

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 117/2018

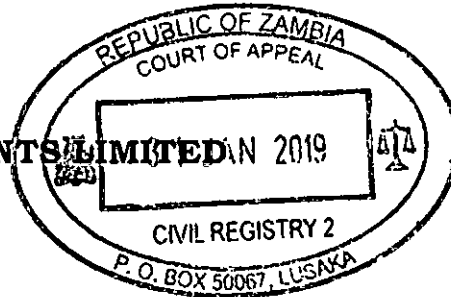
BETWEEN:

FINSBURY INVESTMENTS LIMITED **APPELLANT**

AND

ANTONIO VENTRIGLIA
MANUELA VENTRIGLIA

1ST RESPONDENT
2ND RESPONDENT



CORAM: LENGALENGA, SIAVWAPA AND MAJULA, JJA

On 30th October 2018 and 31st January, 2019

FOR THE APPELLANT: MR. J.P. SANGWA, SC WITH MR. J
CHIMANKATA AND MR. MULENGA OF
MESSRS SIMEZA SANGWA ASSOCIATES

MR. M. MUNDASHI, SC WITH MR CHAKOLEKA
BOTH OF MULENGA MUNDASHI, KASONDE
AND ASSOCIATES

FOR THE RESPONDENTS: MR. V. B. MALAMBO, SC WITH MR. C.M
SIANONDO BOTH OF MESSRS MALAMBO &
CO

MR. S. SIKOTA, SC WITH MR. K. KHANDA
BOTH OF MESSRS CENTRAL CHAMBERS

MR. S. MAMBWE AND MR. A SIWILA BOTH
OF MESSRS MAMBWE, SIWILA AND
LISIMBA ADVOCATES.

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to

1. *National Westminster Bank PLC v IRC*¹ [1995] 1 AC 119, [1994] 3 ALL ER 1

Legal Works

1. *Farrar's Company Law* 4th Edition, Butterworths 1998 at page 166 and 167
2. *Gower's Principles of Modern Company Laws* 6th Edition, Sweet and Maxwell London, 1997 page 305

This is an appeal against the Judgment of the High Court delivered on 18th May 2018 which declared the Respondents in this appeal who were the Plaintiffs' in the court below as the only shareholders in Zambezi Portland Cement Limited (herein after referred to only as ZPC).

The Judgment further ordered the rectification to the membership Register of ZPC and the expunging from Companies Registry of documents reflecting the Appellant herein and Ital Terazzo, as shareholders in ZPC.

Aggrieved by the Judgment, the Appellant herein which was the Defendant in the court below raised seven grounds of appeal as per the memorandum of Appeal filed into Court on 21st May 2018.

The grounds are as follows;

1. *The learned Judge misdirected himself by failing to direct himself to the Respondents' case as set out in the pleadings.*
2. *The learned Judge was wrong in law by holding, despite the express provision of Section 50 of the Companies Act Chapter 388 of the Laws of Zambia that the Respondents' case was properly before Court.*
3. *The learned Judge misdirected himself by considering the Respondents' claims when neither Ital Terrazzo Limited nor Zambezi Portland Cement Limited were parties to the proceedings.*
4. *There was no evidence to support the 2nd Respondent's case as pleaded.*
5. *The finding of the learned Judge that the transfer of the Respondents' shareholding in Zambezi Portland Cement Limited was improperly done was against the weight of the evidence.*
6. *The finding of the learned Judge that the Respondents are the only shareholders of Zambezi Portland Cement Limited was against the weight of the evidence.*
7. *There was no evidence to support the order by the learned Judge that the filing of the Company Registry reflecting the Defendants and Ital Terrazzo Limited as shareholders be expunged from the Company Registry.*

In the court below the background of the case is that the Appellant commenced an action against the Respondents in September 2008.

By writ of summons and a statement of claim, the Appellant sought three remedies in the court below namely;

1. *An order that the Plaintiff is the registered and beneficial owner of K580, 000,000 issued shares in Zambezi Portland Cement Limited.*

2. *A declaration that the Defendants are not registered owners of any shares in Zambezi Portland Cement.*
3. *An injunction restraining the Defendants, whether by themselves individually and or severally or through their servants or agents from holding themselves out as shareholders of Zambezi Portland Cement Limited or taking any course of action of any nature whatsoever as shareholders of Zambezi Portland Cement Limited and or transferring their purported shares to a company known as Carmago Correa or any person whether corporate or otherwise until final determination of this matter in Court.*

The Defendants filed their defence and later an amended defence with a counter claim. After several amendments and re-amendments to their pleadings, the Plaintiff filed a Notice of Discontinuance on 19th May 2014 by which it wholly discontinued its action against the Defendants. The counter-claim was maintained and again the parties re-amended their counterclaim and defence to the counter-claim before trial commenced in 2017.

The Judgment appealed against is therefore, on the trial of the counter claim by the herein Respondents who were the Plaintiffs in the counter claim in the court below.

In their counter claim, the Respondents sought the following remedies in the court below;

1. *A declaration that the Defendants are the only shareholders in Zambezi Portland Cement Limited.*

2. *A declaration that they have lawfully rescinded the agreements to transfer 58% of the shareholding in the company to the Plaintiff for reason of fraud. Alternatively an order for the rescission of the Agreement for fraud.*
3. *For an order that changes made to the membership Register be rectified and the filings at the Companies Registry reflecting the Plaintiff and Ital Terrazzo Limited as shareholders be expunged from the Companies Registry.*
4. *In the alternative payment of the sum of K500, 000,000 and USD 60,000,000 being the value of the share agreed to be transferred to the Plaintiff.*
5. *Damages for loss of earnings as shareholders*
6. *Damages for breach of contract*
7. *Interest on all sums that may be found due and owing*
8. *Further and other relief, as the court may deem fit*
9. *Costs.*

At trial the Respondents called five witnesses comprising of an official from PACRA, an expert forensic lawyer, a forensic document examiner, the 1st Respondent and a Director of Ital Terrazzo Limited.

From the record and the pleadings, it is clear that there are two main issues the Respondents advanced in the court below as the bases for seeking the remedies pleaded namely; that the share transfers and the resulting share certificates relating to ZPC in favour of the Appellant were made and obtained by fraud. Secondly that the Appellant did not pay for the shares it took from ZPC.

With regard to the allegations of fraud, the court below accepted the forensic report of the handwriting expert, who was PW3. The Court also accepted the 1st Respondent's evidence that the Appellant did not pay for the shares it accepted to take thereby conferring no shareholding status on the Appellant.

In his Judgment, the learned trial Judge found it as a fact that the share certificates were fraudulently obtained based on the handwriting expert's testimony and report on the signatures on the two share certificate transfer forms purporting to be for the Respondents.

The report concluded that although the signatures on the share transfer forms were those of the Respondents the same were not physically appended by the Respondents. The handwriting expert's opinion was that the same were either electronically or mechanically affixed to the documents because of their lack of what he calls natural writing variations. This conclusion was informed by a comparison between the signatures on the forms and the sample signatures collected from the Respondents which exhibited the natural writing variations.

As regards the alleged failure to pay for the shares, the learned trial Judge, accepted evidence to that effect and further rejected the Shareholders' Agreement of 26th February 2007 on account that it was not pleaded.

Before we delve into the appeal proper, we wish to trace back the genesis of this controversy over the shareholding in ZPC.

The record shows that ZPC Limited was incorporated under the Companies Act on 14th December 2004 with five (5) million allotted shares of which 4,999,999 were held by Ital Terrazzo Limited and 1 share held by the 1st Respondent out of the total authorized share capital of ten million.

On 18th April, 2005, Ital Terrazzo Limited transferred all its shares to the 1st Respondent making him the sole shareholder in ZPC Limited.

On 16th April 2005, ZPC Limited, by special resolution, altered its share capital from ten (10) million to one (1) billion with the 1st Respondent acquiring 825 million and the 2nd Respondent acquiring 170 million of the newly created shares. As a result, as of May 2006, records held at PACRA showed the Respondents as Directors of ZPC Limited as per page 211 of the Record of Appeal. The records also showed the two Respondents' shareholding as of May 2006 as 830 million and 170 million each respectively.

However, as of 12th December 2006, share certificate numbers 1 to 5 were cancelled. Certificate 1 was in the name of Ital Terrazzo and it was cancelled on 18th April 2015 when its shares were transferred

to the 1st Respondent. The rest of the Certificates which were in the names of the 1st and 2nd Respondent were cancelled on 12th December 2006.

Further cancellations were made to share certificate numbers 7 and 9 in the names of the Respondents on 15th January 2007. Then came the disputed form of transfer of fully paid shares in a Company Limited by shares dated 12th December 2006 and 15th January 2007 by which the 1st Respondent and the 2nd Respondent are purported to have transferred their shares to the Appellant and Ital Terrazzo Limited.

These purported transfers divested the Respondents of all their shareholding in ZPC Limited handing the full shareholding to the Appellant and Ital Terrazzo Limited.

As earlier indicated, the point of dispute is that the Respondents deny ever signing on the said forms although their true signatures appear on the forms as confirmed by the expert witness.

In its defence, the Appellant averred that there were a number of documents that when read together legitimize the share transfers from the Respondents to it.

The re-amended defence to the re-amended counter claim also avers that the one billion share capital remained unpaid for until

July 2005 when the Appellant paid USD250, 000.00 to ZPC Limited which was an equivalent of one billion kwacha at the time to cover the value of the entire share capital in ZPC Limited.

The other document that the Appellant has relied upon is the Shareholders' Agreement of 26th February 2007. We shall examine some of the said documents in much detail later.

We however, note from the record and arguments from the parties that key among the reasons for the protracted litigation in this case is the complexity of the law governing share capital and the rules governing the acquisition and disposal of shares of a company limited by shares. We will therefore, endeavor to set out the law and principles herein.

In saying this we take into account the valuable arguments both written and oral rendered by state counsel Malambo for the Respondents and Sangwa for the Appellant and other counsel on either side of the divide. However, rather than go to individual arguments as proposed in the heads of argument submitted, our preferred route is to condense the arguments into issues in contention to find a resolution to the conflict before us.

In simple terms share capital is the number of shares a company limited by shares proposes to be registered with. The share capital should be divided into shares of a fixed value each.

In this case ZPC Limited proposed to register with a share capital of K10 million as the application form occurring at page 229 of the record will show.

The share capital was divided into ten million shares valued at K1.00 each. Five million of which were paid for shares in the amount of K5 million. Of the five million paid up shares, 4,999,999 were taken up by Ital Terrazzo while the 1 remaining share was taken up by the 1st Respondent.

It will be noted that the 1st Respondent's signature appears under the slot for subscribers in respect of the shares taken up by Ital Terrazzo and him at page 233 of the Record of Appeal.

This means that as at 14th December 2004 when ZPC Limited was issued with its certificate of incorporation as a private company limited by shares, five million of the ten million nominal share capital had been subscribed and fully paid up by the two shareholders. It is also noted that the first Directors of ZPC Limited were the 1st Respondent, the 2nd Respondent and their three children. In essence it was a family company.

As regards the remaining five million unsubscribed shares, of the authorized capital, the same were available for taking up as the company would deem fit in accordance with the law.

The shareholding in ZPC Limited changed on 18th April 2005 when Ital Terrazzo Limited transferred its 4,999,999 shares to the 1st Respondent who now held all the fully subscribed and paid up shares in ZPC Limited. The share transfer was followed by an alteration of the share capital on 19th May 2005 from ten million to one billion shares divided into one billion shares each with a par value of K1.00.

Out of the one billion shares, 995,000,000 were allotted and payable in cash leaving a total of five million shares, which shares were already subscribed to and fully paid up by the 1st Respondent.

The 995,000,000 shares were allotted as follows;

1st Respondent, 825,000,000 shares

2nd Respondent 170,000,000 shares

What is important to note from this allotment of shares is that it brought the total shareholding by the 1st Respondent to 830,000,000 shares when the five million shares he already owned are added thereby placing the company under the full control of the Respondents as at 11th May 2006 as per the Annual Return of a Company form occurring from page 209 to page 212 and in particular at page 212 of the Record of Appeal.

We however, wish to shed some light on the effect of an allotment of shares in an existing private company limited by shares. The main objective of allotting shares is for the company to raise capital either through equity or cash transfer of paid for shares to a new member.

In this case the shareholders decided to allot shares to themselves out of the newly created shares to increase the authorised share capital of ZPC Limited.

It is also important to note that an allotment of shares can only be made from and within the authorised share capital and according to the English Company Law and Practice, an allotment of shares entitles the allottee an unconditional right to be included in the company's register of members in respect of the allotted shares. Further according to the learned authors of Farrar's Company Law 4th Edition, Butterworths 1998 at page 166 and 167;

***“The allotment creates an enforceable contract for the issue of the share and the shares are issued when an application to the company has been followed by allotment and notification to the purchaser and completed by entry on the register of members.*”**

This statement emanated from the holding of the House of Lords in the case of National Westminster Bank PLC v IRC¹. In that case tax relief to investors in shares in companies set up under the business expansion scheme was altered in respect of shares issued after 16th March 1993; here shares had been allotted prior to that date but

registration took place after the date. The House of Lords, by a majority of 3 to 2, held that shares were issued after 16th March 1993.

So in the sequence of events, an application to purchase shares, if accepted, is followed by an allotment of a specific number of shares of a specific class, which allotment is notified to the applicant and finally the entry into the register of members.

There is also the doctrine of pre-emptive rights under the English Companies Law and Practice which gives existing members the right to protect their proportion of the total equity.

This doctrine gives such members the opportunity to subscribe for newly issued shares for cash or equity capital. See Gower's Principles of Modern Company Laws 6th Edition, Sweet and Maxwell London, 1997 page 305.

So an allotment, though a subject of payment, does not necessarily evidence payment for allotted shares, there has to be proof that the allotted shares were fully paid for. We note however, in this case that once the Respondents took an allotment of the new shares in ZPC Limited, they also became the only directors of the company and the question whether or not they paid for the shares comes into focus. Section 63(1) (a) of the Companies Act Chapter 388 of the

Laws of Zambia, 1994, which was in force at the time provides as follows;

“Whenever a Company makes an allotment of its shares, the company shall within one month thereafter, lodge with the Registrar-

a return of the allotments in the prescribed form stating the number and the normal amount of the shares comprised in the allotment, the names and addresses of each allottee whether each allottee is an individual, a body corporate or an unincorporated association and the amount (if any) paid or due and payable on each share”.

The relevant form was filed with PACRA on 19th May 2005 which occurs at page 208 of the Record of Appeal. It is noted that in that form, there is no amount indicated against the amount to be treated as paid on such shares. This in essence means that no cash payment had been made by the Respondents as consideration for the allotment at the time of lodging the return.

We have noted from the record that ZPC Limited, was in dire need of capital from its incorporation because soon after its incorporation on 14th December 2004, it accepted a credit facility in the sum of USD3, 000,000. The facility letter which is dated 20th January 2005, and occurring at page 275 of the Record of Appeal states under paragraph 4 that it was to be used for investment in fixed assets. The facility was provided by Finance Bank Zambia Limited and accepted by the 1st Respondent as Chairman and the 2nd Respondent as Director for ZPC Limited.

In addition to that, another facility in the sum of USD930, 000 was offered to ZPC Limited by Leasing Finance Company Limited on 16th May 2005 which the Respondents accepted on behalf of the Company in their capacities as Managing Director and Director. The facility letter occurring from page 280 to page 285 of the Record of Appeal was also stated to be for purchase of fixed assets for the company. Barely three days after accepting the facility, on May 19th 2005, ZPC Limited filed notice for alteration of its share capital from ten million to one billion shares divided in one billion shares with a par value of K1.00 each.

On 21st June 2005; ZPC Limited entered into a loan Agreement with the PTA Bank with Section 3.1(3) (e) providing as a condition precedent that the borrower provides;

“Corporate Guarantees and personal guarantees of the shareholders of the borrower, supported by audited statements of accounts of the corporate Guarantors and statements of net-worth of the personal guarantors.”

By Deeds of Variation dated 24th May 2006 and 5th December 2006; the Loan Agreement of 22nd June 2005 between ZPC Limited and the PTA Bank was varied and furnished the Bank with a validly passed resolution authorizing the issuance of guarantees. Section 6(j) of the 2nd Deed of Variation provides as follows;

“Evidence to the satisfaction of PTA Bank that Finsbury Investment Limited and Ital Terrazzo Limited have taken up all the shares in the borrower in the ration of 58% to 42% respectively”.

Further to that Section 6(d) (iv) and (v) of the 2nd Deed of Variation also names Finsbury Investment Limited and Ital Terrazzo Limited as the Corporate Guarantors of the increased loan facility while Antonio Ventriglia and Manuela Sebastian were named as personal Guarantors of the said loan.

Both Deeds of Variation were appropriately signed and sealed with appropriate corporate seals of the borrower ZPC Limited.

Further to that both the Appellant and Ital Terrazzo Limited availed minutes of their respective Board meetings authorizing the two to act as corporate Guarantors of the loan following which the two corporates executed a joint Deed of Guarantee with PTA Bank.

The loan Agreement, is exhibited from page 553 to 601 while the Deeds of Variation, the extracts of Board meetings of the two corporate Guarantors other accompanying documents and the joint Deed of Guarantee occur from page 608 to 649 of Volume 2 of the Record of Appeal.

The parties, having executed all the above listed documents in order to meet the conditions for the granting of the loan facility by PTA Bank to ZPC Limited, there remained the requirement for the shareholding to move from the Respondents to the Appellant and Ital Terrazzo in the proportions of 58% and 42% respectively as demanded by PTA Bank and therein lies the dispute.

At page 657 of the Record of Appeal Volume 2 is a document purporting to be minutes of the Annual General Meeting of ZPC Limited held on 15th January 2007 at which the transfer of shares from the Respondents to the Appellant and Ital Terrazzo Limited was discussed and agreed to.

In cross-examination at page 2450 of volume 8 of the Record of Appeal, in particular lines 20 to 22, the 1st Respondent states as follows;

“Myself and my wife, my Lord. The ZPC shareholders are myself and my wife my Lord there has never been any changes to that my Lord”.

So, in short, the 1st Respondent distanced himself from the resolutions of the said meeting although the document shows that both he and the 2nd Respondent were in attendance. However, when the 1st Respondent is referred to the first paragraph of the Shareholders’ Agreement of 26th February 2007 which names the Appellant as the primary shareholder, he responds as follows at page 2451 of the Record of Appeal in particular lines 22 and 23;

“Yes, that’s right because these shares were never paid for. Therefore, no change took place my Lord.”

What the 1st Respondent is saying is that the 58% shareholding by the Appellant as provided for in the shareholders’ Agreement is

correctly stated but that the changes to the shareholding did not take effect because the Appellant did not pay for the shares.

The 1st Respondent also stated in cross-examination that the Shareholders' Agreement was signed by the Respondents under duress alleging that Dr. Mahtani had threatened not to source for credit for ZPC Limited if they did not sign it.

In responding to the question on whether or not the Appellant had paid for the initial 50% shares as earlier agreed before the additional 8% was agreed in the Shareholders' Agreement, the 1st Respondent answered as follows;

"Yes. But all this was going to happen at the end, after the plant was completed as I had earlier stated my Lord. We could only establish the value after the plant was completed and not before. So we couldn't even transact these sales that's why there was the verbal agreement but he insisted on this written agreement of 26th of February which he put us in a corner and made us sign. I must add with a knot in my neck when I signed that loan agreement."

Again, this statement from the 1st Respondent is an admission that the Shareholders' Agreement was valid except that payment for the shares was to be made upon completion of the construction of the plant. There is though, a contradiction on the price for the 58% shares because in one breath, he says it was to be determined upon

completion of the plant while in another he says 50% shares were valued at K500 million and the 8% at 60 million USD.

That notwithstanding we have carefully perused the Shareholders' Agreement of 26th February 2007 which occurs at page 663 of the Record of Appeal volume one which does not attach any cost for the 58% shares declared to devolve to the primary shareholder the Appellant.

It is however noted from the evidence of the 1st Respondent that he has heavily relied on an oral agreement that 50% shareholding in ZPC would be acquired by the Appellant.

What is certain however, and beyond dispute is that it was a condition precedent by the PTA Bank that the shareholding in ZPC should be held by the Appellant and Ital Terrazzo at 58% to 42% respectively before the additional loans could be disbursed to ZPC as per the two Deeds of Variation already referred to earlier in this Judgment. Consequent upon that the resolution of 15th January 2007 was passed to effect the Bank's condition. The Shareholders' Agreement of 26th February 2007 was therefore executed in aid of the resolution of ZPC earlier referred to.

The fact that the PTA Bank loan was eventually disbursed is not in dispute which is evidence that all the conditions precedent including the shareholding structure were met. It is for that reason

that on 8th July 2008, the Bank issued a default notice to ZPC Limited exhibited at page 739 of volume 3 of the Record of Appeal.

This notice was swiftly followed by notice that ZPC Limited had been placed under receivership on 14th July 2008 whereupon Mr. Robert Mbonani Simeza was appointed receiver/manager of ZPC Limited. We therefore, find that the learned trial Judge misdirected himself when he discounted the Shareholders' Agreement and dismissed it in his Judgment.

We are of the firm view that the Shareholders' Agreement, the PTA Loan Agreement, the two Deeds of Variation and the resolution of ZPC Limited of 15th January 2007 are key to the determination of how the shareholding structure of ZPC Limited evolved from its incorporation in December 2004 until the disbursement of the USD15 million loan facility in early 2007.

The learned trial Judge should have taken particular note of the fact that the 1st Respondent did not dispute being a party to any of the above listed documents. The only issue he raised was that the Shareholders' Agreement was forced on his family by threats that Dr. Mahtani would not facilitate the procurement of any further loans for ZPC Limited.

He did not however, explain if PTA Bank also arm-twisted his family into accepting the condition precedent that the shareholding

structure should be at 58% to the Appellant and 42% to Ital Terrazzo, a company in which he was a shareholder together with the 2nd Respondent and their children. There was also the requirement by PTA Bank for the Appellant and Ital Terrazzo to be Corporate Guarantors of the loan which the 1st Respondent did not suggest was made in bad faith.

Most importantly on the last page of the Shareholders' Agreement of 26th February 2007, the following statement is made;

"Signed in agreement by the parties (having obtained such independent legal advice as they may have required and fully understand and have read the Agreement hereto)....."

Considering that the Respondents do not claim to be illiterate and considering that they have been doing business for many years, the learned trial Judge ought to have imputed freedom of contract on both parties and considered the Shareholders' Agreement as key to the resolution of the dispute before him.

The learned trial Judge ought to have equally taken into consideration that one of the remedies sought by the Respondents in the counterclaim is a declaration that they had lawfully rescinded the Agreement to transfer 58% of the shareholding in ZPC to the Plaintiff, the Appellant herein for reasons of fraud and in the alternative, the rescission of the Agreement for fraud.

Section 57(1) of the 1994 Companies Act which was in force at the time provides as follows;

“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”.

Section 65 of the Act provides as follows;

- (1) “Save as expressly provided in a company’s articles and in this Act, shares shall be transferable without restriction by a written transfer in accordance with Section fifty-seven”***
- (2) “The articles of a private company shall not impose any restrictions on the transferability of shares after they have been issued unless all the shareholders have agreed in writing”.***

From the law as was in force at the time, a member of a company limited by shares is at liberty to transfer his shares by a written instrument.

We also note that the law did not require that a transfer of shares was to be upon cash payment. It is therefore presumed that parties were at liberty to agree on the terms of payment for the share transfer.

In so far as the formalities for share transfer are concerned, we note that following the second Deed of Variation of the Loan Agreement

dated 5th December 2006, which made it a condition precedent that the parties provide evidence of the taking up of all shares in ZPC Limited by the Appellant at 58% and Ital Terrazzo at 42%, the parties namely; the Respondents, Ital Terrazzo Limited and the Appellant executed formal share transfer documents pursuant to sections 57 and 58 of the Companies Act.

The forms are exhibited from page 237 to 240 of volume one of the Record of Appeal. We are however, quick to mention that these are the documents disputed by the Respondents on account that they did not physically append their signatures to them and therefore a product of fraud.

We will revisit the fraud allegation later in this judgment in more detail. But our thoughts are that the Respondents, having signed the Deed of Variation in issue, it is unknown how else they expected the share transfer to be effected without them signing the disputed documents. As a matter of fact, the 1st Respondent made it very clear in cross-examination that ZPC Limited was in dire need of capitalization to commence its operations and as such, it is only reasonable that the shareholding in the company changed to meet the condition PTA Bank had imposed for the disbursement of the loan. It is also reasonable to draw an inference that the Respondents were in a desperate situation to procure the loan in order to bring ZPC Limited to full operation and it was therefore, in

their best interest to have the loan disbursement conditions met without undue delay

We therefore, find that the learned trial Judge did not consider the events leading to the execution of the Forms of Transfer of fully paid shares as if he had, he would have come to the inevitable conclusion that having executed the second Deed of Variation on 5th December 2006, it was reasonable that the Respondent also executed the share transfer forms just seven days later on 12th December 2006 and about forty days later on 15th January 2007.

It is also logical that the fact that the loan was eventually disbursed was as a result of the share transfer formalities having been followed as endorsed by the Respondents who were the sole shareholders of the one billion issued shares in ZPC Limited at the time.

We now revert to the alleged transfer of shares to the Appellant by fraud. In the first place, we note that this allegation revolves mainly around the evidence and report of the handwriting expert which the trial Judge accepted and we do not fault the learned Judge for accepting that evidence as there was no basis to reject it.

As earlier pointed out in our judgment, the thrust of the handwriting expert's evidence was that the signatures on the share transfer forms lacked the natural handwriting signature variations

to show that the same were physically appended to the documents by the Respondents. He thus concluded that the signatures on the forms were either mechanically or electronically affixed to the forms.

In his evidence in cross-examination the 1st Respondent argued that he was out of jurisdiction on 12th December 2006 when the share transfer forms were dated and he could not therefore, have physically signed them. This was then the case for the engagement of the handwriting expert whose report and testimony is referred to above.

The allegation is therefore that the Appellant, through Dr. Mahtani fraudulently affixed the Respondents' signatures mechanically or electronically without their consent to transfer their shares to the Appellant. We however, note that there is no similar evidence to show that the 2nd Respondent was equally out of jurisdiction when her signature was affixed to the share transfer forms on the same date and neither is it contended that both Respondents were also out of jurisdiction on 15th January 2007 when the other share transfer forms were signed.

That notwithstanding, Dr. Mahtani, in his Defendants' witness statement occurring from page 2076 in particular in paragraph 109 at page 2099 in volume 7 of the Record of Appeal, avers that it was common practice for the Respondents' children to use electronic signatures when he states;

"Most of the expatriate staff were interviewed and recruited in India. The Plaintiffs' son Mr. Claudio Ventriglia was responsible for recruiting the employees. Through some of the expatriate employees, I came to learn that an electronic version of the headed paper of ZPC was created and the first Plaintiff's signature was electronically affixed on the headed paper. The electronic papers were prepared in favour of the recruited employees and the signature of the first Plaintiff, as the Managing Director of ZPC, was electronically affixed into these letters which were sent to the recipients as attachments to emails".

He then, in paragraph 110, referred the court to the said letters of employment as exhibited. We have had occasion to look at the said letters which occur from page 701 to 710 of volume three of the Record of Appeal. A close scrutiny of the 1st Respondent's signature which occurs at the left hand side of the last page of each letter, shows that signatures in all the letters are similar to those affixed to the share transfer forms.

They also fit the description given by the handwriting expert in so far as they lack the usual variations or natural variation marks. It will further be noted that this evidence by Dr. Mahtani was not traversed in cross-examination leading to the conclusion that the signatures on the letters of employment were electronically affixed and this could only have been either by the 1st Respondent or his son Claudio as stated by Dr. Mahtani in his Defendant's witness statement.

Looking at the background to the filing of the share transfer forms with PACRA and the use of electronically affixed signatures, and further the desperation with which the Respondents wanted to see ZPC Limited swing into production amidst the dire financial difficulties that the family faced, the issue of fraud based on the electronically affixed signatures of the Respondents on the share transfer certificates is not tenable. In any case, it was not established by evidence that if that was fraud, it was committed by the Appellant. The most probable position in our view, is that it was an accepted practice in business transactions between the parties to use electronically affixed signatures whenever, it was convenient to do so.

The findings of fact upon which the learned trial Judge granted the remedies to the Respondents are that the Respondents did not hold the shares in trust for the Appellant and that the Appellant did not pay for the shares that were transferred to it.

Further based on the learned Judge's dismissal of the Shareholders' Agreement of 2007, the learned Judge held that the Respondents were the only shareholders in ZPC Limited. The learned trial Judge also generally accepted the Respondent's testimony.

Having already found that the learned trial Judge erroneously rejected the Shareholders' Agreement when the 1st Respondent

acknowledged it, we take the view that what is critical to this appeal is the determination whether the Appellant paid for the one billion shares in ZPC Limited which had been allotted to the Respondents and whether the procedure of altering the members' register for ZPC Limited was done in accordance with the prescribed law.

The argument for payment for the shares advanced by the Appellant is that in July 2005, the Appellant paid to ZPC the sum of USD250,000 which was slightly in excess of one billion kwacha, the nominal value of the one billion shares allotted to the Respondents.

The Respondents have dismissed that argument on two fronts firstly, that the same was paid in partial satisfaction of a credit facility that had been advanced to Dr. Mahtani by ZPC Limited in the sum of three million euros and secondly that the money for the shares should have been paid to the Respondents as the shareholders and not ZPC Limited.

We have earlier said in this Judgment that at the incorporation of ZPC in December 2004, the company's share capital was ten million shares out of which five million were issued to Ital Terrazzo and the 1st Respondent. However, when ZPC altered by increasing its share capital by 990 million shares, to bring it to one billion and the Respondents took up all the shares, it is not clear whether the newly allotted shares were paid for by the Respondents but given

their obvious financial challenges, we take the view that they probably did not pay for them.

We will however, be quick to state that a company allots shares in order to raise cash for its operations. It is for that reason that share capital is always divided into shares each with a par value. Anyone therefore, seeking to be entered in the company's register of members through acquisition of equity is expected to pay for the shares allotted to them and the cash is paid into the company's account.

Similarly, where shares already allotted and issued are transferred by the allottee to another person, natural or corporate, the transferee shall pay for the value of the acquired shares to the transferor and not to the company. The transferee however, will have his name entered in the Company's register as a new member and shareholder.

The issues that pose a conundrum in this case are two firstly, if the Respondents did not pay for the shares allotted to them, was the Appellant entitled to pay for the transfer of the shares allotted to the Respondents directly to ZPC Limited?

Secondly, if the Appellant paid for all the one billion shares in ZPC Limited on 27th July 2005 through the USD 250,000.00 payment why wasn't the register of members rectified to show that the

Appellant held one hundred percent of ZPC Limited's nominal share capital?

To deal with the first issue, we re-iterate our earlier position that on allotment of shares by a company, it is not mandatory for the allottee to immediately pay for them as can be noted from Section 63(1) (a) of the Companies Act of 1994. It follows therefore, that upon being allotted with their respective shares, the Respondents were not required to immediately pay for them in order to be entered in the ZPC Limited register as members. That notwithstanding, anybody acquiring shares in ZPC Limited thereafter, would have to take a share transfer from the Respondents and not ZPC Limited as it had exhausted all its authorized nominal capital.

In that regard it is noted that at no time was the ZPC Limited register rectified to show the Appellant as the sole shareholder of ZPC with one billion shares following an allotment upon payment of USD250, 000.

We also wish to state that companies limited by shares with a nominal share capital do not sell or transfer shares. They instead allot shares for cash or issue to the public for equity at par value or other value depending on the class of shares issued.

So, the only time that the register of ZPC Limited was altered or rectified was pursuant to the Shareholders' Agreement of 26th February 2007 through share transfers stated to be for fully paid shares.

The share transfer forms which are dated 12th December 2006 and 15th January 2007 are specific as to who the transferor and the transferee are; being Antonio Ventriglia and Manuela Sebastiani Ventriglia as transferors of specified numbers of shares at K1.00 each and Finsbury Investments Limited as transferee. Just that we keep track of the events, the share transfer forms were completed before the Shareholders' Agreement because the shareholding arrangement preference was introduced in the second Deed of variation dated 5th December 2006.

It would appear that the Shareholders' Agreement was made to facilitate the filing with PACRA of the said share transfer forms and the issuance of share certificates in the names of the new shareholders and the cancellation of the share Certificates of the previous shareholders.

We therefore accept the position that the Appellant, upon taking up shares from the Respondents, was duty bound to pay the par value of each share it acquired from the Respondents to the Respondents.

We do not accept the argument that the USD 250,000 paid to ZPC was for the shares held by the Respondents. That argument is contrary to the principles governing share transfer as it is the transferor who is entitled to be paid for the number of shares so transferred at the agreed price.

In view of our finding that the learned trial Judge misdirected himself in fact by discounting the Shareholders Agreement of 26th February 2007 and the other documents pointing to the transfer of a total of five hundred and eighty (580) million shares from the Respondents to the Appellant at par value of K1.00 per share, it follows that the Appellant is obliged to pay the sum of five hundred and eighty million kwacha (580,000.00) to the Respondents for the transfer of shares. We must however, re-iterate that the fact that the consideration for the share transfer was not paid at the time of the transfer, does not render the transfer a nullity.

In so far as the transfer procedures are concerned, we find the same to have been done in substantial conformity with the applicable law under the Companies Act as shown earlier in this Judgment.

Finally, we consider the factors upon which the learned trial Judge granted Judgment in favour of the Respondents and made a declaration holding the Respondents as the only shareholders in ZPC Limited.

The following factors are recorded from page 63 to page 65 volume one of the Record of Appeal in the Judgment.

- (i) *The 1st Plaintiff's (now 1st Respondent) testimony that neither he nor the 2nd Plaintiff (now 2nd Respondent) have ever divested themselves of shares in ZPC to the Defendant (now Appellant) which were on the filed Arrival Returns remained uncontroverted and unshaken during cross-examination.*

We have demonstrated in our Judgment that the Loan Agreement entered into between the PTA Bank and ZPC Limited as read together with the 2nd Deed of variation as well as the Shareholders' Agreement of 26th February 2007 had the effect of divesting the Respondents of their shareholding in ZPC Limited by consent of the Respondents. It was therefore, misdirection on the part of the learned trial Judge to hold that the Respondents never divested themselves of their shareholding in ZPC Limited in light of the aforementioned documents which were voluntarily signed by the Respondents.

- (ii) *The 1st Plaintiff's testimony that neither he nor the 2nd Plaintiff ever signed the share transfer forms transferring the shares in ZPC Limited to the Defendant remained uncontroverted and unshaken during cross-examination.*

We have shown in our Judgment that there is on record evidence that the Respondents' son used electronic affixation of the 1st Respondent's signature on employment letters issued to expatriates he had recruited in India to work for ZPC Limited.

We have also noted that on the strength of the documents confirming the changes to the shareholding in ZPC Limited, the Respondents are estopped from denying being parties to the said agreements regardless of how their signatures got on the documents. Fraud was not proved to the requisite standard which is beyond a mere balance of probability

- (iii) The 1st Plaintiffs' testimony that the money or amounts reflected on the Share Transfer Forms in issue were never paid by the Defendant to the Plaintiff as consideration for the shares in ZPC Limited was unshaken in cross-examination.

In our Judgment, we have accepted the learned trial Judge's finding on this factor for the reasons we have adequately set out earlier.

- (iv) PW1's testifying that the original Share Transfer Certificates have never been lodged with PACRA was not controverted and shaken during cross-examination.

This factor, in our view, does not in any way render the Share Transfer Agreements a nullity because, it is PACRA that accepted and registered the share transfers and in turn the share transfer certificates. If only photocopy Share Transfer Certificates had been lodged with PACRA, it should never be the Appellant's problem that PACRA nonetheless accepted and registered the same as valid. PACRA ought to have rejected the lodging of such documents if it offends against the law.

- (v) PW3's testifying that the finding of the Forensic Investigation on the signatures on the disputed documents of share transfer; that these were pasted either mechanically or electronically was unshaken during cross-examination.

This factor is closely connected to the second factor in that the Respondents' denial of having physically appended their signatures to the Share Transfer Forms led to the hiring of a handwriting expert who rendered the said Forensic Report. The effect of this factor on the share transfers is the same as the position we have taken in relation to the second factor dealt with earlier in this Judgment.

- (vi) No exemption or waiver of Property Transfer Tax payable on share transfers in Limited Companies was shown to have been obtained from Zambia Revenue Authority. It is

trite law that share transfer done without payment of Property Transfer Tax referred to under Section 9 of the Property Transfer Tax Act renders the Transaction null and void as a matter of public policy as, among other things is a fraud on the Revenue of the Republic. PW5's testimony that none of the Directors of ITL signed the form of share Transfer from the Plaintiffs to ITZ went uncontroverted and unshaken during cross-examination.

Our diligent search of the law relating to Property Transfer Tax has revealed that the party whose duty it is to pay Property Transfer Tax is the vendor/transferor and not the purchaser/transferee.

In that regard Section 4 (1) of the Property Transfer Tax Act Chapter 340 of the Laws of Zambia states as follows;

"Whenever, any property is transferred there shall be charged upon, and collected from the person transferring such property a property transfer tax in accordance with the provisions of this Act.

In Section 2(1) the interpretation section, property includes (b) "any share issued by a company incorporated in the Republic".

Clearly, ZPC Limited being a company limited by shares and incorporated in Zambia, issues shares that are liable to property transfer tax upon transfer of such shares. We however, find it

strange that the learned trial Judge would use the Respondents' failure to pay property transfer tax to divest the Appellant of the shares transferred to it by the Respondents.

In any case, Section 11 of the Act provides for the penalization of failure to pay tax. The Act does not, in any of its 13 sections provide that any transfer of share without payment of property transfer tax renders the transfer null and void as held by the learned trial Judge.

We have also noted that the learned trial Judge specifically relied on Section 9 of the Act as in his understanding of that section, failure to pay property transfer tax on share transfer renders the transfer null and void.

Our careful scrutiny of Section 9 has not revealed any such provision either. We however, believe that the learned trial Judge should have sought to rely on Section 9 (4) which states as follows;

"The Registrar shall not register any transfer of property unless he is satisfied that any tax due under this act in respect of such transfer has been paid".

This provision, we note, does not by any ingenuous interpretation, render any support to the learned trial Judge's holding that failure to pay tax on share transfer renders the transfer null and void.

We also note that Section 9 applies to transfers of land or interest in land. This is deducible from Section 2(1) of the Act which provides the following meaning to "Registrar.";

"Registrar" shall have the meaning assigned thereto in the Lands and Deeds Registry Act".

It will be noted that apart from the requirement for payment of property transfer tax on shares, the authority that is conferred with powers to attend to the registration of business entities is PACRA and not the Registrar of Lands and Deeds. Clearly, reliance upon Section 9 of the Property Transfer Tax Act by the learned trial Judge to conclude that the transfer of shares by the Respondents to the Appellant was null and void for want of payment of property transfer tax was misconceived at law.

As earlier stated in this case, it is the Respondents who are liable to pay property transfer tax on the shares they transferred to the Appellant and their failure to do so attracts the penalties as stated under Sections 9A and 11 of the Property Transfer Tax Act Chapter 340 of the Laws of Zambia.

- (vii) PW5's testimony that none of the Directors of Ital Terrazzo Limited signed any form of share transfer from the Plaintiffs to Ital Terrazzo was unshaken during cross-examination.

Since Ital Terrazzo is not a party to this appeal and neither was it in the Court below, we shall not make any pronouncement on this factor suffice to say that whatever the case is, it would not affect the Appellant's case as it is a separate entity.

Having said everything we have said in this Judgment we look at the seven grounds of appeal as set out in the memorandum of appeal and find it unnecessary to deal with the first three which have been rendered otiose. Ground seven is equally irrelevant to the appeal as grounds five and six are all the Appellant need to challenge the Judgment of the court below.

The net effect of our Judgment is that we allow the appeal and set aside the Judgment of the court below.

As a remedy, we order that the Appellant pays the sum of five hundred and eighty million (580,000,000) to the Respondents representing the five hundred and eighty million (580,000,000) shares transferred to the Appellant in ZPC Limited, which represents the 58% share transfer of the one billion (1,000,000,000) share capital authorized by ZPC and allotted to the Respondents at K1.00 par value per share.

In view of the fact that the payment of the sum of K500, 000,000 and USD60, 000,000 was the Respondent's remedy in the court below in the alternative as representing the 58% shares agreed to

be transferred to the Appellant, we order that interest on the amount payable for the shares shall be at the short term fixed deposit rate from the date of the writ until judgment and thereafter, at two (2) per centum until final payment.

We however, note that the claim for USD 60, 000,000 is not payable to the Respondents because this amount is the price of the eight percent shares to be transferred to Claudio Ventriglia according to paragraph 8 of the Shareholders' Agreement.

The register at ZPC Limited shall accordingly be restored, if changes have been effected, to reflect the shareholding of 58% by the Appellant.

In order to quickly normalize the operations of ZPC Limited, the Appellant shall pay the share transfer sum to the Respondents within three (03) months or ninety (90) days of this Judgment.


Costs here and below are for the Appellant.



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F.M. LENGALENGA
COURT OF APPEAL JUDGE



.....
M. J. SIAVWAPA
COURT OF APPEAL JUDGE



.....
B.M. MAJULA
COURT OF APPEAL JUDGE