

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2019/HPC/0248

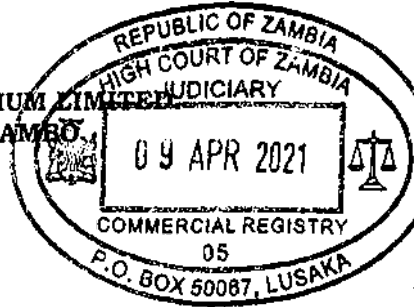
BETWEEN:

FELICITAS KABWE CHIBAMBA
CHANDA KATOTOBWE

FIRST PLAINTIFF
SECOND PLAINTIFF

AND

MARSHLANDS CONSORTIUM LIMITED
TOBIAS HAANYIMBO MILAMBO
RICHARD LUBEMBA
NACHI MUSONDA
JUSTIN PHIRI
KLEIN SYAMONGO
MAYBIN SILAVWE



FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT
FIFTH DEFENDANT
SIXTH DEFENDANT
SEVENTH DEFENDANT

Before the Honourable Mr. Justice K. Chenda on the 9th day of April, 2021

For the Plaintiffs : *Mr J. Madaika & Mr M. Mwanza both
of J & M Advocates*

Also for the Second Plaintiff : *Mr S. Sikota S.C. of Central Chambers*

*For the First - Fourth
Defendants* : *Mr N. Nchito S.C. and Mr C. Hamwela
both of Nchito & Nchito Advocates*

*For the Fifth - Seventh
Defendants* : *Mr L.M. Chikuta of LM Chikuta Legal
Practitioners*

JUDGMENT

Legislation referred to (primary and subsidiary):

- (i) The Companies Act, Chapter 388 (repealed and replaced) in s. 216(1) and (5)
- (ii) The Companies Act, No. 10 of 2017 in ss. 12(1),21,23,30,31,77 and 85
- (iii) The High Court Act, Chapter 27 of the Laws of Zambia in section 13
- (iv) The Corporate Insolvency Act, No. 9 of 2017 in section 57(1)(d)

- (v) The Companies Act (Commencement) Order, Statutory Instrument No. 47 of 2018

Rules of Court:

- (vi) The High Court Rules in Order 53 Rule 6(2),(3) and (4)

Case Law:

- (vii) *Lake Kariba Boating Services Limited v Kariba North Bank Co. Limited* (1982) ZR35 at p.38
- (viii) *Galaunia Farms Limited v National Milling Company Limited* (2004) ZR1 at pages 9-10
- (ix) *John Paul Mwila Kasengele & Ors v ZANACO* (2000) ZR72
- (x) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* (1942) 2 All ER 122 at page135
- (xi) *Konkola Copper Mines Plc. v Mitchell Drilling International Limited & Mitchell Drilling (Z) Limited* - Selected Judgment No. 22 of 2015 (Appeal No. 156/2013) at p.J29

1. INTRODUCTION AND BACKGROUND

- 1.1 The feud in this matter is over the ownership and control of a corporate entity known as Ultimate Insurance Company Limited (“**UIC**” or “**Ultimate Insurance**”).
- 1.2 The warring factions are the Plaintiffs on the one hand with the Second Plaintiff as financier of the First Plaintiff’s acquisition of an interest in UIC and on the other hand the Second to Fourth Defendants asserting control over UIC and claiming an interest through the First Defendant as their special purpose vehicle.

- 1.3 The Fifth to Seventh Defendants are dragged into the arena as the former shareholders – directors of UIC before the two factions.
- 1.4 By amended writ of summons and statement of claim dated 23rd August 2019, the Plaintiffs sought the following remedies from this Court following a re-allocation of the matter:
- i) a declaration that the Plaintiffs are the 100% owners of UIC having been the parties that paid the full purchase price of K1,500,000.00;
 - ii) an order directing that the 1st, 2nd, 3rd and 4th Defendants having not furnished any consideration were not entitled to have received any shareholding in UIC directly from the 5th, 6th and 7th Defendants;
 - iii) an order that the transfer by the 5th, 6th, and 7th Defendants of shares to the 1st Defendant was done wrongly, by mistake of fact and on a misapprehension of the true facts, which said error, mistake and misapprehension was perpetrated by the 2nd, 3rd and 4th Defendants;
 - iv) an order directing for the reversal of transaction transferring 65% shares between the Defendants whereby the 1st Defendant was made a beneficiary of shares to which it had not furnished any consideration and that the status *quo ante* be restored by means of the initial owners, the 5th, 6th and 7th Defendants getting back the 65% shares in UIC from the 1st

Defendant for purposes of properly concluding the share sale agreement between the proper parties to that agreement, who are the Plaintiffs and the 5th, 6th and 7th Defendants;

- v) an order directing that the contracts, agreements and/or undertakings agreed between the Plaintiffs and the 1st, 2nd, 3rd and 4th Defendants have been discharged on account of the breaches committed by the said Defendants;
- vi) ancillary to (v) above, a further order declaring null and void the transfer of shares into the 1st Defendant on account of mistake of fact on the part of the 5th, 6th and 7th Defendants and for failure of consideration;
- vii) an order *restitutio in integrum* between the Plaintiffs and the 1st, 2nd, 3rd and 4th Defendants;
- viii) an order directing for the reversal or rescission of the transaction envisaged between the Plaintiffs and the 1st, 2nd, 3rd, and 4th Defendants by which the 1st Defendant retained the 65% shares erroneously transferred to it by the 5th, 6th and 7th Defendants;
- ix) an order directing that the Plaintiffs are not bound to conclude the transaction with the 1st, 2nd, 3rd and 4th Defendants despite any purported part-performance undertaken by any party;

- x) an order directing that the initial transaction between the Plaintiffs and the 5th, 6th and 7th Defendants be properly concluded by filing the proper share transfer documents other statutory requirements for the remaining 65% shares in UIC to be transferred to the Plaintiffs by the 5th, 6th and 7th Defendants after same are retrieved from the 1st Defendant;
- xi) an order compelling the 5th, 6th and 7th Defendants to execute all necessary documents and provide all necessary legal and other assistance to ensure that the Plaintiffs obtain the 100% shareholding in UIC that they paid for;
- xii) accompanying the ultimate transfer of shares to the Plaintiffs, an order for the Plaintiffs, as 100% shareholders, to have sole and full control of the affairs of UIC to immediately appoint a board of directors to oversee such matters as meeting the statutory obligations to the Pensions and Insurance Authority (PIA), bank accounts, appointment and disappointment of all employees and all other rights and obligations that ownership of the company affords;
- xiii) an order for the 1st, 2nd 3rd and 4th Defendants' contribution, in UIC, whether in monetary form or by contribution of real property as security to the Pensions and Insurance Authority (PIA), be assessed by Court and paid out to the said Defendants after a full audit of the company has been

conducted and a property account rendered by the 1st, 2nd 3rd and 4th Defendants;

- xiv) an order for the cancelation of the shares allotted to the 1st Defendant and that the said shares be transferred to the 5th, 6th and 7th Defendants for onward transfer to the Plaintiffs;
- xv) an order that the register of members as held at the Patents and Companies Registration Agency ("**PACRA**") be ultimately rectified to reflect the Plaintiffs as the owners of the entire shares of UIC;
- xvi) an order for the appointment of auditors to carry out a forensic audit of UIC and present a report to the Court for purposes of ascertaining the state of affairs of the company;
- xvii) an order for the 1st, 2nd 3rd and 4th Defendants to render an account for all monies received by the UIC at all material times and that any waste, pillage, misuse, misapplication, abuse, theft or unexplained loss of revenue and/or assets be made good jointly by the 1st, 2nd, 3rd, and 4th Defendants;
- xviii) a permanent injunction restraining the Defendant from interfering with the operations and management of UIC or in any way representing themselves to the public as shareholders or owners of the said company;

- xix) in addition to all the above, an order for the 1st, 2nd, 3rd and 4th Plaintiffs to pay damages for breach of contract including aggravated damages for their malicious conduct;
- xx) any other relief that the court may deem fit;
- xxi) interest on all sums found due and payable to the Plaintiff;
- and
- xxii) costs.

1.5 The First to Fourth Defendants' unitary position was embodied in their amended defence of 21st October 2019, with the severance of their intended counterclaim by the previous presiding Judge.

1.6 As for the Fifth to Seventh Defendants, their side of the material facts was contained in their joint defence of 12th September 2019.

1.7 The set of pleadings was completed with the filing of the Plaintiffs' combined reply on 20th January 2020.

2. MATERIAL FACTS AND ISSUES

2.1 The following facts are common cause when one considers the mosaic formed by the pleadings exchanged¹:

- (i) the First Plaintiff is a director and shareholder of UIC (see paragraph 1 of statement of claim, paragraph 1 of First to

¹ By operation of Order 53 Rule 6(2),(3) and (4) of the High Court Rules created under Chapter 27 of the Laws of Zambia, any allegation of fact that is not traversed by the responding pleading from an opponent in a commercial action is deemed to be admitted.

- Fourth Defendants' defence; paragraph 1 of Fifth to Seventh Defendants' defence);
- (ii) the First Defendant is the holder of 65% of the shareholding in UIC while the stake held by the First Plaintiff represents 35% (see Paragraph 29 of statement of claim, paragraph 16(h) and (i) of First to Fourth Defendants' defence; paragraph 30 of Fifth to Seventh Defendants' defence);
 - (iii) the First Plaintiff and First Defendant acquired the shares held through the acts of Fifth to Seventh Defendants (paragraph 21 and 29 of statement of claim, paragraph 22 and 30 of Fifth to Seventh Defendants' and paragraph 16 (c), (d), (f), (h) and (i) of First to Fourth Defendants' defence);
 - (iv) the Second Plaintiff paid the Fifth to Seventh Defendants K1,500,000 (paragraph 28 of statement of claim and paragraph 29 of Fifth - Seventh Defendants' defence); and
 - (v) Second to Fourth Defendants have been managing affairs of UIC (paragraph 30 and 38 of statement of claim and paragraph 18, 21 and 25 of First to Fourth Defendants' defence).

2.2 The parties are however at cross purposes over the following material facts:

- i) *what the K1,500,000 payment by the Second Defendant to Fifth to Seventh Defendants was for -*

- a) Plaintiffs contend that it was for 100% of the shareholding of UIC based also on a separate agreement with Second to Fourth Defendants that upon their payment of K3.5 million to the Plaintiffs, the Plaintiffs would later transfer 65% of the shareholding to the First Defendant as the SPV/nominee of the Second to Fourth Defendants (see paragraphs 2, 15, 16 and 20 of the statement of claim) and that Second to Fourth Defendants would provide K6,500,000 worth of security required by PIA and the rest would be by the Plaintiffs (see paragraph 20 (vii) of the statement of claim;
- b) First to Fourth Defendants cross contend that it was for the purchase of K1.650,000 shares held by the Fifth to Seventh Defendants in UIC albeit at K1,000,000 (see paragraph 2, 13, 16(g) of the First to Fourth Defendants' defence); and
- c) position of the Fifth to Seventh is that it was for ownership of the entire UIC by Second Plaintiff following failure by the Second to Fourth Defendants to purchase UIC (see paragraph 2, 4, 8, 9 of Fifth to Seventh Defendants' defence).
- ii) *how the First Defendant acquired 65% shareholding in UIC –*

- a) the Plaintiffs contend that the Second to Fourth Defendants were their agents in the acquisition of UIC and abused that position by colluding with or misleading the Fifth to Seventh Defendant to transfer the shares now held by the First Defendant (see paragraph 24, 29, 31 of statement of claim)
 - b) the First to Fourth Defendants cross contend that they were not the Plaintiffs' agents but instead acquired the shares in their own right through a subscription by the First Defendant/SPV from UIC directly and independent of the Plaintiffs' transaction with the Fifth to Seventh Defendants (see paragraphs 12, 13, 14, 16, 17, 20 of First to Fourth Defendants' defence); and
 - c) the Fifth – Seventh Defendants contend that after the acquisition of UIC by the Second Plaintiff, they facilitated the acquisition of 65% shares in UIC by First Defendant on the strength of representations by the Second to Fourth Defendants who the Fifth to Seventh Defendants believed to be agents of and acting on behalf of the Plaintiffs (see paragraph 2, 16,19,24, 25, 30, 39 of Fifth to Seventh Defendants' defence);
- iii) *the management of the affairs of UIC by the Second to Fourth Defendants –*

- a) the Plaintiffs' contend that after the purchase of UIC, the Plaintiffs requested the Fifth to Seventh Defendants to allow the Second to Fourth Defendants to operate at UIC premises for transition pending appointment of a board of directors and a managing director but the Second to Fourth Defendant unlawfully constituted a board of directors and took over management of UIC to the exclusion of the Plaintiffs resulting in financial mismanagement (see paragraph 32, 38, 44, 45, 46,49 of statement of claim);
- b) the First to Fourth Defendants contend that the Third and Fourth Defendants took up managerial positions in UIC and that the First Plaintiff participated in the appointment of a board of directors and that all payments made were in line with the company's business (see paragraph 21, 29, 30, 32 of First to Fourth Defendants' defence); and
- c) the Fifth to Seventh Defendants confirm that the Second to Fourth Defendants were allowed to operate at UIC premises on request of the Second Plaintiff for transition purposes but they are not privy to the reconstituting of the board and subsequent management of UIC's affairs (see paragraph 34 and 38 of the Fifth to Seventh Defendants' defence).

2.3 The issues for determination as I see them are therefore:

- i) was the Second Plaintiff's payment to the Fifth to Seventh Defendants for acquisition of the entire UIC or only part of it represented by 1,650,000 shares;
- ii) how did the First Defendant acquire shareholding in UIC and was it lawfully done; and
- iii) was the board of UIC properly constituted and have the Second to Fourth Defendants been lawfully in charge of the affairs of UIC?

3. SUMMARY OF EVIDENCE

3.1 **PW1 was Chanda Augustine Katotobwe**, a 51-year-old businessman, the Second Plaintiff and husband of the First Plaintiff.

3.2 **His testimony in chief** was embodied in his witness statement of 22nd January 2020 together with the Plaintiffs' bundle of documents also of 22nd January 2020.

3.3 **When cross examined** by Mr N. Nchito S.C., representing the First to Fourth Defendants, Mr Katotobwe testified that:

- i) he was not a shareholder in Ultimate Insurance nor is there any record in the bundles of minutes showing that he attended a board meeting or shareholders meeting of Ultimate Insurance;

- ii) the First Plaintiff is one of the directors of Ultimate Insurance and appears as such in the Patents and Companies Registration Authority (PACRA) print out at page 123-127 of the Plaintiffs' bundle of documents but there is no record in Plaintiffs' bundle of documents of a return filed at PACRA for her appointment;
- iii) at completion of the transaction for the acquisition of the shares of Ultimate Insurance, the share capital stood at 10 million shares split into 35% for First Plaintiff and 65% for First Defendant;
- iv) the document produced at page 76 of Plaintiffs' bundle of documents showed that the First Defendant held 6.5 million shares in Ultimate Insurance;
- v) the document at page 192-209 of the Plaintiffs' bundle of documents is a proposed shareholders agreement prepared at the Second Plaintiff's instruction and it shows at page 194 that the share capital of Ultimate Insurance is 10 million held by the First Plaintiff and Second Defendant in ratio of 35% to 65%;
- vi) the same is the shareholding position reflected at PACRA;
- vii) the First Plaintiff became a signatory to the accounts of Ultimate Insurance after the share acquisition;

- viii) the First Plaintiff was on panel B signatory with Mr. John Mponda while panel A had the Third Defendant, Fourth Defendant and all of whom were appointed as signatories at the same time by the same instrument; and
- ix) there is no document in the Plaintiffs' bundle of documents which shows that the 65% shareholders had not paid for their shares.

3.4 **Under continued cross examination**, this time by Mr. Chikuta, Mr Katotobwe testified that the Fifth to Seventh Defendants engaged agents to look for buyers for Ultimate Insurance. The agents included the Third and Fourth Defendants as informed to Plaintiffs by Fifth to Seventh Defendants.

3.5 By special resolution passed by Fifth to Seventh Defendants dated 24th July 2017, the share capital of Ultimate Insurance was increased from 1.65 million shares to 10 million shares. The resolution appears at page 8 – 9 of the Fifth to Seventh Defendants' bundle of documents.

3.6 He met the Fifth to Seventh Defendants in person before conclusion of the sale of shares and the agreed purchase price was K1.5 million notwithstanding the increase in share capital.

3.7 He thereafter paid a deposit of K300,000 to the Fifth to Seventh Defendants who at the Second Plaintiff's request, receipted the same in the name of the First Plaintiff as per document dated 22nd

February 2018 in the Fifth to Seventh Defendants' bundle of documents at page 154.

3.8 After the said payment, he asked the Fifth to Seventh Defendants to allow the Second to Fourth Defendants to operate at Ultimate Insurance for the transition but did not explain the reasons why not disclose to the Fifth to Seventh Defendants the terms of a separate agreement between him and Second to Fourth Defendants.

3.9 He later came to discover that the Second to Fourth Defendants proceeded to execute various transaction documents without the Plaintiffs' authority which include:

- i) sale and purchase agreement at page 168 of the Fifth to Seventh Defendants' bundle of documents (the "SHA"); and
- ii) shareholders agreement at page 4 of the First to Fourth Defendants' bundle of documents (the "SSA");
- iii) share subscription agreement at page 103 of the First to Fourth Defendants bundle of documents (the "SSA").

3.10 Mr. Katotobwe further testified that the document at page 36 of the First to Fourth Defendants' bundle of documents speaks of proceedings of 26th June, 2018 at Ultimate Insurance and refers to the First Plaintiff as buyer represented by the First Defendant under the paragraph "REFERENCES";

- 3.11 There is no document submitted by the Fifth to Seventh Defendants to show that the Fifth to Seventh Defendants paid for the 65% shares held by the First Defendant in Ultimate Insurance.
- 3.12 The shareholding ratio of 65% to 35% between the First Defendant and the First Plaintiff had nothing to do with the Fifth to Seventh Defendants but instead a separate agreement which the Fifth to Seventh Defendants were not privy to.
- 3.13 The Plaintiffs are aggrieved by the Second to Fourth Defendants' failure to honour that agreement and for excluding the Plaintiffs from affairs of Ultimate Insurance for the past two years.
- 3.14 The Plaintiffs are also aggrieved with the Fifth to Seventh Defendants as they did not authorise the Fifth to Seventh Defendants to give shares to the First Defendant.
- 3.15 The Plaintiffs are also aggrieved by the Second to Fourth Defendants' failure to pay them K3.5 million for the First Defendant's shares and by the purported part payment of about K400,000 which it later turned out to be from funds belonging to Ultimate Insurance.
- 3.16 Mr Katotobwe further testified that there was a Pensions Insurance Authority (PIA) requirement to provide assets to meet the value of the shareholding of Ultimate Insurance to serve as security for the interest of insurance policy holders.

- 3.17 He further testified that he was aware that the Fifth to Seventh Defendants complained via letter to PIA Registrar that the Second to Fourth Defendants caused them to inadvertently participate in giving the PIA Registrar misleading information that the assets provided meet the requisite value when in fact not. The letter appears at page 316-319 of the Fifth to Seventh Defendants' bundle of documents and complains that the valuation reports submitted to PIA showed higher values for the properties than the value submitted to Zambia Revenue Authority (ZRA) for Property Transfer Tax (PTT) purposes.
- 3.18 Mr Katotobwe testified that at the time that he was buying Ultimate Insurance the only shareholders were the Fifth to Seventh Defendants and they all participated in the sale.
- 3.19 He was aware that the Fifth to Seventh Defendants had Ultimate Insurance valued by ZRA for tax purposes and that it was based on share capital of 1.65million shares and higher than K1.5 million and that the Fifth to Seventh Defendants paid PTT as evidenced by documentation in their bundle of documents.
- 3.20 Mr Katotobwe also stated that he was aware that at the time that the Fifth to Seventh Defendants were selling Ultimate Insurance, they had not yet allotted the balance of unissued shares from the K10 million after deduction of the pre-existing 1.65 million shares.

3.21 He also testified that there were two valuation reports prepared by Chikwendo and Associates in respect of a property in Chanyanya, Kafue at the instance of the Second to Fourth Defendants for use to meet PIA requirements and tax but for different values and that one of the reports appeared at page 366 of the Fifth to Seventh Defendants' bundle of documents.

3.22 According to Mr Katotobwe, the Fifth to Seventh Defendants only partly performed their role in the sale. He however conceded that he later came to see that the Fifth to Seventh Defendants executed documents which showed that whoever was signing was doing so for Plaintiffs' benefit.

3.23 **When re-examined** by Mr. Madaika, Mr Katotobwe testified that the Fifth to Seventh Defendants only partly fulfilled their role as they were not privy to the Plaintiffs' separate verbal agreement with the Second to Fourth Defendants and the Fifth to Seventh Defendants should not have allotted the shares as they did without the Plaintiffs' authority or consent.

3.24 The Plaintiffs expected that just as the Fifth to Seventh Defendants had asked if the Second to Fourth Defendants should be allowed to operate from Ultimate Insurance premises, they should have consulted the Plaintiffs before signing documents with the Second to Fourth Defendants.

- 3.25 The Plaintiffs only discovered that the SPA, SHA and SSA had been signed after the Second to Fourth Defendants appointed a board of directors. The Second to Fourth Defendants were the Plaintiffs' agents but they signed documents without authority.
- 3.26 Mr Katotobwe stated that he had not come across any document showing a payment by the Second to Fourth Defendants to Fifth to Seventh Defendants and that however, following the Second to Fourth Defendants failure to raise 65% of the purchase price it was verbally agreed that the Plaintiffs would purchase the entire shareholding and that once the company was operational, the Second to Fourth Defendants would purchase 65%.
- 3.27 Mr Katotobwe trusted the Third Defendant to honour the agreement having known him for over 10 years as an accomplished insurance executive. The Second to Fourth Defendants have now denied the existence of the agreement and have been running Ultimate Insurance for over 2 years without input from the Plaintiffs who purchased it.
- 3.28 **PW2 was Felicitas Kabwe Chibamba** the First Plaintiff herein and spouse of the Second Plaintiff.
- 3.29 Her testimony in chief was embodied in her witness statement of 9th September 2020.

- 3.30 **She was cross examined** by State Counsel N. Chito during which she testified that she was a director and shareholder in Ultimate Insurance but did not know the exact date when she became so.
- 3.31 Her shares were purchased from the Fifth to Seventh Defendants and paid for in 3 instalments. The proof of such payments includes the acknowledgment of K200,000 dated 9th March 2018 produced at page 257 of the Plaintiffs' bundle of documents and at page 71 of the same bundle.
- 3.32 The acknowledgement at page 71 of the Plaintiffs' bundle of documents does not state that the First Plaintiff was paying for the purchase of Ultimate Insurance but for purchase of K1.65 million shares in Ultimate Insurance.
- 3.33 She conceded that she did not know what the nominal capital of Ultimate Insurance was at time of buying the shares and that she did not know the difference between a purchase of shares and allotment.
- 3.34 Ms Chibamba also admitted that she signed documents with the First Defendant relating to the shareholding in Ultimate Insurance which documents included the resolution at page 65 of the Plaintiffs' bundle of documents which alluded to the First Defendant subscribing for 8.35 million shares and the First Plaintiff subscribing for 1.85 million shares.

3.35 She also conceded that she did not know when the First Defendant subscribed for the said shares or whether it was properly done and also did not know if the subscription came after her purchase of shares from the Fifth to Seventh Defendants.

3.36 Ms Chibamba testified that she was familiar with the sale and purchase agreement at page 76 of the Plaintiffs' bundle of documents and that she signed it to signify her acceptance of its terms. The documents show at page 77 what shares were held by who including 1.85 million by her and 6.5 million by the First Defendant.

3.37 The terms included Ms Chibamba acquiring shares in Ultimate Insurance but not the entire 10million shares. She however, spoke of limited knowledge as her husband handled the entire transaction and she only got to know the details when the legal issues arose.

3.38 She also conceded that there is no document in the Plaintiffs' bundle of documents which showed that she acquired the entire 10million shares in Ultimate Insurance.

3.39 Ms Chibamba testified in one breath that she did not know whether the Second and Fourth Defendants are directors in Ultimate Insurance. She however stated in another breath that she had made a criminal complaint against the Second to Fourth Defendants supported by the affidavit at page 91 of the First to

Fourth Defendants' bundle of documents which in paragraph 12 and 24 has her averment that the Second to Fourth Defendants are directors.

3.40 She stated that there are no documents in the Plaintiffs' bundle which spoke of a separate relationship between the Second to Fourth Defendants and her besides being shareholders and directors.

3.41 It was Chibamba's testimony that the SHA at page 192-209 of the Plaintiffs' bundle of documents was her document and that she sent it to the First to Fourth Defendants. According to the Share Capital clause at page 194 of the Plaintiffs' bundle of documents, the shareholding of Ultimate Insurance was 10 million shares broken down as 6,500 shares representing 65% held by the First Defendant; and 3,500 shares representing 35% held by her.

3.42 She recognised the resolution at page 1 of the First to Fourth Defendants' bundle of documents but did not know whether it spoke of her acquisition of 1.85 million shares.

3.43 **Mr Chikuta also cross examined Ms Chibamba** during which she testified that the resolution at page 1-2 of the First to Fourth Defendants' bundle of documents speaks of being passed on 26th February 2018 but does not explain why the First Defendant would have 6.5million shares or why the First Plaintiff would have 1.85 million shares. It actually spoke of them as additional shares.

- 3.44 As for the SPA at pages 168-180 of the Fifth to Seventh Defendants' bundle of documents, Ms Chibamba understood the said Defendants to be selling Ultimate Insurance through 1.65 million shares and that thereafter she could as beneficiary deal with the unallotted shares as she pleased.
- 3.45 The documents at pages 154 and 257 of the Plaintiffs' bundle of documents show payment of two instalments and refer to the purchase of Ultimate Insurance and payment of the balance of K1million is shown by the document at page 71 of the Plaintiffs' bundle of documents.
- 3.46 As at 26th February 2018 there was no document that she had entered into with the First to Fourth Defendants other than them being her agents. They did however have a verbal agreement in place with her husband Mr Katotobwe.
- 3.47 Ms Chibamba stated that she was aware that after the Fifth to Seventh Defendants received the balance of K1 million on 19th April 2018 they left Ultimate Insurance and its premises to the Plaintiffs to deal with only availing themselves to attend to documents to conclude the transaction.
- 3.48 As for the resolution dated 27th February 2018 at page 65 of the Plaintiffs' bundle of documents, the shareholding was arranged in the manner proposed based on a separate agreement that had nothing to do with the Fifth to Seventh Defendants.

3.49 She was aware that her husband informed the Fifth to Seventh Defendants to allow the Second to Fourth Defendants to work at Ultimate Insurance premises during the transition but did not know whether day to day communication over the transaction was between the Second to Fourth Defendants and Fifth to Seventh Defendants. She could however, confirm that her husband was not involved in giving the Fifth to Seventh Defendants instructions on a day to day basis.

3.50 Ms Chibamba stated that she entered into the SPA at page 76 of the Plaintiffs' bundle of documents in order to give value to the separate verbal agreement which was not known to the Fifth to Seventh Defendants. By that date she was not aware that the Second to Fourth Defendants were denying the existence of that separate verbal agreement.

3.51 As part of the exit formalities, the Fifth to Seventh Defendants facilitated the change of bank signatories for Ultimate Insurance through the resolution dated 12th April 2018 produced at pages 256-257 of their bundle of documents. By the said resolution the Fifth to Seventh Defendants ceased to be signatories.

3.52 She was aware that the Fifth to Seventh Defendants gave the resolution to the Plaintiffs agents (the Second to Fourth Defendants) and according to a date stamp of 16th May 2018 it was presented to the bank by which date the Fifth to Seventh

Defendants had left Ultimate Insurance premises. She was happy with the changes made to the signatories but later on the panel B of signatories was changed without her input to allow for payments to be made without her involvement.

3.53 The documents from pages 72—86 of the First to Fourth Defendants' bundle of documents show appointments being made to the board of Ultimate Insurance at the hands of the First Plaintiff and First Defendant.

3.54 However, she did not sign any of the said documents which are a forgery as she was recovering from surgery and not attending to any company business at the time.

3.55 The said documents appear to show the Second Defendant signing for the First Defendant. She also stated that she had checked the First to Fourth Defendants' bundle of documents and could not see any cover letters to show that the said letters were ever sent to her.

3.56 Even the one expressed as appointing her as a director was not signed by her to acknowledge receipt but was instead blank.

3.57 Ms Chibamba stated that the alleged forgery of her signature was captured by a report from the Zambia Police appearing at pages 265-268 of the Plaintiffs' bundle of documents.

3.58 As for the resolution at page 285 -286 of the Fifth to Seventh Defendants' bundle of documents, it was signed by the First Defendant and Fifth to Seventh Defendants to facilitate registration

of exit of Fifth to Seventh Defendants from the board of Ultimate Insurance and appointment of new directors who included the First Plaintiff and Luke Lubemba, Wilson Musonda, Innocent Sinzala, Second Defendant and Fourth Defendant.

3.59 She also testified that she was aware that there were valuations done for various properties namely in Ndola, Mikango and Kafue at the instance of the Plaintiffs' agents (First to Fourth Defendants) and without the knowledge of the Fifth to Seventh Defendants.

3.60 Ms Chibamba also stated that she knew that when the Fifth to Seventh Defendants discovered that the valuations overstated the values of the properties, they complained of it to the PIA as per letter at page 316-319 of the Fifth to Seventh Defendants' bundle of documents.

3.61 **PW3 was Mr. Holland Chanda Mulenga** a 56-year-old valuation surveyor whose testimony in chief was embodied in his witness statement of 8th September 2020.

3.62 **When cross examined** by State Counsel N. Chito, he admitted that he did not know who procured the valuation reports which he talked about in his witness statement or where they were procured from. He also conceded that he had not personally valued any of the properties referred to in the said reports.

- 3.63 **PW3 was also cross examined** by Mr. Hanuwela during which he agreed that he was aware that there were 7 Defendants in this matter and that he has not had dealings with any of them.
- 3.64 **When cross examined** by Mr. Chikuta, PW3 testified that he was the proprietor of Bitrust Real Estates and that he was shown the valuation reports in the Fifth to Seventh Defendants' bundle of documents relating to the property in Kansenshi, Ndola and the one in Mikango. He stated that the reports were not his documents and the signature not his doing. He also stated that he charges for valuation reports and there is no record of the First to Fourth Defendants' coming to pay Bitrust Real Estates for services.
- 3.65 PW3 was not re-examined.
- 3.66 **DW1 was Justin Phiri**, the Fifth Defendant herein who testified on his own behalf and on behalf of the Sixth and Seventh Defendants.
- 3.67 **His testimony in chief** was embodied in his witness statement of 9th September 2020 admitted into evidence together with the Fifth to Seventh Defendants' bundle of documents filed on 29th January 2020.
- 3.68 **When cross examined** by Mr. Madaika, counsel for the Plaintiffs, Mr. Phiri testified that:
- i) Ultimate Insurance was incorporated in 2013 with 3 shareholders who included him;

- ii) sometime in 2017 him and the other shareholders decided to sell the company;
- iii) prior to the sale, they passed a resolution increasing the share capital from 1.65million to 10million shares;
- iv) the resolution is the one at pages 8-9 of the Fifth to Seventh Defendants' bundle of documents and it communicated a lack of intention to give out the extra shares to third parties;
- v) a second resolution was signed on 26th February 2018 for allotment of shares to outsiders namely the First Defendant and Second Plaintiff;
- vi) the second resolution appears at pages 1 - 2 of the First to Fourth Defendants' bundle of documents and was drafted by the Second to Fourth Defendants and signed by the Fifth to Seventh Defendants without calling the Second Plaintiff for confirmation;
- vii) the Fifth to Seventh Defendants signed the second resolution as such because on 24th February 2018, the Fourth Defendant came and advised them that it was agreed with the Second Plaintiff that the new 8.35m shares should be allotted in the manner set out in the second resolution;
- viii) the Fifth to Seventh Defendants also signed the SPA, SHA and SSA on 23rd February 2018 and did so without consulting the Second Plaintiff as on 22nd February 2018

when they met him, he (Second Plaintiff) advised them to work with the Second to Fourth Defendants;

ix) the SHA was premature because it was signed before the relevant parties became shareholders of Ultimate Insurance;

x) even though the Fifth to Seventh Defendants signed the SPA, SHA and SSA, the First to Fourth Defendants have never paid anything for shares in Ultimate Insurance;

xi) the mistake of giving shares to the First Defendant was made by the Fifth to Seventh Defendants because of a discussion on 21st February 2018 where the Second Plaintiff used these exact words:

“you can go ahead and work with them for purposes of transition. We have a separate agreement that will be used to finalise the transaction.”

xii) the Second Plaintiff however never used the word “agents” when describing Second to Fourth Defendants;

xiii) the Second Defendant denies the truthfulness of the First to Fourth Defendants’ assertion that there was an agreement between the First to Fourth Defendants and Fifth to Seventh Defendants to the exclusion of Plaintiffs whereby the First to Fourth Defendants would subscribe for shares;

xiv) the Second Defendant’s witness statement in paragraphs 6 and 7 over what money was received and for what is not true;

- xv) the document at page 99 of the First to Fourth Defendants bundle of documents is an acknowledgement drafted by the Fifth to Seventh Defendants but the wording is erroneous as the correct position is what is stated in paragraph 29 of his witness statement;
- xvi) in reaction to the First to Fourth Defendants' denial in paragraph 14 of defence that they were agents for the Plaintiffs' the Fifth Defendant stated that when he first met the Second to Fourth Defendants they were interested as buyers but that when it came to payment, they introduced a buyer, and the Second to Fourth Defendants never paid anything;
- xvii) the valuation reports which the Fifth Defendant spoke of as being fraudulent in paragraph 43 of his witness statement are the ones at pages 119, 128 and 136 of the Fifth to Seventh Defendants' bundle and he came to that conclusion when he discovered that the purported author disowned the documents;
- xviii) he agreed that the Fifth to Seventh Defendants never received any money from the First to Fourth Defendants and that the property which they were expected to have provided to Ultimate Insurance to match the shareholding was fraudulently valuated; and

xix) he agreed that the Plaintiffs are the full owners of Ultimate Insurance.

3.69 Under continued cross examination, this time by Mr Sikota S.C. on behalf of the Second Plaintiff, Mr Phiri testified that:

- i) the Second to Fourth Defendants had initially wanted to purchase Ultimate Insurance in their own right but failed to see the transaction through;
- ii) after their failed purchase, the Second to Fourth Defendants introduced the Plaintiffs to the Fifth to Seventh Defendants as buyers; and
- iii) the Plaintiffs met all the requirements for the purchase of Ultimate Insurance and all payments received by the Fifth to Seventh Defendants in respect thereof were from the Plaintiffs and nothing from the First to Fourth Defendants.

3.70 Mr. Phiri was also cross examined by Mr Nchito, S.C. (Counsel for First to Fourth Defendants) during which he conceded that:

- i) the relationship between the Plaintiffs and Second to Fourth Defendants was according to him that the Plaintiffs were introduced to him by the Second to Fourth Defendants;
- ii) the Plaintiffs and Second to Fourth Defendants had a separate agreement which he was not privy to;

- iii) the Fourth Defendant was paid a commission of K30,000 by Fifth to Seventh Defendants but there was no document before Court to prove receipt of the money;
- iv) the Fifth to Seventh Defendants resolved to increase the shareholding of Ultimate Insurance from 1.65million shares to 10million shares as per resolution at page 8 of the Fifth to Seventh Defendants' bundle of documents;
- v) the increase was done to meet an insurance regulatory requirement under the 2015 statutory instrument;
- vi) as at 24th November 2017, the extra 8.35million shares were unallotted and were the property of Ultimate Insurance before allotment;
- vii) he confirmed having signed the SPA, SSA and SHA appearing respectively at pages 168, 158 and 181 of the Fifth to Seventh Defendants' bundle of documents;
- viii) he believed that him and his fellow original shareholders of Ultimate Insurance were the ones to be paid for the unallotted shares and not the company though he conceded that the SSA did not say so;
- ix) the document at page 258 of the Fifth to Seventh Defendants' bundle of documents is an acknowledgement by the Fifth to Seventh Defendants for full and final payment for 1.65million shares;

- x) after the payment the Fifth to Seventh Defendants updated their records to show the First Plaintiff as owner of 1.65million shares and later on a transfer of additional shares was done making the First Plaintiff the holder of 35% shareholding;
- xi) in pursuance of the SSA an allotment of shares was done to the First Defendant and the SPA for its part was for sale of 1,65million shares by Fifth Defendant and his co-shareholders;
- xii) he denied that after allotment of the 8.35million new shares between them, the First Plaintiff and First Defendant were supposed to produce assets in Ultimate Insurance to meet the value of the said shares;
- xiii) he did not suspect that the Second to Fourth Defendants did not have authority from the Plaintiffs as one of the documents brought by them was a valuation report for the First Plaintiff's property;
- xiv) amongst the valuation reports was the one at page 384 of the Fifth to Seventh Defendant's bundle and he did not know whether it was indeed from Bitrust;
- xv) the assets the subject of the valuation reports were being produced to satisfy both PIA and the previous shareholders of Ultimate Insurance;

- xvi) he was familiar with the SPA at page 76 of the Plaintiffs' bundle of documents, he signed it together with his fellow previous shareholders and the First Plaintiff did so too, the First to Fourth Defendants were not party to the document;
- xvii) the documents that he had seen, resolutions produced and agreements show the First Defendant as holder of 6.5million shares/65% and the First Plaintiff holding 3.5million shares/35%;
- xviii) there is no document in Fifth to Seventh Defendants' bundle of documents showing that the Plaintiffs bought 100% shares in Ultimate Insurance; and
- xix) he did not know who was responsible for PACRA filings for the finalising of the transaction.

3.71 **Mr. Phiri was re-examined** by Mr. Chikuta (Counsel for the Fifth to Seventh Defendants) and clarified that the initial operational issued share capital of Ultimate Insurance was 1.65million shares. The increase to 10million shares was mainly to meet the PIA regulatory requirement which is why him and fellow previous shareholders did not allot the new share to themselves. Their understanding was that whoever paid for the 1.65million shares had the right to take the 8.35million new shares and based on that the SPA at page 76 of the Plaintiffs' bundle of documents was executed.

- 3.72 The document at page 205 of the Fifth to Seventh Defendants' bundle of documents introduces the Plaintiffs to the Second to Fourth Defendants under the heading "**REFERENCES**"
- 3.73 On 22nd February 2018, the Second Plaintiff on behalf of the First Plaintiff paid a commitment fee of K300,000 to the Fifth to Seventh Defendants and that is how the Fifth to Seventh Defendants were allowed to work with the Second to Fourth Defendants.
- 3.74 The SPA was the document covering the sale by (and money for) the Fifth to Seventh Defendants so when they signed it, they proceeded to sign SSA and SHA on the same day.
- 3.75 The Fifth Defendant never called the Second Plaintiff before signing the SPA, SSA and SHA as the Second Plaintiff had allowed them to deal with the Second to Fourth Defendants and when the Second to Fourth Defendants came with valuation reports it included one of the First Plaintiff's properties and a certificate of title for it making it look in order for Fifth to Seventh Defendants to deal with the Second to Fourth Defendants directly.
- 3.76 The Fifth Defendant does not know who was responsible for PACRA filings for the transaction as after the final payment from the Plaintiffs on 19th April 2018, him and the other previous shareholders never went to Ultimate Insurance premises again.

3.77 For that reason, he could not really speak to the SPA at page 76 of the Plaintiffs' bundle of documents as it came after that on 5th June 2018.

3.78 **DW2 was Tobias Haanyimbo Milambo** the 48-year-old Managing Director of Ultimate Insurance and also the Second Defendant in the matter.

3.79 **His testimony in chief** was embodied in his witness statement of 28th October 2019 together with the unitary bundle of documents for the First to Fourth Defendants filed on 9th October 2019.

3.80 **When cross examined**, he proved to be a very uncredible and unreliable witness whose antics ranged from evasiveness to answer simple questions, prolonged pauses before answering questions, looking down and away from the Court before answering continuous questions and in some instances posing a counter question or assertion to Counsel.

3.81 Be that as it may be, the first round of cross examination of Mr Milambo was by Mr. Madaika (Counsel for the Plaintiffs) during which Mr Milambo testified that:

- i) in the initial interaction with the Fifth to Seventh Defendants, the Second to Fourth Defendants were to buy Ultimate Insurance in two components;
 - a) payment of K1.3million for the issued shares; and

- b) investment of K8.35million for the unsubscribed shares.
- ii) the First Defendant's shareholding in Ultimate Insurance is anchored on the SSA at page 103 of the First to Fourth Defendants' bundle of documents, SPA at page 112 and the SHA;
- iii) the consideration for subscription of shares under the SSA was K8.35million for 8.35 shares to be paid in cash or in kind but the First Defendant never paid it as there was an adjustment in the number of shares;
- iv) the First Defendant has however paid in kind for the shares it holds in Ultimate Insurance by procuring the following transfers of property to Ultimate Insurance-
 - a) a Kansenshi, Ndola property by Luke Lubemba;
 - b) a Mikango, Lusaka property by Pefarm; and
 - c) a Demu, Kanyanya Kafue by the Second Defendant;
- v) only the Demu Kanyanya, Kafue property had a valuation report but the Second Defendant did not have it before court, and he could neither confirm nor deny that the document at page 238-255 of the Fifth to Seventh Defendants' bundle of documents was the one;

- vi) the Court should accept that the First Defendant provided the consideration in kind by looking at:
 - a) documents in First to Fourth Defendants' bundle at pages 60, 62,63,64,66,68 and 69;
 - b) deeds of transfer in Fifth to Seventh Defendants' bundle at pages 211, 219, 221 which specify values of properties;
 - c) the title deed for the 3 properties; and
 - d) the return of allotment at pages 32 – 33 of the First to Fourth Defendants' bundle and entry of the First Defendant's name in the register as a shareholder which proves that the First Defendant met the terms for subscription.

- vii) the SPA required the First Defendant to pay K1.3million for shares and clause 5.2 (at page 119 of the First to Fourth Defendants' bundle of documents) in particular required a payment of K900,000 at completion and K400,000 too, both of which the First Defendant failed to meet;

- viii) the First Defendant did not meet all the conditions precedent under clause 3 of the SPA and the purchase of shares under the SPA never occurred;

- ix) when signing the SPA and SHA on 23rd February 2018 he had never met the Second Plaintiff, was not aware of transaction between Second Plaintiff and Fifth to Seventh Defendants where the former was purchasing shares for the First Plaintiff nor was he aware that by the 22nd February 2018 the Second Plaintiff had made a down payment of K300,000;
- x) he denied that the Second to Fourth Defendants introduced the Second Plaintiff to the Fifth to Seventh Defendants;
- xi) he agreed that the document at page 31 of the First to Fourth Defendants' bundle of documents was on the First Defendant's letterhead dated 27th February 2018 nominating the First Plaintiff as a shareholder but he did not know why;
- xii) he agreed that the original shareholders (Fifth to Seventh Defendants) had a right to decide how and to whom they would sell Ultimate Insurance;
- xiii) he was not part of the meeting of the 21st February 2018 between the Fifth to Seventh Defendants and Second Plaintiff to discuss what was being sold in Ultimate Insurance;
- xiv) he however, insisted that the First Defendant is entitled to its shares even though:
 - a) the Fifth to Seventh Defendants say they never sold shares to the First Defendant or allowed it to subscribe;
 - and

- b) the Fifth to Seventh Defendants say that they sold the entire (allotted and unallotted) shares to Second Plaintiff buying on behalf of the First Plaintiff.
- xv) he is the Managing Director of Ultimate Insurance, the Third Defendant is Manager Technical and the Fourth Defendant is Manager Corporate Services;
- xvi) from August 2018, the Second to Fourth Defendants have been in full control of Ultimate Insurance; its operations, assets and accounts;
- xvii) the Plaintiffs' have had no participation in the affairs of Ultimate Insurance since 2019; and
- xviii) he was not aware that Zambia Police had declared the valuation reports of property transferred to Ultimate Insurance for subscription purposes as fraudulent.
- 3.82 Under continued cross examination by Mr. Madaika, Mr Milambo testified that based on paragraph 13 and 16 (c) of the First to Fourth Defendants' defence, he was trying to convince the Court that the shares held by the First Defendant in Ultimate Insurance are not connected to Fifth to Seventh Defendants but instead resulted from the SSA.

- 3.83 He however, conceded that it was not possible for anyone to get shares whether through subscription or otherwise without the authority of Fifth to Seventh Defendants.
- 3.84 He also conceded that the SSA was only possible because of a resolution of the Fifth to Seventh Defendants passed to increase the share capital of Ultimate Insurance.
- 3.85 He could not confirm on behalf of the Third to Fourth Defendants that they never met the Second Plaintiff prior to the signing of the SSA, SHA and SPA.
- 3.86 He could not dispute the Fifth Defendant's evidence that him (Fifth Defendant) and Third Defendant met Second Plaintiff on 21st February 2018.
- 3.87 He admitted that when the Second Plaintiff made payments to the Fifth to Seventh Defendants, the First to Fourth Defendants were not part of Ultimate Insurance.
- 3.88 He also admitted that only the Fifth to Seventh Defendants who created and signed the acknowledgments of the payments from the Second Plaintiff could tell the Court what the documents related to.
- 3.89 He testified that while paragraph 16 (i) of the defence of First to Fourth Defendants avers that the First Defendant got 83.5% shares, the First Defendant only holds 6.5million shares as the First Defendant nominated the First Plaintiff to get 1.85million shares. The nomination was for a payment in kind under a

nominee agreement referred to in paragraph 16(h) of the same pleading which agreement was however not before Court and there was also no record of payment in kind allegedly from the First Plaintiff.

3.90 He stated that paragraph 32 of the First to Fourth Defendants' defence speaks of a payment of K400,000 from Ultimate Insurance to First Plaintiff but he could not explain it and did not know who authorised it.

3.91 He however, stated that it would be wrong for the First Defendant to use Ultimate Insurance to pay the Plaintiffs for the alleged dues owing from the First to Fourth Defendants to Plaintiffs.

3.92 He denied that the First to Fourth Defendants used money paid to Fifth to Seventh Defendants to enter Ultimate Insurance and illegally obtain shares.

3.93 According to him, the First Defendant provided valuable consideration for the shares it holds but there are no valuation reports before Court to prove that the value was met.

3.94 **Mr Milambo was also cross examined** by Mr. Sikota S.C. during which he testified that he was aware that the valuation reports for the 3 properties provided by the First Defendant as payment in kind were in contention before this Court, before a Criminal Court and the PIA. He however did not provide them to this Court as there were with Ultimate Insurance.

3.95 According to him the proof that the First Defendant met the consideration threshold is in the deeds of transfer for the properties at page 211 and page 221 of the First to Fourth Defendants' bundle of documents and also in the documents at page 235.

3.96 He however conceded that the valuations by ZRA and the PTT assessed and paid was for much lower values than represented by the First to Fourth Defendants and that he had no reason to dispute the ZRA valuations.

3.97 Ultimate Insurance has two panels of bank signatories and changes were made at some point.

3.98 One Panel had and was controlled by the Third and Fourth Defendants and John Mponda.

3.99 On 31st July 2019 there were two payments on Ultimate Insurance account and he signed to authorise the same. The payments were for the sums of USD15,820 and USD26,160.38 for legal services.

3.100 The K400,000 payment to the First Plaintiff from Ultimate Insurance was made in two or three tranches. It was for her personal expenses.

3.101 Ultimate Insurance made some additional payments in favour of the First Plaintiff between June and July 2018 for PTT for the transfer of the 1.65million shares by the Fifth to Seventh Defendants to the First Plaintiff. It was because the Plaintiffs'

had no money to pay it and the First to Fourth Defendants wanted to conclude the transaction.

3.102 He stated that despite PW3 disowning the Bitrust Real Estate valuation reports, the First to Fourth Defendants still wished to rely on them.

3.103 Ultimate Insurance settled a claim made by Road Development Agency (RDA) on a performance guarantee but the Plaintiffs were not informed of it and other large claims.

3.104 The Plaintiffs were not informed as they have declined invitations to attend board meetings and have taken out adverse actions against the First to Fourth Defendants.

3.105 Ultimate Insurance has not had an Annual General Meeting (AGM) in over 2 years and he could not confirm whether the First Plaintiff was given notice of the last AGM.

3.106 He was aware that the First Plaintiff disputed the authenticity of the signatures attributed to her in a number of documents such as at pages 80 and 83 of the First to Fourth Defendant's bundle of documents.

3.107 He signed the documents for First Defendant but did not sign at the same time as her, he did not see her sign any of the disputed documents and could not state whether she did actually sign any of them. He agreed that the First Plaintiff's

assertion that she did not sign the disputed documents remains unchallenged.

- 3.108 **When cross examined** by Mr. Chikuta, Mr Milambo testified that he signed each of the letters at pages 72 - 86 of the First to Fourth Defendants' bundle of documents and that all the countersigned by the addressees except the one addressed to the First Plaintiff.
- 3.109 The letters are addressed to new board appointees who include Wilson Musonda, personally known to Mr Milambo, Innocent Sinzala, the cousin of Mr Milambo and Luke Lubemba, the father of the Third Defendant and eventual board Chair of Ultimate Insurance.
- 3.110 He agreed that the document at pages 285 to 286 of the Fifth to Seventh Defendants' bundle of documents was attempting to constitute a new board by unanimous shareholders resolution but it was not signed by the First Plaintiff.
- 3.111 He agreed that the SPA, SHA and SSA were sent by the Fourth Defendant to the Seventh Defendant by email on 17th February 2018 by which date the First Defendant had not been incorporated. The email correspondence is at page 156 of the Fifth to Seventh Defendants' bundle and all the said documents were signed on 23rd February 2018.

3.112 The Second to Fourth Defendants failed to meet the payment obligations under the SPA of K900,000 and K400,000.

3.113 There is an extract of minutes of a board meeting on 26th February 2018 at page 30 of the First to Fourth Defendants' bundle and it makes reference to the SPA.

3.114 **Under continued cross examination** by Mr. Chikuta, Mr. Milambo testified that:

- i) the resolution at page 30 of the First to Fourth Defendants' bundle was signed by the Fifth to Seventh Defendants and did not confer any benefits on the First Defendant;
- ii) he approached the Fifth to Seventh Defendants to open an escrow account for deposit of funds for the transaction which was done but no funds were ever paid into it;
- iii) he thinks that the First Defendant was incorporated on 19th February 2018;
- iv) the stakeholders of the First Defendant from inception to date are the Second to Fourth Defendants as shareholders; Second to Fourth Defendants as directors and the Second Defendant as Chief Executive Officer;
- v) at the instance of him, the Third Defendant and Second Defendant, the following properties were transferred to the First Defendant:

- a) Mikango Property by Pefarm valued at about K2.45million;
- b) Ndola property by Luke Lubemba valued at about K2.4 million; and
- c) Demu Chanyanya Kafue by Mr. Milambo valued at about 1.75million;
- vi) he facilitated the valuation of the Kafue property while Ultimate Insurance facilitated the valuation of the Mikango and Ndola properties through Peter Kanganja Phiri and Maybin Silavwe but he had no documents in the bundles to prove it;
- vii) the resultant valuation reports were taken to PIA one of which is at page 320 of Fifth to Seventh Defendants' bundle of documents and another at page 348, both dated 6th January 2018;
- viii) the properties were accepted by the Fifth to Seventh Defendants for use in relation to Ultimate Insurance after the SPA, SSA and SHA were signed on 23rd February 2018;
- ix) the deed of transfer for the Mikango property is at page 359 of the Fifth to Seventh Defendants' bundle and it was signed for by the Fourth Defendant on behalf of Pefarm and signed for by Mr Milambo on behalf of the First Defendant;

Pefarm was required to pay PTT for the transfer to Ultimate Insurance as a shareholder;

- x) Luke Lubemba had to pay PTT for the Ndola property to be transferred to the First Defendant as per ZRA assessed value of K420,000 and PTT of K21,000 appearing at page 280-282 of the Fifth to Seventh Defendants' bundle and receipt at page 284 with Luke Lubemba as payer;
- xi) the PTT for the transfer of the Mikango property by Pefarm was calculated at K3,750 based on ZRA; assessed value of K75,000 appearing from page 226 -228 of the Fifth to Seventh Defendants' bundle of documents and proof of payment on 21st June 2018 at page 357 of the Fifth to Seventh Defendants' bundle of documents with Pefarm showing as payer;
- xii) the Kafue property of Mr. Milambo has an initial valuation report by Chikwendo and Associates which stated its size as 14 hectares but the report was later reissued showing its size as 7 hectares, the later report is at page 238 – 255 of the Fifth to Seventh Defendants' bundle of documents and the value of the land alone was not adjusted from the initial K1.1million but Mr. Milambo was not aware why;
- xiii) the issue was queried by the PIA and he was aware of the response given by Chikwendo and Associates to the PIA;

- xiv) he did not cause the Fifth to Seventh Defendants to execute the addendum at page 235 of Fifth to Seventh Defendants bundle which has First Defendant and Ultimate Insurance as parties;
- xv) the First to Fourth Defendants did not have prior documents with the Plaintiffs which authorised the First Defendant to enter into the addendum with the Fifth to Seventh Defendants;
- xvi) the Second to Fourth Defendants were not agents of the Plaintiffs and the position of the Plaintiffs and Fifth to Seventh Defendants was wrong that the Second to Fourth Defendants were agents of the Plaintiffs and that instead they had a separate agreement with the Plaintiffs to explain the First Defendant's holding of shares;
- xvii) the board of Ultimate Insurance has 5 directors namely himself, Innocent Sinzala, Wilson Musonda, Luke Lubemba and the First Plaintiff while the Third and Fourth Defendants were not directors but instead General Managers for Corporate and Technical Services respectively;
- xviii) Mr. Wilson Musonda and Luke Lubemba were known by Mr. Milambo as the fathers of Fourth and Third Defendants but were not appointed to the board of Ultimate Insurance

- as director and Chairman to take care of his and Fourth and Third Defendants' interests;
- xix) Innocent Sinzala was his cousin but was not appointed to the board of Ultimate Insurance to take care of his interests;
- xx) the First Plaintiff was not put on the board by him;
- xxi) he was aware that the first Plaintiff disputes having signed the document as page 75 of the First to Fourth Defendants bundle of documents purporting to appoint her to the board and he conceded that she did not sign the document of acknowledgment receipt;
- xxii) there was a similar document at page 84 to 86 of the First to Fourth Defendants' bundle of documents which was addressed to him and he signed and dated it to acknowledge receipt;
- xxiii) the Chief Executive Officer of Ultimate Insurance at the time was Peter Kanganja Phiri but there is no document before Court to show that he was involved in constituting the new board;
- xxiv) the appointment letters were signed on behalf of Ultimate Insurance by its two shareholders namely the First Defendant signing through him (Second Defendant) and the First Plaintiff signing for herself;

xxv) he never saw the First Plaintiff actually sign any of the appointment letters and the First to Fourth Defendants had no evidence before Court to prove that the signature at page 77 of their bundle of documents was appended by the First Plaintiff;

xxvi) he was an experienced insurance practitioner of 21years standing and portfolios included:

- a) assistant underwriter at Madison General Insurance;
- b) General Manager Corporate services at Goldman Insurance;
- c) Chief Executive Officer at Diamond Insurance; and
- d) Managing Director at Meanwood General Insurance.

xxvii) PIA allowed owners of insurance companies to be involved in day-to-day affairs if qualified for it;

xxviii) he was appointed as Chief Executive Officer of Ultimate Insurance by the board and the board papers would show it but they are not before Court;

xxix) the Fifth to Seventh Defendants were not involved in the appointment of Mr. Milambo as Chief Executive Officer of Ultimate Insurance.

3.115 **When re-examined** by Mr Nchito S.C., Mr. Milambo clarified that one of the additional documents which showed that the First Defendant had paid for the shares was the addendum at pages 235-237 of the Fifth to Seventh Defendants' bundle of documents.

3.116 The addendum in recital B recognised that the assets had already been transferred to Ultimate Insurance and the addendum also revoked clause 4 of the SSA.

3.117 According to Mr. Milambo, the First Defendant's shares were adjusted downwards because the First Plaintiff requested for an increase in her number of shares. The First Defendant's subscription therefore reduced its subscription from the intended 8.35 million to 6.5 million shares and the difference of 1.85million was given to the First Plaintiff to subscribe for and pay for in kind through property.

3.118 According to him, this part of the transaction is confirmed by the nomination agreement at page 31 of the First to Fourth Defendants' bundle.

3.119 The resolution at page 30 of the First to Fourth Defendants' bundle of documents did not confer a benefit on the First Defendant but instead on the First Plaintiff. The First Defendant has rights to subscribe for the shares.

4. ANALYSIS AND FINDINGS

4.1 Following the conclusion of trial on 9th November 2020, the Plaintiffs tendered their final submissions on 27th November 2020 to which the First to Fourth Defendants and Fifth to Sixth Defendants reacted with their respective opposing submissions on

22nd December 2020. The set of submissions was completed by a reply from the Plaintiff on 4th January 2021.

4.2 I propose to dispense with a copious reproduction of the submissions for reasons which shall become apparent in my analysis below.

4.3 After a close study and careful evaluation of the pleadings, body of evidence and submissions (whose depth and industry reflected the proficiency of the members of the Bar involved), my decision is as set out hereunder.

The contention of whether the Second Plaintiff's payment to the Fifth to Seventh Defendants was for acquisition of the entire UIC

4.4 In the case before Court, there is no record of a written agreement signed between the Second Plaintiff and Fifth to Seventh Defendants to explain what the payment of K1,500,000 from the former to the latter grouping was for.

4.5 In determining the issue, it is important to begin with a close examination of the wording of the written documents generated by the Fifth to Seventh Defendants to acknowledge receipt of the payments from the Plaintiffs' camp. They appear at pages 154, 234 and 258 of the Fifth to Seventh Defendants' bundle.

4.6 The first acknowledgment was dated 22nd February 2018 and worded:

“ACKNOWLEDGMENT RECEIPT

ACKNOWLEDGMENT OF FUNDS ZMK300,000 CASH, BEING PART-PAYMENT TOWARDS PURCHASE OF SHARES IN ULTIMATE INSURANCE COMPANY LIMITED DATE 22ND FEBRUARY 2018

This is to acknowledge receipt of ZMK300,000 from Felistus Kabwe Chibamba of NRC no. 643840/11/1 being deposit and part-payment to Klein Syampongo, Justin Phiri and Maybin Silawe towards purchase of Ultimate Insurance Company Limited.

The balance will be paid in 5 days from the date of this acknowledgment receipt.” (Emphasis added)

4.7 The second acknowledgment was dated 9th March 2018 and worded:

“ACKNOWLEDGMENT RECEIPT

ACKNOWLEDGMENT OF FUNDS ZMK200,000 CASH, BEING PART-PAYMENT TOWARDS PURCHASE OF SHARES IN ULTIMATE INSURANCE COMPANY LIMITED DATE 9TH MARCH 2018

This is to acknowledge receipt of ZMK200,000 from Felistus Kabwe Chibamba of NRC no. 643840/11/1 being part-payment to Klein Syampongo, Justin Phiri and Maybin Silawe towards purchase of Ultimate Insurance Company Limited.

The balance of K1,000,000 to be paid in 7 days upon take-over and commencement of operations under the new management of Ultimate Insurance Company Limited.” (Emphasis added)

4.8 The third and final acknowledgment was dated 19th April 2018 and worded:

"ACKNOWLEDGMENT RECEIPT

ACKNOWLEDGMENT OF FUNDS ZMK1,000,000 CASH, BEING FULL PAYMENT FOR SHARE PURCHASE IN ULTIMATE INSURANCE COMPANY LIMITED DATED 19TH APRIL 2018

This is to acknowledge receipt of ZMK1,000,000 from Felistas Kabwe Chibamba of NRC no. 643840/11/1 being payment to Klein Syampongo, Justin Phiri and Maybin Silavwe as full and final payment for purchase of 1,650,000 shares in ULTIMATE INSURANCE COMPANY LIMITED.

DECLARATION

We declare that we have no further claim from Felistas Chibamba and hence-with relinquish our shareholdings in Ultimate Insurance Company Limited and vice versa." (Emphasis added)

4.9 Quite clearly, the natural and ordinary meaning of the words in first two acknowledgments suggests that the First Plaintiff (through funding from the Second Plaintiff) was purchasing the entire UIC.

4.10 However, the third and final acknowledgment for its part can be construed to mean that the payment was for only the 1,650,000 shares in UIC held by the Fifth to Seventh Defendants and not the entire UIC.

4.11 I now turn to the relevant portions of the witness testimonies for clarity:

- (i) the Second Plaintiff stated as follows in paragraphs 4 and 24 of his witness statement -

"4. The said Defendants intimated to me that the Company had been advertised for sale at the price of ZMK1,500,000.00 (Zambian Kwacha One Million and Five Hundred Thousand only). **I**

did not personally see the advertisement but later interactions with the 5th to 7th Defendants confirmed that there was indeed an intent to sell the Company."

"24. Acting in reliance on the said undertakings and by the said representations and not otherwise, my wife and I paid the full purchase price of ZMK1,500,000.00 for the purchase of the Company from the previous shareholders. The transaction was spearheaded by the 2nd, 3rd and 4th Defendants whom we had trusted to take a lead role because of their stated experience in this area of business. I will at trial rely on the acknowledgment of the amount paid for the shares which is on page 71 of the Plaintiffs Bundle of documents." (Emphasis added)

- (ii) the Second Defendant as sole witness for the First to Fourth Defendants conceded (when cross examined by Mr Madaika) that -
- a) he could not dispute the Fifth Defendant's evidence that the Fifth Defendant and Third Defendant met Second Plaintiff on 21st February 2018;
 - b) when the Second Plaintiff made payments to the Fifth to Seventh Defendants, the First to Fourth Defendants were not part of UIC; and
 - c) only the Fifth to Seventh Defendants who created and signed the acknowledgments of the payments from the Second Plaintiff could tell the Court what the documents related to;

(iii) the Fifth Defendant as sole witness for the Fifth to Seventh Defendants stated as follows in paragraphs 19, 26, 27, 28 and 29 of his witness statement (and the said allegations were not shaken by cross examination)-

"19 As none of the said 8,350,000 shares were allotted to anyone of us or at the most applied by the company as working capital before we sold the company, we as owners and directors of the company decided that we should continue to sell the company as a whole at the value of the 1,650,000 shares which were as of date of sale the only working share capital that had been applied in the business to create its then value. According to us, whoever bought the 1,650,000 shares from us did in fact buy the whole company which we were selling as stated earlier." (Emphasis added)

and

"26 Unfortunately, our offer to the 1st to 4th Defendant herein did not meet acceptance from the other end due to failure to raise and pay the purchase price demanded of them by us.

27. The 4th Defendant later came to indicate that he had found a new buyer who turned out to be the 2nd Plaintiff and the same (2nd Plaintiff) was a person we knew before from past business transactions unrelated to the sale of the company herein.

28. We met the said new buyer aforesaid (2nd

Plaintiff) in the presence of the 3rd Defendant
sometime around 21st February, 2018 at East
Park Mall sometime after 19:00 hours.

29. At another meeting held the following day
between us the 5th to 7th Defendants and the
2nd Plaintiff offered to purchase the company
after we re-negotiated the purchase price with
him to K1,500,000.00 and an amount of
K300,000.00 was deposited the following day
on 22nd February, 2018. We accepted this
little amount more so because we had
confidence that the buyer would finish up
payment towards the purchase price within
reasonable time having had prior business
dealings with him before. He paid towards the
second instalment on 19th March 2018 and the final
instalment was made on 19th April 2018. See
pages 154, 234 and 258 of the 5th, 6th and 7th
Defendants' Bundle of Documents."
(Emphasis added)

4.12 Given the said mosaic of evidence it is manifestly clear that the payment of K1,500,000 made by the Second Plaintiff to the Fifth to Seventh Defendants was for the purchase of the entire issued share capital of UIC, based on the verbal agreement of February 2018.

4.13 It is also evident from the said mosaic that at the time of the agreement between the Second Plaintiff and the said Defendants:

- (i) the shareholding of UIC comprised 1,650,000 issued shares and 8,350,000 unissued shares; and
- (ii) the First Defendant had not acquired any interest in UIC.

4.14 I therefore find as a fact that the payment of K1,500,000 made by the Second Plaintiff to the Fifth to Seventh Defendants was for acquisition of the entire issued shareholding of UIC.

4.15 In **Lake Kariba Boating Services Limited v Kariba North Bank Co. Limited**² the Supreme Court guided that acquisition of the entire issued share capital of a company was effectively an acquisition of a company and its assets with conferment of a beneficial interest in the acquiring party.

4.16 I thus further find that by acquiring the entire issued shareholding of UIC, the First Plaintiff (financed by the Second Plaintiff) by implication acquired beneficial ownership of the entire undertaking and assets of UIC.

The contention of how the First Defendant acquired shareholding in UIC and whether lawfully done

4.17 In **Galaunia Farms Limited v National Milling Company Limited**³, the Supreme Court reaffirmed that the burden of proof of an allegation before Court lies with the allegor.

4.18 The evidential record before Court shows that-

- (i) there are letters from the First Plaintiff to the First Defendant / Second Defendant where she recognises the status of the

² (1982) ZR35 at p.38

³ (2004) ZR1 at pages 9-10

First Defendant as her co-shareholder in UIC but seeks to formalise and / or document their relationship through a draft SHA attached by her (appearing at p. 101,102, 103 and 107 of the Plaintiffs' bundle);

- (ii) the aforesaid draft SHA (at page 192 of the Plaintiffs' bundle)-
 - a) in clause 3.1 recognises the co-shareholding by the First Plaintiff and First Defendant in the ratio 35% : 65%;
 - b) in clauses 9.3 and 9.4 suggests a dividend sharing formula for First Plaintiff and First Defendant to take into account *inter alia* the First Plaintiff's payment for the purchase of UIC from the previous owners;
- (iii) the First Plaintiff admitted (during cross examination by State Counsel Nchito) that she executed the SPA (appearing at page 77 of the Plaintiffs' bundle) to signify acceptance of its terms which included recognition of the First Defendant and herself as co-shareholders of UIC;
- (iv) there is a series of correspondence by the First Plaintiff addressed to *inter alia* various authorities (including the Inspector General of Police and PIA Registrar) where she recognises the status of the First Defendant as her co-shareholder in UIC but complains only of the constituting of a new board of directors without her involvement and of alleged mismanagement by the Second to Fourth Defendants (appearing at page 104, 106, 122, 165 and 167 of Plaintiffs' bundle); and
- (v) the only record of a pre-litigation complaint by the First Plaintiff over shareholding was in a letter to the PIA dated

13th May 2019 (at page 167 of the Plaintiffs' bundle) and was not that there was collusion with or misleading of the Fifth to Seventh Defendants but that the value of the property put up as collateral for PIA requirements was inflated, I reproduce the relevant parts of same for reference-

" Felicitas Chibamba Katotobwe
Plot # 3876, Manda Hill Road
Olympia,
Cell No. 0977852626
LUSAKA

Monday, 13th May, 2019

The Registrar,
Pension and Insurance Authority
Plot No. 5 Lubwa Road,
Rhodespark

LUSAKA

RE: Ultimate Insurance Company Limited

Reference is made to the above subject matter.

Am compelled to write to yourself – our regulators – as a result of further information obtained that exceeds the scope of the letters that I wrote to yourselves, dated Sunday 5th May 2019.

It has come to my attention that the property values used by Mr. Nachi Musonda and Mr. Richard Lubemba who are two (2) of the three (3) principal shareholders of Marshlands Consortium Limited – The vehicle used for the acquisition of 65% of the equity of Ultimate insurance Ltd – significantly fall short of the values that the two (2) above mentioned individuals declared to the Pensions and Insurance Authority. I have also found out that the valuation of the property used by the third shareholder of Marshlands Consortium Ltd, Tobias H. Milambo is also overstated. This came to light by review of the Property Transfer Taxes assessments of the two (2) i.e. Mr. Nachi Musonda and Mr. Richard Lubemba on their declared properties. ---" (Emphasis added)

4.19 I am therefore loathe to accept the Plaintiffs' account of events suggesting that the Second to Fourth Defendants abused their position as agents of the Plaintiffs to collude with or mislead the

Fifth to Seventh Defendants into facilitating the First Defendant's acquisition of shares in UIC.

4.20 The evidential trail also depicts that-

- (i) the Second Defendant conceded (when cross examined by Mr Madaika) *inter alia* :
 - a) that it was not possible for anyone to have obtained shares in UIC whether through subscription or otherwise without the authorisation of the Fifth to Seventh Defendants; and
 - b) that he could not dispute that the Third and Fourth Defendants met the Second Plaintiff nor the evidence of the Fifth Defendant that on 21st February 2018 there was a meeting between the Third Defendant, Fifth Defendant and Second Plaintiff;
- (ii) the trigger resolution was prepared by the Second to Fourth Defendants for signature by the Fifth to Seventh Defendants to authorise contemporaneous issuance to both the First Plaintiff and First Defendant (appearing at page 1-2 of the First to Fourth Defendant's bundle);
- (iii) share acquisition documents prepared by the Second to Fourth Defendants speak to the First Plaintiff and First Defendant both taking up shares (appearing at page 31 of the First to Fourth Defendant's bundle);
- (iv) the issuance and allotment of shares to the First Plaintiff and First Defendant occurred concurrently as reflected on the same return of allotment (appearing at page 150-151 of the First to Fourth Defendant's bundle);
- (v) the update letter by the Second Defendant to the PIA spoke of the acquisition of UIC by both the First Defendant and First

- Plaintiff (appearing at page 155 of First to Fourth Defendants' bundle);
- (vi) there was no record (prior to commencement) of the First to Fourth Defendants disputing-
- a) the account of events in the First Plaintiff's letter of 5th May 2019 (at page 107 of the Plaintiffs' bundle); and / or
 - b) that the terms embodied in the referenced draft SHA were as agreed with the Plaintiffs;

4.21 I reproduce the content of the said letter for reference-

*"Felicitas Kabwe Chibamba
Plot # 3876, Manda Hill Road
Olympia
Cell No: 0977852626
LUSAKA*

Sunday, 5th May, 2019

*The Chairman,
Marshlands Consortium Ltd
Plot # 30 Pundwe Close, Off Nyatwa Road
Woodlands
LUSAKA*

Attn: Tobias H. Milambo

Dear Shareholder,

RE: Proposed Ultimate Insurance Ltd- Conclusion of Shareholding Agreement

I am in receipt of your response to my letter dated 3rd May, 2019, and your implied response to my earlier letters of Thursday, 25th April, 2019 and Thursday, 18th April, 2019 which I could deduce from your letter.

*I note that your letter is marked 'without prejudice' and is deliberately undated. I will assume this letter was written on Friday, 3rd May, 2019 in the afternoon, the day I received it. **I wish to state that, in the processing leading to the acquisition of Ultimate Insurance Ltd and in order to facilitate the urgent transaction and the smooth transition, your attached shareholding agreement was drafted, clearly for the transition period prior to the culmination of the actual and final Shareholding Agreement. It was agreed that the new Shareholding Agreement between the parties i.e. Marshlands Consortium and Felicitas K.Chibamba would incontrovertibly take effect; the representations contained in the Shareholders Agreement***

that we sent to you on your mail of Thursday, 25th April, 2019 to reflect the terms and conditions agreed to by both parties.

I released the full payment for the purchase of Ultimate Insurance Ltd i.e. One Million Five Hundred Thousand Kwacha (ZMW 1,500,000.00) whereas Marshlands Consortium Ltd, the other Shareholder, did not contribute any payment for the purchase. I have receipts for the Share purchase and the previous owners of Ultimate Insurance Ltd can bear testimony to this fact.

In view of the above and your clear reluctance to have the Shareholders meeting, I therefore declare a dispute.

Yours Sincerely,

Felicitas Kabwe Chibamba

Encl. REF: URGENT HAREHOLDER'S MEETING -ULTIMATE INSURANCE LTD, dated 18th April, 2019
REF: RE URGENT HAREHOLDER'S MEETING -ULTIMATE INSURANCE LTD, dated 18th April, 2019
RE: REF: URGENT HAREHOLDER'S MEETING -ULTIMATE INSURANCE LTD, dated 3rd May, 2019
Shareholding Agreement-(1)
Shareholding Agreement-(2)

cc: The Registrar- Pensions and Insurance Authority" (Emphasis added)

4.22 Further, the case for the First to Fourth Defendants on the issue is not helped by the testimony of the Second Defendant who (for reasons stated in the summary of evidence) was found to lack credibility.

4.23 In the premises, I am not persuaded by the First to Fourth Defendants' side of the story that the First Defendant's acquisition of shares was based on a transaction separate from that between the Plaintiffs and Fifth to Seventh Defendants.

4.24 Instead I find more credence in the Fifth to Seventh Defendants' position that they facilitated the acquisition on the strength of representations by the Second to Fourth Defendant whom they believed to be agents of the Plaintiffs.

4.25 I also accept that they had little reason to doubt the apparent collaboration (between Plaintiffs and Second to Fourth Defendants).

I say so because:

- (i) the clear testimony of the Fifth Defendant (when cross examined by Mr Nchito S.C.) was that the Second to Fourth Defendants are the ones who introduced the Plaintiffs to the Sixth to Seventh Defendants;
- (ii) the Fifth Defendant testified (in cross examination by Mr Nchito S.C. and in re-examination by Mr Chikuta) that the Second to Fourth Defendants even showed them important documents relating to the First Plaintiff such as the title and valuation report for her leasehold property being pledged to fulfil the requirements of the PIA relating to the shareholding of UIC; and
- (iii) the Second Plaintiff admitted (under cross examination by Mr Chikuta) that he asked the Sixth to Seventh Defendants to allow the Second to Fourth Defendants to operate at UIC premises for the transition.

4.26 I therefore find as a fact that the First Defendant acquired its shareholding on the backbone of the prior acquisition of UIC by the First Plaintiff (financed by the Second Plaintiff).

4.27 I further find that (in the totality of the circumstances) the First Defendant's acquisition of the said shares could only have been facilitated by the Fifth to Seventh Defendants with the approval (or involvement) of the Plaintiffs in furtherance of the collateral agreement between the Plaintiffs and the Second to Fourth Defendants.

4.28 I also find that the Plaintiffs only subsequently took issue with the First Defendant's shareholding after differences arose (between them and the Second to Fourth Defendants) over:

- (i) the reconstituting of the board of directors of UIC;
- (ii) the management of the affairs of UIC; and
- (iii) revelations of apparent discrepancies in the values of leasehold properties communicated to PIA as security for the value of shares held by the First Defendant.

4.29 Having determined that the First Defendant acquired its shareholding through a subscription I now proceed to determine whether it was lawfully done. I propose to begin at the very foundation at law (as it stood) of the process of subscription for shares.

4.30 Section 216(1) of the now repealed **Companies Act** ("**Chapter 388**") imposed limitations on the powers of directors of a company to inter alia dispose of the whole or substantially the whole of the

assets of a company, or to issue any new or unissued shares or to create share rights options.

4.31 The limitation required shareholder authorisation by way of an ordinary resolution. I reproduce the exact wording as follows-

“216. (1) 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.”

4.32 Under section 216(5) of **Chapter 388** the validity of a disposition of property to a person dealing in good faith would not be affected by non-compliance with section 216(1):

“(5) The validity of any transfer or disposition of property to a person dealing with the company in good faith shall not be affected by a failure to comply with this section.” (Emphasis added)

4.33 However, there was no such provision to salvage the validity of a share issuance or creation of share options in breach of section 216(1)(b) of **Chapter 388**.

- 4.34 In the case before Court the documentary record shows that by special resolution of 24th November 2017 (at page 8 of the Fifth to Seventh Defendants' bundle) the share capital of UIC was altered by way of creation of 8,350,000 new shares representing an increase from K1,650,000 to K10,000,000.
- 4.35 Resolution 2 therein stated that the new shares could be issued for a consideration of assets or cash equivalent of the nominal value of the shares.
- 4.36 Resolution 4 for its part created a lock out whereby the Fifth to Seventh Defendants reserved the new shares for themselves as existing shareholders.
- 4.37 The alteration of share capital, it appears, was notified to PACRA by notice appearing at page 10 of Fifth to Seventh Defendants' bundle of documents.
- 4.38 The transaction however shows a later change of heart by the Fifth to Seventh Defendants to authorize issuance of the new shares to outsiders namely the First Plaintiff and First Defendant.
- 4.39 This was by shareholder resolution passed on 26th February 2018 in which the company was authorized to issue 6,500,000 of the new shares to the First Defendant and 1,850,000 to them to the First Plaintiff (see page 1-2 of First to Fourth Defendants' bundle of documents).

4.40 The shareholder resolution was however categorical that the said shares were payable in case. I reproduce the exact wording for reference-

“2. That the additional 8,350,000 shares be issued to NEW shareholders as follows;

- Marshlands Consortium Limited - 6,500,000.00 fully paid additional ordinary shares of K1.00 payable in cash and
- Felicitas Chibamba Kabwe - 1,850,000.00 fully paid additional ordinary shares of K1.00 each payable in cash.” (Emphasis added)

4.41 The record further shows that a return of allotment was filed at PACRA stating that the new shares were allotted to the First Defendant and First Plaintiff on 26th February 2018 as per resolution.

4.42 However, the evidence before Court shows:

- i) the First Plaintiff, First Defendant and UIC acting through its directors entered into the SSA dated 23rd February 2018 which in clause 1.1 and 4 envisaged payment in cash or in kind for the new shares; (see page 158 - 167 of the Fifth to Seventh Defendants' bundle of documents).
- ii) associates of the First Defendant provided leasehold properties as consideration for the shares allotted;
- iii) the First Plaintiff provided leasehold property as consideration for the shares allotted; and

iv) the First Defendant and UIC acting through its directors executed an addendum dated 14th March 2018 to the SSA *inter alia* entrenching the payment in kind by way of assets as consideration of the new shares allotted to the First Defendant (see pages 235 – 237 of the Fifth to Seventh Defendants’ bundle).

4.43 There is however, no record of a shareholder resolution authorizing the directors of UIC to accept payment in kind as an alternative to cash for issuance of the new subscription shares to the First Defendant (and First Plaintiff).

4.44 It has already been alluded to that the resolution authorizing issuance of the new shares only allowed for cash consideration.

4.45 The question therefore that begs an answer is could the directors of UIC lawfully depart from the confines of the shareholders’ resolution of 26th February 2018 and instead issue the new shares for non-cash assets as the consideration?

4.46 In ***John Paul Mwila Kasengele & Ors v ZANACO***⁴ the Supreme Court gave guidance on which should prevail where there is a conflict between the position of shareholders and that of directors. Muzyamba JS recounted an earlier decision of the Supreme Court in ***BOZ v Chibote*** and stated:

“We also said at page 19:

⁴ (2000) ZR72

'Thus we affirm that those with a superior claim and title such as the beneficial owners of the company have overriding authority over the company's affairs. Even over the wishes of the board of directors.

The law is therefore settled and we need not say any more except perhaps to emphasize that in corporate law, directors and managers must dance to the shareholders' tune. They have no powers to fetter, change or modify a shareholders' decision. We do not therefore agree with Mr Mabutwe and Mr Siwila that the ZIMCO board of directors gave mere guidelines to the respondent and other subsidiaries. What they did infact amounted to modifying or qualifying the shareholders' decision, which they were not entitled to do and in so doing created an absurdity which we discussed above. The absurdity cannot be allowed to stand."⁵
(Emphasis added).

4.47 Quite clearly the directors of UIC had no choice over the matter but to accept only cash as consideration for the issuance of the new shares to the First Defendant (and First Plaintiff).

4.48 That they chose to do otherwise means that the subscription of shares by First Defendant (and First Plaintiff) by way of payment in kind had no authorisation pursuant to section 216(1) of **Chapter 388**.

4.49 In terms of validity, it has been alluded to that **Chapter 388** in section 216(5) only salvages the validity of a dealing in property

⁵ Ibid., at 76-77

contrary to section 216(1) but without any similar saving of an issuance of new shares or share options.

- 4.50 The situation is compounded by the fact also that the resolution of 26th February 2018 was (according to the unchallenged testimony of [DW1] under cross examination by Mr. Madaika) prepared by the Second to Fourth Defendants such that their associated entity (First Defendant) cannot be said to have been unaware of the requirement to pay cash as consideration for the subscription.
- 4.51 In other words by virtue of the resolution having been drafted by the First Defendant's stakeholders, the First Defendant knew or ought to have known about the limitation on the powers of the directors of UIC to issue the subscription shares for only cash consideration.
- 4.52 The net result is that the subscription of shares in the manner actually done by the First Defendant (and First Plaintiff) is null and void *ab initio* for lack of authorisation required under section 216(1) of **Chapter 388**, which was the governing law at the time.
- 4.53 With that finding it becomes otiose to interrogate the terms of the collateral joint venture agreement (between the Plaintiffs and Second to Fourth Defendants) which gave rise to the First Defendant's annulled shareholding and whether there was any failure of consideration or breach.

The contention of whether the board of UIC was properly constituted and if the Second to Fourth Defendants have been lawfully in charge of the affairs of UIC

- 4.54 The record shows that by letter dated 13th August 2018 a representation was made to the PIA of the reconstituting of the board of UIC to comprise First Plaintiff, Second Defendant and 3 others (see page 155 of the First to Fourth Defendants' bundle).
- 4.55 The record further shows that prior to the said representation, a joint declaration of consent to act as directors was executed and dated 20th July 2018 (see pages 152 – 153 of the First to Fourth Defendants' bundle).
- 4.56 Therefore, considering that the **Companies Act No. 10 of 2017** (the "**Companies Act, 2017**") came into force on 15th June 2018 by virtue of Statutory Instrument No. 47 of 2018, this issue falls to be determined within the auspices of the **Companies Act, 2017** not **Chapter 388**.
- 4.57 Section 85(1) of the **Companies Act, 2017** vests the power to appoint directors in the members by way of ordinary resolution. I reproduce the exact wording:

"85. (1) A company shall, unless the articles provide otherwise, appoint a person as a director by ordinary resolution passed at a general meeting of the company."
(Emphasis added)

4.58 Perusal of the documentary record before Court (and testimonies of the First Plaintiff, Second Defendant and Fifth Defendant) shows that the board of UIC was reconstituted by:

- (i) a unanimous written circular shareholders' resolution signed by the First Defendant (acting through Second Defendant) and the Fifth to Sixth Defendants (see page 285 to 286 of Fifth to Seventh Defendants' bundle); and / or
- (ii) a series of appointment letters allegedly signed by a representative of the First Defendant and by the First Plaintiff in their capacities as shareholders of UIC (see pages 72-76 of the First to Fourth Defendants' bundle).

4.59 I will begin by analysing the written circular resolution which is dated post commencement of the **Companies Act, 2017**, the relevant section of which is 77, reproduced as follows -

"77. (1) The members of a private company may, in accordance with this section, pass a resolution in writing, without holding a meeting, and such a resolution shall be valid and have the same effect as if it had been passed at a meeting of the appropriate kind, duly convened, held and conducted.

(2) The resolution, referred to in subsection (1), shall be—

(a) signed by each member who is entitled to vote on the resolution, if it was moved at a meeting of the company or by the member's authorised representative; and

(b) passed when signed by the last member, or member's representative, referred to in paragraph (a), whether or not the member was a member when the other members signed.

(3) If the resolution proposed is described as a special resolution, it shall be treated as a special resolution for the purposes of this Act.

(4) If the resolution states a date as being the date of the signature by a member, the statement shall be prima facie evidence that it was signed by the member on that date.

(5) **This section shall not apply to a resolution proposed for the removal of an auditor or a director.**"

(Emphasis added)

4.60 Whereas section 77(2)(a) of the **Companies Act, 2017** prescribes that the mechanism under s.77(1) is a preserve of the members of a company, the resolution in issue was signed by the Fifth to Seventh Defendants purportedly as shareholders of UIC and yet by the memorandum dated 19th April 2018 they expressly relinquished their shares following receipt of the final payment from the Plaintiffs (see page 258 of Fifth to Seventh Defendants' bundle).

4.61 Further, whereas section 77(5) of the **Companies Act, 2017** precludes a resolution for removal of directors from being passed in a written circular form *in lieu* of a general meeting, the very first page of the resolution in issue begins with the purported removal of

directors followed by appointment of replacements at page 2 (see page 285 to 286 of Fifth to Seventh Defendants' bundle).

- 4.62 It follows therefore that the written circular resolution at page 285-286 of the Fifth to Seventh Defendants bundle is not valid and the business purported to have been transacted thereunder is void *ab initio*.
- 4.63 Turning to the appointment letters, they do not for their part purport to be extracts of minutes of an ordinary resolution passed at a general meeting of the members of UIC (acting pursuant to section 85(1) of the **Companies Act, 2017**) to effect the appointments.
- 4.64 In addition, following my earlier finding that the subscription for shares was *void ab initio*, there was no legal basis for the First Defendant to participate in the appointment process of directors.
- 4.65 Lastly, the First Plaintiff did without any real challenge or contradiction testify that she did not sign the appointment letters (at pages 72-86 of First to Fourth Defendants' bundle) as she was away recovering from surgery at the material time.
- 4.66 Consequently, by whatever measure, there is no basis upon which this Court can conclude that the board of UIC was lawfully reconstituted following the exit of the Fifth to Seventh Defendants from the affairs of UIC.

- 4.67 The end result is that the new board of UIC as per representation to the PIA in the letter of 13th August 2018 (at page 155 of First to Fourth Defendants' bundle) was not properly constituted as required by section 85(1) of the **Companies Act, 2017**.
- 4.68 All of the appointments of the named individuals are accordingly a nullity and *void ab initio* and by all necessary implication so too is the subsequent appointment of the Second Defendant as Managing Director of UIC.
- 4.69 The said finding is however without prejudice to the validity of acts done by UIC to the extent allowed by section 23 of the **Companies Act, 2017** which provides:

"23. (1) A person dealing with the company or any person who has acquired rights from the company, in good faith, shall not be prejudiced by the company or a guarantor of an obligation of the company by reason only that-

- (a) *the articles have not been complied with;*
- (b) **a person named as director of the company in the most recent notice received by the Registrar is not-**
 - (i) *a director or an employee of the company;*
 - (ii) duly appointed; or**
 - (iii) *authorised to exercise powers performed by a director or executive officer; or*
- (c) *a director, nominee or chief executive officer of the company acted fraudulently or forged a document, that was signed on behalf of a company.*

(2) Subject to subsection (3), a document executed on behalf of a company by a director, nominee or chief executive officer of the company with actual authority to execute the document, shall be valid.

(3) A document specified in subsection (2), shall be void if, at the time the document was executed, a person dealing with the company or acquired rights from the company, knew or ought to have known, by virtue of that person's relationship with the company, of the facts specified in subsection (1)."

(Emphasis added)

4.70 Given the said findings, I further find that the Second to Fourth Defendants were not lawfully in charge of the affairs of UIC as the purported board of directors that mandated them to do so was itself not properly constituted.

5. CONCLUSION AND ORDERS

Claim (xx)

5.1 In light of the various findings in this judgment which culminated into annulment of the subscription of shares and of the reconstituted board of directors, it is appropriate to begin with this general head and order (pursuant to section 13 of the **High Court Act**⁶), as I hereby do:

⁶ Chapter 27 of the Laws of Zambia

- (i) that the register[s] of companies and of beneficial owners established under section 21 of the **Companies Act, 2017** be rectified as follows with respect to UIC-
 - a) by cancellation of all the entries that reflect the First Plaintiff as beneficiary and holder of 1,850,000 subscription shares;
 - b) by cancellation of all the entries that reflect the First Defendant as beneficiary and holder of 6,500,000 subscription shares;
 - c) by updating the relevant entries to reflect the share capital of 10,000,000 shares broken down as 1,650,000 issued shares beneficially held by the First Plaintiff and 8,350,000 unissued shares;
- (ii) cancellation of all entries that reflect the following persons as directors of UIC - Luke Chisenga Lubemba, Wilson Katwishi Musonda, Innocent Sinzala, Felicitas Kabwe Chibamba, Tobias Haanyimbo Milambo;
- (iii) cancellation of all entries that reflect Nachi Musonda as company secretary; and
- (iv) updating the relevant records of UIC to reflect and revert to the directors and company secretary who held office before the entries in 5.1 (ii) and (iii) above were made;
- (v) given the prescription in s.12(1) of the **Companies Act, 2017**, the First Plaintiff as remaining shareholder to ensure that the number of shareholders is brought to a minimum of two within 30 days of this judgment, default of which shall constitute grounds for winding up of UIC under section 57(1)(d) of the **Corporate Insolvency Act No. 9 of 2017**; and

(vi) the directors and secretary to update the statutory records required to be kept under section 30 and 31 of the **Companies Act, 2017** with the changes ordered above.

Claims i), (x), (xi), (xii) and (xv)

5.2 These claims relate to the Plaintiffs' quest for ownership of the entire shareholding of UIC which has succeeded, not as sought but instead, to the extent ordered in 5.1 above.

Claims ii), (iii), (iv),(v), (vi), (vii) and (xiv)

5.3 These claims relate to the Plaintiffs' drive to repudiate their joint venture with the Second to Fourth Defendants and to seek annulment of the shareholding of the First Defendant.

5.4 The claims are academic in view of the effect of the orders in 5.1 above.

Claims (xiii), (xvi) and (xvii)

5.5 This cluster of claims relates to the Plaintiffs' quest for a review of the activities of UIC under the tenure of the First to Fourth Defendants and a return of the capital contributions made by the latter, subject to a reconciliation of the account between the parties.

5.6 In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited*⁷, Lord Wright aptly put it that:

“It is clear that any civilised 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.” (Emphasis added)

5.7 I accordingly have no hesitation in ordering that, subject to the provisions of this judgment, the First to Fourth Defendants are entitled to a return of the capital contribution put up for the annulled subscription of shares in UIC by the First Defendant.

5.8 Further, since the Second to Fourth Defendants have worked for UIC from 2018 to date, they are entitled to remuneration for their services but not on the terms that have prevailed under the auspices of the nullified board of directors (which was dominated by their relatives and associates⁸).

5.9 Instead, failing an amicable agreement between UIC and the Second to Fourth Defendants within 60 days from date of judgment, any of the said parties is at liberty to engage the Registrar of PIA to determine the market average remuneration for

⁷ (1942) 2 All ER 122 at page 135

⁸ As admitted by the Second Defendant under cross examination by Mr Chikuta

insurance companies equivalent to UIC, (for the positions previously held by the said Defendants and duration thereof).

5.10 The Second to Fourth Defendants shall be entitled to retain the benefit of their past earnings as is commensurate to the said market average but must repay the excess (if any) to UIC within 180 days of a written demand following the determination of such remuneration by the Registrar of PIA.

5.11 I order as such (over the remuneration) because the record shows that the Second to Fourth Defendants are the ones who orchestrated the appointment of the nullified board of directors (right down to documentation) and cannot therefore benefit from circumstances brought about by their own wrongs.

5.12 Authority for this proposition is ***Konkola Copper Mines Plc. v Mitchell Drilling International Limited & Mitchell Drilling (Z) Limited***⁹ where the Supreme Court guided:

*“...But the appellant was in breach of contract resulting in the respondent’s failure to meet the completion schedule and **it is trite that a party cannot benefit by taking advantage of the existence of a state of things he himself produced** (New Zealand Shipping Co Ltd).”* (Emphasis added)

5.13 As for the forensic audit, the onus is on the Plaintiffs’ camp who are now in control of UIC to arrange for it and seek appropriate legal redress (if any) based on the findings.

⁹ Selected Judgment No. 22 of 2015 (Appeal No. 156/2013) at pJ29

5.14 For the avoidance of doubt, the return of the capital contributions of the First to Fourth Defendants should be subject to any necessary reconciliation of the account between UIC and the said Defendants post the audit.

Claim (xviii)

5.15 Considering:

- (i) that the First to Fourth Defendants are neither shareholders, directors or otherwise office bearers of UIC; and
- (ii) the manner in which they assumed control of UIC to the exclusion of the First Plaintiff despite her being the beneficial owner with overriding authority over its affairs,

it is fair and just that there be injunctive protection against a recurrence.

5.16 I accordingly order that (other than for purposes of fulfilling this judgment and / or with the written consent of UIC controlled by the Second Plaintiff or her successors in title) the First to Fourth Defendants whether by themselves, their servants, agents or howsoever are hereby restrained from:

- (i) involvement in the operations and management of UIC; and / or
- (ii) representing themselves to the public as shareholders, directors, servants or agents of UIC.

Claim (xix) and (xxi)

5.17 Under this cluster, the Plaintiffs seek damages against the First to Fourth Defendants and interest.

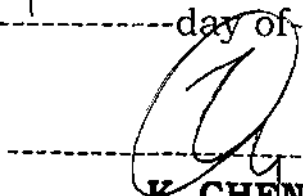
5.18 Having guided on the audit into the affairs of UIC, it will be speculative, unsafe and unsound to make any award on the issue of damages.

Claim (xxii)

5.19 The Plaintiffs having substantially succeeded in their action against the First to Fourth Defendants but failed against the Fifth to Seventh Defendants, I order that -

- (i) the First to Fourth Defendants shall bear the Plaintiffs' costs of and occasioned by this action;
- (ii) the Plaintiffs shall bear the Fifth to Seventh Defendants' costs of and occasioned by this action; and
- (iii) the costs awarded shall be taxed in default of agreement.

Dated this 9th day of April 2021



K. CHENDA
Judge of the High Court