Court to a letter contained on pages 24-25 of the Defendants Bundle of documents.
- 2.24. DW1 testified that in the course of the discussions between the 1st Defendant and the officials from the club under the Chairmanship of Mr. Henry Sichembe, the parties agreed to incorporate a new public limited company to be known as City of Lusaka Football club Limited 2000 Plc (the club).
- 2.25. DW1 testified that it was also agreed that the 1st Defendants would provide funds to clear the club's exposure to the Bank and that the 1st Defendant would invest K500,000,000.00 (unrebased) in the club. DW1 referred the Court to the resolution passed on 11th April, 2000 on page 32 of the Defendants bundle of documents.

- 2.26. DW1 testified that the 1st Defendant entered into a subscription agreement with the club under which it was agreed that the Defendant would make a cash subscription of K5,000,000.00 consisting of K300,000,000.00 in ordinary shares consisting of 3,000,000 shares K100 each and K200,000,000.00 consisting of 200 redeemable preference shares of K1,000,000.00 each at par redeemable at the option of the club. DW1 referred the Court to pages 70 to 88 of the Defendants bundle of documents.
- 2.27. DW1 submitted that it was on the strength of the subscription agreement the Article 25 of the articles of association was amended.
- 2.28. DW1 submitted that the 2nd Defendant entered into a lease agreement with the club that the 2nd Defendant would rent Stand 3034, Lusaka for a period of 25 years renewable for purposes of carrying out development which would include refurbishment of the stadium. DW1 referred the Court to pages 334 to 354 of the Defendants bundle of documents.
- 2.29. DW1 testified that it was on the strength of the lease agreement that the 2nd Defendant carried out refurbishment of the stadium and erected a total of 47 shops for rent.
- 2.30. DW1 testified that the Plaintiff wrongfully and with intent to injure the 2nd Defendant attempted to procure and induce the parties to these agreements to break the agreements with the 2nd Defendant.
- 2.31. DW1 testified under cross examination that that the 1st Defendants consideration for the shares in City of Lusaka 2000 PLC was cash in the sum off K500,000,000.00 (un rebased).
- 2.32. DW1 further testified under cross examination that the consideration referred to in 2.31 above was an investment in the company and that it was for continued rehabilitation of the grounds and club house.

- 2.33. DW1 testified that the consideration referred to in 2.31 above was paid to City of Lusaka Football Club 2000 PLC but does not have evidence before the Court.
- 2.34. DW1 further testified that he was certain that there is in existence an acknowledgement of receipt of the consideration only that it is not before Court.
- 2.35. DW1 testified that the subsequent K150,000,000.00 was also paid in cash but there are no receipts before this Court.
- 2.36. DW1 testified under cross examination that the shareholders of the club convened to pass a resolution and does not recall any evidence of the meeting.
- 2.37. DW1 testified under re-examination that the 1st Defendant is a special vehicle in which investments were made and it was originally managed by Cavmont Merchant Bank.

3. **LAW AND SUBMISSIONS.**

- 3.1. Both Parties filed their written submissions. The Plaintiff filed on the 5th February, 2024 and the Defendants on the 4th of April, 2024.
- 3.2. The Plaintiff submits that before issuing shares, a company must ensure to issue them in accordance with its Articles of Association.
- 3.3. The Plaintiff submits that issuing of shares will require a resolution to be passed by a General Meeting of the company shareholders.
- 3.4. The Plaintiff relied on **Section 140(1) of the Companies Act** which provides that;

“A company may, unless its articles provide otherwise, by special resolution, alter its share capital as stated in the certificate of share capital by—

(a)increasing its share capital by issuing new shares of such an amount as it considers expedient”.

- 3.5. The Plaintiff relied on the case of **ZAMBIA HIGH LIGHT MINING INVESTMENTS LIMITED V REGISTER AND CHIEF EXECUTIVE OFFICER PATENTS AND COMPANIES REGULATIONS AGENCY (2021) ZMHC 50¹** and submitted that the articles of a company regulate its internal affairs and that that the articles amount to a binding contract between the company and its members. It was further submitted that the Companies Act has a recommendation form of articles termed as the standard articles which companies are at liberty to style otherwise and that the standard articles allow for alteration of share capital by way of ordinary resolution.
- 3.6. The Plaintiff submitted that according to the first schedule of Section 12(3) standard Articles, a resolution means an ordinary resolution of the Company.
- 3.7. The Plaintiff submits that the 1st Defendant illegally increased the share capital and subsequently allotted itself without investing the K500,000,000.00 into the club as agreed.
- 3.8. The Plaintiff submits that the 1st Defendant also illegally changed the Company Secretary and proceeded to convert preference shares into ordinary shares.
- 3.9. Furthermore, the Plaintiff submits that the 1st Defendant claimed an amount of US\$562,000 from the city of Lusaka (2000) despite the monies never being advanced to the club and subsequently assigned the debt to the 2nd Defendant without any special resolution.
- 3.10. In response, the Defendants submit that the Plaintiff lacks locus standi in this matter as City of Lusaka Football Club (1970) on whose behalf the Plaintiff brings this action was non-existent and not privy to what

transpired at the time the changes in shareholding were being made in City of Lusaka Football Club (2000) Plc.

- 3.11. The Defendants further submit that the Plaintiff was not privy to the subscription agreement and cannot make allegations regarding the shareholding changes made and placed reliance on the case of **DUNLOP PNEUMATIC TYRES COMPANY LIMITED V SELFRIDGE AND COMPANY LIMITED 1912 AC²** to support their argument.
- 3.12. The Defendants submitted that the subscription agreement was duly executed by the parties (City of Lusaka Football Club 2000 Plc, The Covenantors and the 1st Defendant) thereto and any changes made to the shareholding and governance structure were rightly done and placed reliance on the case of **RATING VALUATION CONSORTIUM AND D.W. ZYAMBO AND ASSOCIATES (SUING AS A FIRM) V THE LUSAKA CITY COUNCIL ZAMBIA NATIONAL TENDER BOARD (2004) ZR 183³** in which it was held as follows;

“What is regarded as an important criterion is for the Court to discern a clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the contract of the parties as a whole”.

- 3.13. The Defendants submit that the DW1’s testimony provides the factual background known to the parties as well as what objective of the transaction was and that DW1 provided all details and relevant documentation relating to how the changes were made.
- 3.14. The Defendants placed reliance on the case of **FRIDAY MWAMBA V SYLVESTER NTHENGE AND OTHERS (2010) SCZ 8⁴** in which it was stated as follows;

“In constructing any written agreement, the Court is entitled to look at the evidence of the objective factual background known

to the parties at or before the date of the contract, including evidence of the “genesis” and objectively “aim” of the transaction”.

- 3.15. The Defendants submitted that the Plaintiff has a duty to prove its case and the Plaintiff has failed to prove its case and relied on the case of **KHALID MOHAMED V THE ATTORNEY GENERAL (1982) ZR 49⁵** where 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 judgement.
- 3.16. The Defendants submit that the Plaintiff is not entitled to any of the reliefs sought.

4. **COURT’S ANALYSIS AND DECISION**

- 4.1. I have considered the evidence on record and the Parties respective submissions. The Plaintiffs have before this Court a cocktail of claims. However, having considered the arguments advanced by the parties, the real question for determination is whether there was illegality in the alteration of shares and change of shareholding and governance structures in the Company known as City of Lusaka Football Club (2000) PLC by the Defendants. The answer to this question will have a bearing on the other issues raised.
- 4.2. The Defendants submit that the Plaintiff lacks locus standi to bring the action on the ground that the body the Plaintiff purports to bring action on behalf was not in existence during the transactions in issue. It is the Defendants position that the City of Lusaka football club (1970) was not in existence in 2000 (having being officially registered in 2018). I have considered this submission and I find that the evidence of both the Plaintiff and Defendants points to the following:

- i) Pages 32-68 of the Defendants bundles of documents contain various documents and correspondence between the Plaintiff (City of Lusaka Football Club 1970) and the 1st Defendant. The same chronicles the genesis of discussions and agreements between the two parties resulting into incorporation of the City of Lusaka Football club 2000 Plc.
- ii) The incorporation documents show trustees of the Plaintiff (including its General Secretary) as Shareholders and Directors of City of Lusaka Football Club 2000 Plc. This also included two representatives of the first Defendant.
- iii) The names of the first Directors of City of Lusaka Football club 2000 Plc were;
 - John Maitland Cruickshank
 - Thomas Francis Ryan
 - Henry Sichembe
 - Justice David Mbelele Lewanika
 - Yuyi Lishomwa

With the Company Secretary recorded as Chifumu K.Banda S.C.

- 4.3. In light of the finding above, it is my considered opinion the Plaintiff does in fact have the locus standi in this matter. The Plaintiff is suing in his capacity as Secretary General, the same position that was previously held by one Henry Sichembe with whom the 1st Defendant had dealings with.
- 4.4. I now direct my mind to the one question that I deem cardinal in determining the claims and counter-claims in this action. That question is whether or not the resolution of City of Lusaka Football Club 2000 Plc, dated 4th August 2000 (which made reference to the Subscription Agreement).

- i) Subscription Agreement dated 31st July, 2000 as appears on page 70-77 of the Defendants bundle signed by Thomas Ryan and Justice David Mbelele Lewanika.
- 4.5. I will direct my mind to the **1994 repealed Companies Act** as it was the applicable law at the time of the occurrences of the issues raised by the parties. Even though the clauses relevant to this matter, read the same.
- 4.6. **Section 74(a) of the repealed Companies Act** provides as follows;
- “A company may, unless its articles provide otherwise, by special resolution alter its share capital as stated in the certificate of share capital by doing any of the following:*
- increasing its share capital by new shares of such an amount as it thinks expedient”.*
- 4.7. **Section 74(a) of the repealed Companies Act** mirrors **Section 140(1) of the Companies Act, 2017** cited in 3.4 above and I am of the considered opinion that the provision means that a company can alter its share capital by making a special resolution unless the articles provide otherwise.
- 4.8. I am guided by the decision in the case of **ZAMBIAN HIGH LIGHT INVESTMENTS LTD V REGISTRAR AND CHIEF EXECUTIVE OFFICER PATENTS AND COMPANIES REGISTRATION AGENCY (2021) ZMHC 50¹** in which the Court stated as follows:
- “It is manifestly clear that the intention / objective of the legislature was for the threshold of a special resolution under section 140(1) of the Companies Act to simply be the default position which can however be relaxed (by the articles) to the lower threshold of an ordinary resolution as per example given in the Standard Articles”.*

- 4.9. From the evidence before me, the Company's articles in relation to creation of new shares mirror the standard articles. Regulation 9 paragraph 37 as shown on Page 51 of the Defendants bundle of documents provides as follows;

"The company may by resolution:

(a)increase its authorised share capital by the creation of new shares of such amount as is specified in the resolution"

Further, regulation 1 paragraph 1 defines a resolution as "an ordinary resolution".

- 4.10. It therefore follows that, in order for the Company's share structure to be altered, there was need for an ordinary resolution to be passed. The Defendants have filed into evidence and referred this Court to the copies of resolutions which effected of gave rise the increase in share capital and allotment of shares. The issue this raises and to be determined by this Court is with regards the validity and legality of the said resolutions.
- 4.11. I have drawn my attention to the special resolution dated 4th August, 2000 on page 89 of the Defendants bundles of documents. From the evidence presented by the parties to this Court, it appears to be the first resolution post incorporation of City of Lusaka Football Club 2000 Plc. The said resolution is reproduced below as follows;

***"The Shareholders of the City of Lusaka Football Club 2000 Plc
HEREBY RESOLVED at a meeting held on the 4th of August 2000
that the Directors of the Company are generally and
unconditionally authorised pursuant to Section 216 of the
Companies Act, Chapter 388 of the Laws of Zambia to exercise
all powers of the company to allot Two Thousand (2000)
redeemable preference shares of Kwacha One million
(K1,000,000=00) each at par and Three Million (3,000,000)
Ordinary Shares of Kwacha One Hundred (K100=00) each at
par in accordance with the terms of an agreement dated 31st***

July 2000 entered into between the company (1) certain individuals (2) and the certain investor ("The Subscription Agreement"). This authority shall expire on the 31st August 2000 but shall extend to allotment of shares pursuant to the Subscription Agreement made after that date.

And it was FURTHER RESOLVED that the Articles of Association shall be amended accordingly.

...."

4.12. Section 216 of the repealed Companies Act provides as follows;

"The directors of a company shall not, without the approval in accordance with this section of an ordinary resolution of the company—

(a) sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking or of the assets of the company;

(b) issue any new or unissued shares in the company; or

(c) create or grant any rights or options entitling the holders thereof to acquire shares of any class in the company".

4.13. The Court of Appeal in the case of **MARSHLANDS CONSORTIUM LIMITED AND OTHERS V FELICITUS KABWE CHIBAMBA APPEAL NO 154 OF 2021⁶** at page 53 held as follows:

"The Directors of a company cannot issue shares in a company without the approval of an ordinary resolution of the company. Therefore, in the present case, we are of the view that the Directors of Ultimate Insurance lacked the authority to issue shares ... as no prior resolution of the members authorising such an allotment had been made in accordance with Section 216(1) of the repealed Companies Act".

4.14. In casu, the resolution states that a meeting was held on the 4th of August 2000 at which the Shareholders gave powers to the Directors in accordance **with Section 216 of the repealed Companies Act**. DW1 also testified under cross examination that the Shareholders of City of Lusaka Football Club (2000) PLC convened to pass the special resolution in 4.8 above but has not shown anything in evidence to show that there was a duly convened meeting at which the resolution was passed.

4.15. It is a trite principle that the party who alleges a fact must prove. The Supreme Court guided on who bears the burden of proof in a civil matter in the case of **KUNDA V. KONKOLA COPPER MINES PLC APPEAL NO. 48 OF 2005⁵**, when it said: -

"He who alleges must prove that allegation. This principle is so elementary, the court has had on a number of occasions to remind litigants that it is their duty to prove their allegation, of course it is a principle of law that he who alleges must prove the allegations."

4.16. The general rule relating to the burden of proof in civil cases is stated as follows by the learned authors of **Phipson on Evidence, seventeenth edition (Thomson Reuters (Legal) Limited 2010)**

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

4.17. The learned authors of **Phipson on Evidence, (supra)** continue in **paragraph 6-06 at page 151** as follows:

"This rule is adopted principally because it is just that he who invokes the aid of the law should be first to prove his case; and

partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleading place it, and never shifting in deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will."

- 4.18. Further, the learned author Peter Murphy in his book "*Murphy on Evidence*" in respect of the burden of proof states at pages 89 and 90 that:

"The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential... if the plaintiff fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. Since the plaintiff affirmatively asserts his claim, the plaintiff bears the burden of proving the claim and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial (sometimes) referred to as an affirmative defence) the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognised by the fact that it raises facts in issue which do not form part of the plaintiffs claim"

- 4.19. In this present case, the Plaintiff has the burden of proving its case on a balance of probabilities in order to establish its claims before this Court and satisfy that the Plaintiff is entitled to the reliefs sought in this action.

- 4.20. The Defendants are under no obligation to prove the falsity of the of the Plaintiffs' claim. However I find that, the Defendants have gone beyond mere denial and have made an affirmative defence and have assumed the legal burden of proving its defence.
- 4.21. In the absence of evidence, I find DW1's testimony that a duly convened meeting was held on the 4th of August, 2000 rather unconvincing. The Defendants have not produced anything in evidence to show that the meeting was properly called in accordance with the provisions of the law, let alone to show that the meeting notice was sent out to the members was called who attended and actually took place.
- 4.22. What I have before for me is only a resolution and in order the Court to determine whether or not the resolution is valid, the Defendant ought to have shown that the resolution was passed in accordance with the provisions of the Act and the articles. They ought to have shown that a meeting was properly called and that indeed the Shareholders convened to pass the resolution dated 4th August, 2000. The members/shareholders of the Company were 10 in number as indicated in paragraph 2.11 and 2.21 above.
- 4.23. In the absence of proof, I find the Resolution dated 4th August, 2000 invalid and tainted with illegality. It therefore, follows that any subsequent decision and changes made on the strength of this special resolution is illegal.
- 4.24. The finding on the illegality of the resolution that the 1st Defendant presented to the Court means that all subsequent actions and resolutions by the 1st Defendant are fruit of an illegality and thus void abinitio.

- 4.25. It follows from the discussion above that the purported transfer/sell of the shares and debt is void at law. The 1st Defendant did not possess legal right/mandate to transfer anything to the 2nd Defendant.
- 4.26. By reason of the finding above it becomes otiose to consider the other of the Plaintiffs claims, and counter-claims on record.
- 4.27. In light of the above. I am alive to the substantive developments that the 2nd Defendant has made on the land that was illegally transferred to them. I take judicial notice of the developments to include but not limited to the construction of the mall known as Lewanika Mall and the improvements to the club house/offices and the fields/pitch. Surely the Plaintiff or a party cannot be unjustly enriched.
- 4.28. It is a settled principle of law that law and equity shall be administered concurrently. **Section 13 of the Hight Court Act** provides and follows;

"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules

of the common law with reference to the same matter, the rules of equity shall prevail”.

- 4.29. The Zambian Supreme Court in the case of **GEMISTAR ENTERPRISES LIMITED V AFGRI CORPORATION LIMITED (2017) ZMSC 159⁷** upheld the principle stated by Lord Wright in the case of **FIBROSA SPOLKA AKCYJNA V PAIRBAIRN LAWSON COMBE BARBOUR LTD (1943) AC 32⁸** as follows:

“It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep....”

5. CONCLUSION

- 5.1. The Plaintiff's case succeeds based on the grounds advance above. I Order that the status of ownership of Stand No. 2757 and Stand No. 3034 and shareholding and governance structures revert to the position at incorporation of City of Lusaka Football Club (2000) PLC. I.e. the representatives of Cavmont Securities Ltd and current trustees of City of Lusaka Football Club 1970.
- 5.2. I Order that the Plaintiff should not be unjustly enriched and it is in the interests of justice that the 2nd Defendant be restituted/compensated for the developments on the Plaintiff's land/property. The Plaintiff shall bear 10% of the estimated value of the developments by the 2nd Defendant. The 90% shall be borne by the 1st Defendant who in my opinion orchestrated the events leading to this action and the 2nd defendant's loss/damage.
- 5.3. I also Order that the 1st Defendant adequately compensates the 2nd Defendant for all losses and damages, suffered by reason of the 1st

Defendant's illegal and irregular actions surrounding the resolutions and purported sell of shares and assets of City of Lusaka Football Club 2000.

- 5.4. I further Order that the Parties are given 4 months within which to settle/agree the damages, loss and restitution amounts among themselves. Failure to which any party be at liberty to apply before the Registrar of the High Court sitting at Lusaka for assessment.
- 5.5. Costs for the Plaintiff to be borne by the 1st Defendant and taxed in default of agreement.
- 5.6. Leave to appeal is granted.

Delivered at Lusaka on 9th December, 2024.



S. CHOCHO

HIGH COURT JUDGE

