

3RD ISSUE

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MWANAMWAMBWA**

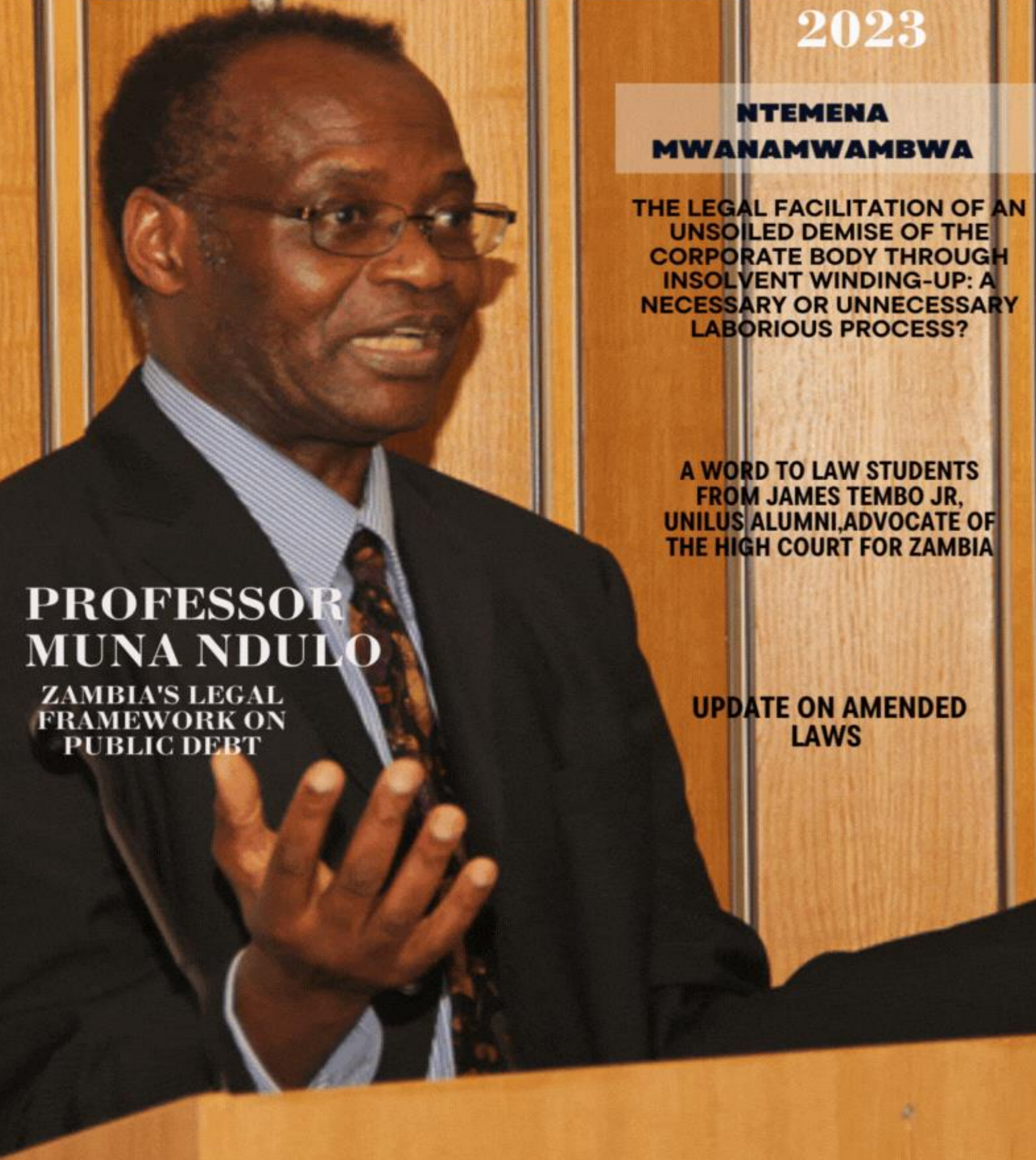
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THE UNIVERSITY OF LUSAKA LEGAL RESEARCH AND WRITING SOCIETY

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ISSUE No.3

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STUDENT LED PUBLICATION

UNIVERSITY OF LUSAKA LEGAL RESEARCH
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EDITOR'S NOTE



The ADVOCATUS is a University of Lusaka (UNILUS) student-led initiative that was founded to be an informative medium between law students, students around the country and the public at large.

This particular newsletter is centered around insight on new laws passed in our jurisdiction, cases of particular interest, and articles on pressing matters in Zambia. It is inclusive of an interview intended to inspire law students and indicate to them that the beginning of their journey through the law might be daunting, but there is a bright light at the end of the tunnel. The interview is also aimed at educating the public on the law relating to public debt.

I would like to thank the entire editorial board for the immense effort they put into the creation of this newsletter, the out-going editorial board's valuable contribution, all students, and lecturers who took time to make this newsletter informative and special. I would also love to extend my gratitude to the management of the faculty of law under the University of Lusaka, your guidance has been a driving force to the production of this piece.

Yours faithfully

Davison Mwale



Outgoing Editor-in-Chief

Taonga Phiri



Incoming Editor-in-Chief

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AN OVERVIEW ON THE CADASTRAL SURVEYING PRACTICE IN ZAMBIA: A CASE FOR IMPROVEMENT.



MULENDEMA SAMAWAYA

INTRODUCTION

A Survey diagram is one of the three cadastral plans needed to obtain a certificate of title. Moreover, the importance of a certificate of title in land transactions is far-reaching, such that it is a firm root in land transactions in Zambia as it proves ownership that is transferred when conveyance is complete. Therefore, it is crucial to understand why a prerequisite such as a survey diagram affects obtaining a certificate of title [1].

Ultimately, a survey diagram is a document that contains geometrical, numerical and verbal descriptions of one or more parcels of land, the boundaries of which have been surveyed by a land surveyor and which document has been signed by a land surveyor or which has been certified by a government surveyor as having been compiled from approved records of a survey or surveys carried out by one or more land surveyors. It includes any document, which before the commencement of the Land Survey Act, had been accepted as a diagram in the Lands and Deeds Registry or in the office of the Surveyor General or his predecessors [2].

WHAT IS CADASTRAL SURVEYING?

Cadastral Surveying is preoccupied with charting land to define its boundaries and accurately obtain a certificate of title. Specific to Zambia, cadastral surveying is governed by

the Land Survey Act, under which a Survey Control Board regulates the practice of Cadastral Surveying, is constituted.

Cadastral Survey diagrams are therefore required:

- To get a 99-year lease for a newly offered parcel of land.
- Where one needs to transfer from a 14-year lease to a 99-year lease
- Where one needs a separate title for a subdivision from a parent parcel of land. In this case, a new survey marks off a part of an existing parcel of land.[3]
- Where one needs to replace a misplaced 99-year lease. Here, a duplicate title is granted using diagrams recompiled from the original approved survey records held by the Surveyor General. The compiled diagrams are called Certified True Copies, whose use is conferred by the authority under section 33 of the Land Survey Act.

Further, The Land Survey Act restricts the practice of cadastral surveying to only licensed surveyors, who are called Land Surveyors. The Surveyor General may appoint Land Surveyors in government employment as Government Surveyors. Government Surveyors are the ones who approve cadastral surveys on behalf of the Surveyor General, who is the top Government Surveyor.[4]

INEFFICIENCIES of CADASTRAL SURVEY FRAMEWORK IN ZAMBIA

The system's major problem is that procedures are not followed at almost every level, leaving much room for negligent professional behaviour and percolates by negligent professionals who survive, further undermining the system.

CADASTRAL SURVEY APPROVAL SYSTEM

As alluded to above, the cadastral survey diagram is a legal document needed to obtain a certificate of title for a certain leasehold. The survey from which it is gathered is analysed in the assessment section of the Survey Department. The Chief Examiner champions this section and has roughly six other examiners below him.

[1] R. chileshe, H. Shamaoma. Examining the challenges of cadastral surveying in Zambia, 2014

[2] Land Survey Act.

[3] Ibid

[4] Land survey act.

When the planning authority has approved the development of specific parcels of land, that plan is forwarded to the Ministry of Lands for numbering; subsequently, advice on commissioning land surveyors to carry out the survey is given to the client. The commissioned land surveyor then carries out the survey, prepares the necessary records and lodges them for examination at the Zambia Survey Department.

After further examinations, the work is either returned to the land surveyor for corrections or passed on to the Government Surveyor for approval. The Land surveyor then collects the approved survey diagrams and hands them over to the client, who uses them to request their Certificate of Title from the Lands Department.

Other relevant materials, such as the written survey report, field book, computations book, operational plan and general plan, become public property and remain with Zambia Survey Department. They are kept and used to update procedures and for available consultation by other land surveyors and others who may need the same information. ^[6]

ROOM FOR IMPROVEMENTS

- Unqualified use of **Section 33 of the Land Survey Act**

Section 33 and its subsection reads, “**No general plan or diagram shall be approved unless its geometrical figure and all the other data it contains are consistent with all details furnished in the approved survey records of the parcel of land to which such general plan or diagram relates.**”

Consistency between general plans or diagrams and survey records and signing and approval thereof

(2) Subject to the provisions of section thirty-four, no general plan or diagram shall be approved unless-

(a) it is prepared under the direction of and signed by the land surveyor or land surveyors who carried out the respective survey; and

(b) it accords with such requirements as may be prescribed:

Provided that a general plan or diagram may be approved if it has been framed from an approved available plan or from an approved diagram or diagrams or from approved survey records filed in the Surveyor-general’s office or registered in the Registry, without the signature thereon of the land surveyor who signed the original general plan or diagram, if he is not available or unreasonably refuses to sign the general scheme or diagram so framed.”

^[6] Mwanza. R. A, *White Collar Malpractices in Cadastral Surveying and their Effects on Secure Land Tenure and Sustainable Development, Zambia*. International Federation of Surveyors, 2004.

In practice, the unsecured application of section 33 by the Zambia Survey Department is a crucial contributor to inefficiency under the framework. This is because one does not strictly need a land surveyor’s signature; typing in the land surveyor’s name is adequate even for false surveys. Section 33 states, among other things, that “provided that a general plan or diagram may be approved if it has been framed from an approved general plan or from an approved diagram or diagrams or from approved Survey Records filed in the Surveyor General’s office or registered in the Registry, without the signature thereon of the land surveyor who signed the original general plan or diagram if he is not available or unreasonably refuses to sign the general plan or diagram so framed”. It does not mention being approved using the same section. ^[6]

- Need for the creation of independent bodies that promote quality.

The Surveyor General’s Office is the leading provider of cadastral survey services nationwide. **Section 4 of the Land Survey Act** provides that this entity is also charged with enforcing cadastral survey standards and regulations. These charges place the entity in competition with private land surveyors who provide cadastral survey services, which can be viewed as unfair competition by many professional actors. It is most probable that the jobs handled by Surveyor’s General Office will not be subjected to strict scrutiny since officers who perform survey assessments and field surveys report to the same management. This is buttressed by the fact that the officers who conduct the quality checks or survey assessments are typically juniors and have inferior academic qualifications compared to those who perform field surveys. ^[7]

- Internal and regulatory impacts

The cadastral survey services in Zambia are characterised by limited professional involvement from the absence of a complete professional board. Subsequently, the Government or Surveyor General controls the profession’s control. This is further exacerbated by the lack of limit in the tenure of office for the members of the survey Control Board, established under **section 6 of the Land Survey Act**. The unlimited term serving on the Survey Control Board brings complaisance to the serving members, which could be the reason for not revising the legislation, standards and regulations to meet the current trends in the profession. ^[8]

^[6] Mwanza. R. A, *White Collar Malpractices in Cadastral Surveying and their Effects on Secure Land Tenure and Sustainable Development, Zambia*. International Federation of Surveyors, 2004.

^[7] F. Mandhu, *a hybrid system of Land Titles and Deeds registration as a new model for Zambia: A case study of the Lands and Deeds Registry Lusaka*, Thesis submitted on 31st October 2014 in fulfilment of the requirements for the degree of Doctor of Philosophy in the Faculty of Law of University of Africa.

^[8] Land Survey Act.

In managing cadastral survey services in Zambia, continuous professional development is optional for holding a practising license. Once someone passes the specific licensing procedure and is awarded the cadastral survey practising license, they don't need to upgrade their skills to match new technological developments. The cadastral surveying practising license surpasses academic and professional qualifications because no categories of acceptable practice exist for different levels of qualifications. Thus because of this, the impact in practice is where private surveyors cannot maintain the required standards.^[9]

RECOMMENDATIONS

Amendment and Review of Current Legislation

The improvements in the current survey practice are mainly concerned with the 2021 amendments to the land survey act, with electronic signatures on documents and electronic device storage modes. Nonetheless, the Act could include strengthening the professional body and procedures. This will provide for a change in the conduct of cadastral surveys—for example, dissemination of cadastral survey reference information and access to cadastral survey information. Further limiting the tenure of serving members on the Survey Control Board could bring improvement in the running of the cadastral survey services.

^[9] <https://www.parliament.gov.zm/sites/default/files/documents/acts/Land%20Survey%20Act.pdf> accessed on 18th 2023



Robert Schallet, Advocate at UP Zambia and UNILUS ALUMNI giving a presentation on how to write a good petition



Ruth K. Kangwa, Gender Activist and UNILUS ALUMNI giving a presentation on how to make a petition to National Assembly and an illustration using a petition she made



Sara Larios, UP Zambia Executive Director giving presenting on the organisation's experience on petitioning to the National Assembly on amending and/or repealing Acts of Parliament and how important the petitions are.



The Guest of Honor, Law Association of Zambia President, Mr Lungisani Zulu giving a keynote speech and taking questions.

A COMMENTARY ON THE ZAMBIA DEVELOPMENT AGENCY ACT NO.17 OF 2022 AND THE INVESTMENT TRADE AND BUSINESS DEVELOPMENT ACT NO.18 OF 2022



CATHERIE GONDWE

INTRODUCTION

This essay will examine the recent enactment of the **Investment Trade and Business Development Act of 2022**^[1] and **Zambia Development Agency Act of 2022**^[2] to highlight or comment on the Acts' advantages and disadvantages. It will then discuss the contention put forth by society, critically examine the Acts using reverberating legal analysis, and provide a firm conclusion.

The writer will use two acts being **Zambia Development Agency Act of 2022** and the **Investment Trade and Business Development Act of 2022**^[3]. However, to give a complete consideration of the critics against the two Acts, reference will be made to other pieces of legislation as well as books written by learned authors.

THE ZAMBIA DEVELOPMENT AGENCY ACT NO.17 OF 2022 AND THE INVESTMENT TRADE AND BUSINESS DEVELOPMENT ACT NO.18 OF 2022

The enactment of the **Zambia Development Agency Act No. 17 of 2022** and the **Investment Trade and Business Development Act No. 18 of 2022** to replace The **Zambia Development Agency Act**^[4] of 2006 and to develop an investment ambience has invited criticism from society

critics, however, argue that the new acts hardly resolve the weaknesses that were in the old act and others say the two Acts which are a new dawn; seem to be in effect a new doom in the investment regime in Zambia.

WEAKNESSES OF THE ACTS OF PARLIAMENT

the first issue to be considered is whether the two pieces of legislation scarcely resolve the weaknesses that were in the **Zambia Development Agency Act of 2006**.^[4]

The first weakness to be looked at is under **Section 3 of the Zambia Development Agency Act 2006**^[6] which is the lack of enforcement power. The ZDA Act of 2006 had provisions that gave the agency power to investigate company records, books and other documents.^[7] However, the new act under section 3 only gives the agency legal personality which is the power to sue and be sued in its capacity. The whole act has no provisions that relate to sanctioning investors that do not comply with the laws.

An evaluation can be made of **Environmental Management Act**, which has its prosecutors under **section 18** and inspectors under **section 14** who can initiate prosecution against defaulting persons.^[8]

The new Act has nothing to solve and consequently, investors might flee from prosecution as there are no inspectors who are responsible to scrutinize the books, records and credentials of people wanting to invest in Zambia. Part IV of the new ZDA creates offences which only relate to board members and not investors. This entails that investors are more sheltered from criminal liability. For instance, where an investor commits fraud or gives phoney information to the board members or any other offence, this means the agency will not utilize its particularly trained prosecutors and inspectors to examine such.

^[6] No. 11 of 2006

^[7] Ibid

^[8] C Mulenga, *Foreign Direct Investment and The Law in Zambia* (2020)

^[9] No. 12 of 2011

^[1] No. 11 of 2006

^[2] No. 18 of 2022

^[3] No. 17 of 2022

^[4] Supra Note 1

The second weakness under the **Zambia Development Agency Act of 2006**^[9] is that there were no principles and incentives in the act, in that the thresholds were too high, which was about 500,000. It also incorporated investors to individually enter into the IPPA agreements with the minister. In addition, the definition of investment in the act seems to imply that the contribution of capital is only for starting, expanding and rehabilitation and not for a perpetuity process which stands as a negative factor.

Furthermore, **Section 6 of the Zambia Development Agency Act of 2006**^[10] reduces the figure of board members to eight and seems not to have qualifications attached to who gets is preferred or not, for example, the chairperson and the vice are selected from among the members, it's kind of biased in the sense the preponderance of the board members again are government officials which does not account for accountability and fairness in the appointments.

This draws down to the minister's excessive power to appoint the majority of the members which would be possibly abused, the issue is whether the new Act resolves such deficiency. **Section 8(4) of the Zambia Development Agency Act of 2006**^[11] conferred more power to the minister than the board, such as the appointment of a chairperson, conceding of incentives, the substitution of members before their term of office expires and the appeals lied in the minister.

However, the new act has included the same provisions under **Section 7(5) of the Zambia Development Agency Act**^[12] which indicates that the minister may give the board instructions relating to the performance of its functions. **Section 6 of the Zambia Development Agency Act**^[13] sets out the board of the agency that is appointed by the minister including the chairperson as indicated earlier. This proves that the new act provides the minister wider discretion because it does not indicate the qualifications for such an appointed member as a replacement should hold. It might be any member who has close-up ties with the minister and even anyone from the public.

This same found in **Section 7(6) of the Zambia Development Agency Act**^[14] has been enacted under **Section 8(4) of the Zambia Development Agency Act of 2022**^[15] and therefore proves the critics right.

^[9] No. 11 of 2006^[10] No. 17 of 2022 ^[11] No. 11 of 2006^[12] No. 11 of 2006 ^[13] No. 11 of 2006 ^[14] No. 11 of 2006

^[15] No. 17 of 2022

Lastly, a weakness under the act is the provision of Externalization of funds under **section 20 of the Zambia Development Agency Act**^[16], which provides that, notwithstanding any other written law relating to externalization of funds, a foreign investor may convey out of Zambia, dividends after-tax income, royalties, the interest of any loan and net proceeds of any sales. This stipulation contradicts the temperament of foreign direct investment which is to bring about financial gain. An investor can exploit resources and cheap labour and then proceed to transfer all his profits to his country, which is not the host country where he is making his profits. However, this section has not been changed in the new Acts. **Section 10 of Zambia Development Agency Act**^[17] is a copy and paste of **section 20 of the Zambia Development Agency Act**^[18]. This means they barely solve the defects that were found in **the Zambia Development Agency Act of 2006**^[19].

Moving forward to the **Investment Trade and Business Act**, under **section 54 of the Zambia Development Agency Act of 2006**^[20], the minister consulted another minister when considering the award of incentives. This was a defect in investment as both the minister might not have much data concerning the investor and the whole process can be biased.

Sections 31 and 33 of the Investment Trade and Business Development Act of 2022^[21] provides the effect that, the minister can only award incentives after commendation from the agency. This provision reduces the discretionary powers given to the minister as indicated earlier on. In addition, the agency under **Section 5 of the Zambia Development Agency Act**^[22] considers documents, accounts and other necessities for investment from the investors and hence, has more information about investors than the minister. Therefore, they can decide whether to propose the grant of incentives or not. Nevertheless, this does not inevitably convey much improvement, because even though the board commends someone for investment, it is still up to the minister to either award or not award the incentives, which draws us back to the starting point.

Sections 70 and 54 of the Zambia Development Agency Act of 2006^[23], read together provided that a license was valid for ten years while incentives were for five years.

^[16] No. 11 of 2006

^[17] No. 17 of 2022

^[18] No. 11 of 2006

^[19] No. 11 of 2006

^[20] No. 11 of 2006

^[21] No. 18 of 2022

^[22] No. 17 of 2022

^[23] No. 11 of 2006

This mandated the investors to remain and proceed operating even where the incentives terminate because they might want to undergo for the entire period of operation of the license. However, in the act, both the licence and incentives are for about five years by virtue of **Section 34 of the Investment Trade and Business Development Act of 2022**^[24] which is in essence a new doom for investment in Zambia, as it provides that failure to conform to any term or condition of the license will result into ending of the license.

The adverse effect here is that, when the license expires, the incentives also end and the investor can simply leave that country because he has used up the whole duration of the license. The new provisions grant foreign investors a prospect to utilize resources and go without any intentions of coming back since the licence and incentives have ended. Deferment of the licence is another substantiation to show how the ZDA Act and ITBD Act are a new doom for investment. The board may suspend the licence in line with **Section 74(1) Investment Trade and Business Development Act of 2022**.^[25] However, as to **Section 25(3) of the Investment Trade and Business Development Act of 2022**.^[26] the agency can defer a licence where the investor fails to correct the contraventions. This means that the agency, unlike in the old Act, can suspend the licence without considering the representations provided by the investor. Which takes away the right to be heard, a fundamental principle of justice.

CONCLUSION

From the analysis and comparison drawn above, it could be concluded that the new Acts, which are the **Zambia Development Agency Act of 2022**^[27] and the **Investment Trade and Business Development Act of 2022**^[28] Acts of 2022 are a new doom rather than a boom to the investment field. The acts give too much authority to the board rather than the investors, and most of the provisions directed to investors are not well regulated which still lowers the development of a proper investment regime or framework in Zambia.

^[24] No. 18 of 2022

^[25] No. 18 of 2022

^[26] No. 18 of 2022

^[27] No. 17 of 2022

^[28] No. 18 of 2022

THE UNIVERSITY OF LUSAKA MAGNUM OPUS MOOT COMPETITIONS

The Magnum Opus Moot Competition is an annual event that is facilitated by the University of Lusaka Moot Court Society. Its primary objective is to enhance the oral advocacy skills of law students at the University of Lusaka (UNILUS). The competition is an excellent platform that enables students to engage in simulated court proceedings and gain practical skills that will be useful in their future legal practice.

In 2022, the Magnum Opus Moot Competition received a significant boost when Nsapato and Co. Advocates, a prominent law firm, agreed to become the official sponsor of the competition. This move was crucial in providing the necessary resources to ensure the competition's success and motivate the students to excel in their performance.

The 2022 Magnum Opus Moot Competition attracted a total of 40 students, ranging from first-year to fourth-year law students. The competition was fierce, and only six students qualified for the final. The finals were highly competitive, with each student displaying excellent oral advocacy skills. In the end, three students emerged victorious, namely Beatrice Anamunda, Natasha Nondo, and Vanessa Ndhlovu.

The three winners were awarded a cash prize and a vacation internship opportunity at Nsapato and Co. Advocates. This award was a significant achievement for the students, as it provided them with an opportunity to apply their skills in a practical setting and gain valuable experience.

Moreover, Beatrice Anamunda was recognized as the best oralist for the 2022 Magnum Opus Moot Competition. This award was well-deserved as Beatrice demonstrated exceptional oral advocacy skills, such as effective communication, critical thinking, and persuasive argumentation. Her success was a testament to her hard work and dedication to her studies.

In conclusion, the Magnum Opus Moot Competition is an essential event that provides law students at UNILUS with a practical platform to enhance their oral advocacy skills. With the support of Nsapato and Co. Advocates, the competition was a success, and students were motivated to strive for excellence.

Link to UNILAW website:
<https://undergrad.unilus.app/law/>

The success of the competition, as demonstrated by Beatrice Anamunda's achievement, highlights the importance of practical skills in legal education and the need for continued support from the legal community.



On 23rd March 2023, the Moot Court Society at the University of Lusaka (UNILUS) held a moot seminar aimed at improving the advocacy skills of its members. The seminar focused on several critical areas, including how to balance academics and moot and how to go about litigation in practice. The event was graced by the coordinator in charge of moot, Mrs. Kaswalale Mwauluka, and three speakers who were UNILUS alumni with extensive experience in moot competitions and represented the university in several moot competitions.



The seminar was a success as it provided a platform for UNILUS law students to learn about the practical aspects of moot court proceedings and the legal profession. The speakers shared their experiences and insights, which were instrumental in motivating the students and improving their understanding of the intricacies of moot competitions.

One of the critical areas that the seminar focused on was the importance of balancing academics and moot. The speakers emphasized that while moot court competitions are essential in enhancing practical legal skills, they should not interfere with academic performance. The students were advised to prioritize their academic work and allocate sufficient time for moot practice to ensure they excel in both areas.

Mrs. Kaswalale Mwauluka, the coordinator in charge of moot, was pleased with the outcome of the seminar. She commended the speakers for their insightful presentations and the students for their active participation. She noted that the seminar was an essential step in achieving the Moot Court Society's objective of enhancing the practical legal skills of UNILUS law students



writingandresearch2021@gmail.com



**UNIVERSITY OF LUSAKA ACADEMIA AND
LEGAL WRITING SOCIETY**

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N T E M E N A

M W A N A M W A M B W A

**AHCZ, LLB (hons) University of
Wales, LLM-Corporate and
Financial Law- Kingston
University London, Lecturer-
School of Law, University of
Lusaka**

Abstract

This article is a reaction to the trending discourse on the legitimacy or otherwise of the closure of the Post Newspapers Limited whose compulsory liquidation proceedings commenced in November 2016, via a court order passed by the Zambian High Court, corollary to that being the the conduct of the liquidator in the winding-up of the company as highlighted most recently[1]. The article also dwells on the importance of role of the liquidator as the main actor as well as the need for such an officer to be upright in his dealings throughout the winding-up proceedings. Without dwelling on the substantial issues surrounding the winding-up proceedings of Post Newspapers Limited as a result of the company's insolvency, the aim of this article is to enlighten the reader, on the role of both the Zambian legal and institutional frameworks in ensuring the utmost legitimacy and sanity in the winding up of a company, following the liquidation of its assets.

[1] *M'membe and Post Newspapers Ltd (In Liquidation) v Mboози and Ors (Appeal 7 of 2021) [2022] ZMSC 4*



INTRODUCTION

This article will highlight the law on Zambian corporate insolvency law, as it relates to the winding-up of a company through the liquidation of its assets by means of the laid down procedure for compulsory liquidation. This will be achieved through the analysis of the law relating to the tests of insolvency; the grounds for compulsory liquidation; parties with the *locus standi* to petition the high court to commence the proceedings; the effects of commencement of the proceedings; the appointment of a provisional liquidator and subsequent confirmation of a provisional liquidator.

The current law governing winding-up of companies within the sphere of corporate insolvency law in Zambia, is the Corporate Insolvency Act No. 9 of 2017 and supplemented by the winding up rules 2004.

THE TESTS OF CORPORATE INSOLVENCY

Insolvency, is one of the many pre-cursors to the commencement of compulsory winding-up proceedings carried out by the high court. That being said, the Act defines insolvency from two viewpoints. Namely, the cash-flow test and the balance sheet test.

Section 2 of the Corporate Insolvency Act No. 9 of 2017 defines *“insolvent” to mean having liabilities that exceed the value of assets, having stopped paying debts in the ordinary course of business or being unable to pay them as they fall due.*¹

The balance sheet test

A company is considered to be balance sheet insolvent when its debts and liabilities exceed the value of its assets. This is translated to mean that if a company’s assets in the absence of any of them being pledged as collateral were to be converted into cash, the proceeds would not be enough to settle all of its liabilities, taking into account present, prospective and contingent liabilities.²

The cashflow test

On the other hand, a company is considered to be cashflow insolvent when it can no longer pay its debts as it runs its business. It must therefore be understood, that with regard to this version of the cashflow test, incurring debt is an inescapable event in the running of a business, which must however be settled to ensure that a company continues to thrive financially.

A company can also be considered to be cashflow insolvent when it is unable to pay its debts when they fall due. Unlike the balance sheet test which takes into account both present, future and contingent liabilities, this version of the cashflow test focuses on the diminished flow of cash into a company’s coffers rendering it impossible to settle its present liabilities.³

Cashflow insolvency when compared to balance sheet insolvency is milder than the latter. This is because a cashflow insolvent company could be considered to be technically insolvent on the premise that it possesses more assets than its liabilities. Such that the disposal of those assets would settle of all of its

¹ *Corporate Insolvency Act No. 9 of 2017, section 2*

² *BNY Corporate Trustee Services Ltd v Eurosail [2013] UKSC 28*

³ *Re Cheyne Finance Plc (No.2) [2008] Bus LR 1562,*

liabilities, while the same cannot be said about a balance sheet insolvent company. Owing to the fact that balance sheet insolvency poses the risk of leaving most of a company's creditors hang and dry and without recourse to their outstanding debts.⁴

Financial distress as a horizon of insolvency

Having defined insolvency from the point of view of both the balance sheet and cashflow tests respectively, it is further cardinal to analyse the relationship between insolvency and financial distress. The term financial distress has been defined to mean the likelihood of a company becoming insolvent immediately within the subsequent six months.⁷ This definition is an indication that financial distress is a warning sign of the looming insolvency of a company. It is important therefore, for companies to keep a close watch on their liquidity and put in place measures which would avert a company's slippage into insolvency, which most often leads to a point of no return.

One such measure to avoid insolvency and ultimately liquidation and the insolvent winding-up of a company, is voluntary business rescue proceedings. The proceedings are instituted pursuant to the provisions of section 21 of the Corporate Insolvency Act No. 9 of 2017, allowing the company some breathing space through the external management of the company's business by a business rescue administrator.⁵ Suffice to mention at this juncture, that insolvency, liquidation and winding-up are avoidable under the Corporate Insolvency Act 2017, except under extremely harsh and unforeseeable economic factors, such as the Covid-19 pandemic.

Liquidation as a means necessitating the winding-up and dissolution of a company

It is important to note the difference between solvent and insolvent winding-up of a company. Solvent winding-up entails the closure of a company's business in the absence of any insolvency.

Insolvent winding-up on the other hand, being the focus of this article, entails the closure of a company's business due to insolvency.⁶

Section 2 of the Corporate Insolvency Act No. 9 of 2017, defines winding up to mean "the process of settling accounts and liquidating assets in anticipation of a company's dissolution."⁷

Liquidation is defined by the Act, to mean "the process of converting the property of a company into cash in order to settle the company's debt and other liabilities." While dissolution is defined to mean "the termination of a company's legal existence by liquidation in accordance with this Act;⁸

It can thus be seen that insolvent winding up is the penultimate goal, which justifies the liquidation of a company's assets, prior to its dissolution.

⁴ Danilov, A.K (2014) *Corporate Bankruptcy: Assessment, Analysis and Prediction of Financial Distress, Insolvency, and Failure* ⁷ *Ibid, supra note 1*

⁵ FINANCIAL DISTRESS, INSOLVENCY, BUSINESS RESCUE AND RESTRUCTURING available at [FINANCIAL DISTRESS, INSOLVENCY, BUSINESS RESCUE AND RESTRUCTURING – Antswisa](#). Accessed on 11/09/2021 at 02:06 AM

⁶ www.accaglobal.com/vn/en/student/exam-support-resources/fundamentals-exams-studyresources/f4/technical-articles/winding-up.html

⁷ *Corporate Insolvency Act No. 9 of 2017, section 2*

⁸ *Ibid, supra note 1*

Grounds for insolvent compulsory winding-up

The only ground for insolvent winding-up, is the inability of a company to pay its debts⁹ and that being said, the most likely party to petition the High Court to place an insolvent company under winding-up, is a creditor.¹⁰

Commencement of compulsory winding-up

Compulsory winding-up proceedings under the Act, is by way of petition¹¹ filed in the High Court, accompanied by an affidavit, verifying the petition and clearly stating the facts necessitating the filing of the petition, aimed at commencing the proceedings. Additionally, the party seeking the court's intervention must of course satisfy it as to their locus standi in the proceedings.¹²

Hearing of the petition

As with any other civil proceedings, the court must hear the petition on its merits in order to determine whether to grant the petition or dismiss it altogether. The passing of a winding-up order by the court, signals its belief that there is cause to winding-up the company, as discussed in the subsequent paragraphs.

The role of a provisional liquidator as a care taker in compulsory winding-up proceedings

A liquidator under the Act, is defined as a person appointed to wind up the affairs of a company. This illustrates that the liquidator is the most important player in the proceedings as it is the role of this external manager, to administer the entire process for the ultimate benefit of the company's creditors.

Thus, the court may appoint a provisional or temporal liquidator between the filing of the winding-up petition and the passing of the winding-up order by the court.¹³ The purpose of doing so, is for the provisional liquidator to preserve the company's assets from looting or loss, pending the court's confirmation of the commencement of the proceedings through a winding-up order. This is most commonly the case with companies which own many assets which risk being looted in the wake of newly commenced winding-up proceedings. Being provisionally appointed also entails that such a liquidators' powers are subject to certain restrictions and limitations as directed and stipulated by the court.

Owing to the lengthy duration of winding-up proceedings, the court is empowered by the Act to appoint either the official receiver or an eligible person, as the actual liquidator of the company to administer the entire process from vesting of property until the dissolution of the company. Such appointment is done through the winding-up order. Although practically speaking, the trend in practice has been to confirm a provisional liquidator as the actual liquidator through the winding-up order. This was seen in the Post Newspapers case.¹⁴

⁹ *Corporate Insolvency Act No. 9 of 2017, section 57(1)(b)*

¹⁰ *Corporate Insolvency Act No. 9 of 2017, section 56(1)(b)*

¹¹ *Corporate Insolvency Act No. 9 of 2017, section 58(2)*

¹² *Ibid, supra note 7*

¹³ *Corporate Insolvency Act No. 9 of 2017, section 65(1)*

¹⁴ *M'membe and Post Newspapers Ltd (In Liquidation) v Mboosi and Ors (Appeal 7 of 2021) [2022] ZMSC 4*

EFFECTS OF THE COMMENCEMENT OF WINDING-UP PROCEEDINGS

The following is a discussion of the legal effects of the passing of a winding-up order, by the High Court in addition to the order confirming the that the court has been convinced of the need to wind-up the company's affairs through the liquidation of its property.

Liquidator's report on company's statement of affairs

The functioning of the liquidator typically begins with him being presented with a statement of the company's affairs by the directors. The statement is a summary of very vital information pertaining to the details of the company's property, debts and liabilities, identity of its creditors, property pledged as collateral to its secured creditors as well as details relating to the dates when such properties were pledged as collateral. As a matter of transparency and to secure the sanity of the process, the liquidator is required by law submit copies of the statement to the court and the Registrar and official receiver as regulators of the court appointed liquidator in these proceedings.¹⁵

Furthermore, for purposes of the transparency of the process and in order to ease the liquidator's laborious task ahead, the Act mandates him to prepare a report on his findings on the statement of the company's affairs, as at the date of the winding-up order for the benefit ultimate of the court, the Registrar of companies and the company's creditors.¹⁶

Vesting of company property-custody and control

One of the effects of the passing of a winding up order, is vesting of the company's property in the liquidator. This therefore entails the company property being placed under the liquidator's custody and control in order for him to account for them, as they would be required in order to discharge the company's debts and liabilities. Furthermore, the court if requested by a liquidator, may exercise its power through the winding-up order, to dismantle any trusts created over all or some of the company's property prior to the commencement of winding-up, in order to revert them back into the general pool of property and vest them in the liquidator.

Disposal of property in the winding-up process

Typically speaking, the entire winding-up process comprises of major chronological steps ultimately resulting in the dissolution of a company. The liquidator is empowered to dispose of the company's property, but must do so by public tender or by using an alternative transparent method and must notifying the Registrar of companies 21 days prior to such disposal.¹⁷

¹⁵ *Ibid*, section 72

¹⁶ *Ibid*, section 73

¹⁷ *Ibid*, section 74(e)

Proof of debts

Prior to the discharge of the company's debts by the liquidator, he would have to call upon the creditors to come forward and prove their debts against the company's estate.¹⁸ Having done, so the liquidator would then have a clear picture of the actual debts to be paid, in comparison to the company's statement of affairs already handed to him by the directors in the three month period following the commencement of the compulsory winding-up process.

Discharge of the company's debts-the parri passu perking order table

In terms of major chronological steps in the winding-up process, discharge of the company's debts and liabilities follows the disposal of the company's property. During this stage, the liquidator is bound to follow the perking order table in line with the pari passu principle which states that 'all unsecured creditors in the same class, rank equally between themselves'. The perking order table is divided into four classes, namely:

Class 1 which comprises of general costs and expenses of the winding-up process which include the taxed costs of the petitioner, the liquidators' remuneration and the costs of any audit which may have been carried out upon the commencement of the winding-up process.

Class 2 which comprises of debts in the form of taxes, duties or rates due to the Zambia Revenue Authority, government rents and rates due to a local authorities such as town, district or city councils.

Class 3 comprises of various payments due and arrears due to the company's employees. These include salary arrears for the past three months before the commencement of the winding up process; leave accruing to employees for the past two years before the commencement of the winding up process; paid absences other than leave process as well as recruitment and other expenses which are repayable under a contract of employment.

Class 4 is left open for any other creditors. This class allows for some flexibility in order for the liquidator to cater for non-statutory creditors, that is, creditors not specifically listed or provided for under the law.

That being said, the implication of the perking order table is that a liquidator is not allowed under whatever circumstances to contract out of the law, except when faced with the task of also paying secured creditors. Only then will he consider the latter first before the cluster of unsecured creditors in their respective classes.

CONCLUSION

The legal existence of a company is never guaranteed, taking into account all the varying factors which may lead its eventual extinction. The insolvent winding-up process provided by the Corporate Insolvency Act 2017 discussed in this article, is but one of those factors which results in the demise of a corporate body. The current law, appears on the face of it to be more watertight than its predecessor¹⁹. That is too say, it is not laborious and is certainly necessary in ensuring the orderly conduct of liquidation proceedings. However, it may be necessary for the regulators²⁰ to enforce the law more strictly whenever

¹⁸ *Corporate Insolvency Act No. 9 of 2017, section 126*

¹⁹ *The Companies Act, chapter 388 of the Laws of Zambia*

²⁰ *The Registrar of Companies*

a company is placed under insolvent winding-up in order to avoid abuse of the entire process, to the disadvantage of the company's creditors.



PENAL CODE (AMENDMENT) ACT, 2022 AND CRIMINAL PROCEDURE (AMENDMENT) ACT, 2022

The parliament of Zambia has through the amendments of the **Penal Code (Amendment) Act, 2022^[1]** and **Criminal Procedure (Amendment) Act, 2022^[2]** abolished the death penalty. Pursuant to the amendments, all offences that attracted a death penalty now attract a sentence of life imprisonment.

Section 11 of the Penal Code (Amendment) Act, 2022^[3] has repealed the offence of defamation of the President in **Section 69 of the Penal Code Chapter 87 of the Laws of Zambia**. Other repealed sections of Chapter 87 are **Sections 25 and 71**, while amended sections are **Sections 4,24,31,39,40,43,63,64,118,201,294,297, and 391**

NATIONAL PENSION SCHEME (AMENDMENT) ACT, 2022

Parliament has enacted the **National Pension Scheme (Amendment) Act, 2022^[4]** to allow for the partial withdrawal of pension benefits to members of the National Pension Scheme Authority. As per **Section 39 of the National Pension Scheme (Amendment) Act, 2022^[5]**, members who are under the pensionable age; attains a minimum age of thirty-six; and has made contributions to the existing fund.

In accordance to **Section 2(3) of the National Pension Scheme (Amendment) Act, 2022^[6]**, National Pension Scheme Authority has the discretion to waive penalties incurred by contributing employers on conditions that the Minister may, by statutory instrument, prescribe.

^[1] No. 23 of 2022

^[2] No. 22 of 2022

^[3] No. 23 of 2022

^[4] No. 20 of 2022

^[5] No. 20 of 2022

^[6] No. 20 of 2022

INSURANCE ACT 2021

Pursuant to the **Issuance of Commencement Order ^[7]**, the **Insurance Act 2021^[8]** which is further supported by the Insurance (General) Regulations of 2022, repealed and replaced the insurance act of 1997.

This new Act is pertinent to every agent, brokers, reinsurers, insurers, and auxiliary service providers. This is because it provides for a significant change to the shareholding of insurers, reinsurers and brokers: Brokers are required to have not less than 51 percent of their shareholders being Zambians and or a Zambian owned company while insurers and reinsurers are required to have not less than 30 percent of their shareholders being Zambian citizens and or citizen owned companies

PROPERTY TRANSFER TAX ACT

The **Property Transfer Tax (Amendment) Act ^[9]** has amended a number of provisions from the **Property Transfer Tax Act Chapter 340 of the Laws of Zambia**. The following are amended provisions: **Sections 2,4,5,6, and 9**,

VALUE ADDED TAX (AMENDMENT) ACT

The **Valued Added Tax (Amendment) ^[10]** is another Act amendment by parliament which shall be read as one with the "The Principal Act", Value Added Tax Act.

^[7] No.83 of 2022

^[8] No. 38 of 2021

^[9] Act No.27 of 2022

^[10] Act No.26 of 2022

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THE ADVOCATUS

A CRITICAL ANALYSIS OF THE CASE OF DUFF KOPA KOPA V UNIVERSITY TEACHING HOSPITAL BOARD OF MANAGEMENT SCZ NO. 8 OF 2007



PEACE
KAMANGA

INTRODUCTION

The following commentary is based on the critical analysis of the Supreme Court decision on the case of **Duff Kopa Kopa v University Teaching Hospital Board of Management**.^[1] This will be done with the application of the principle governing medical negligence; the 'Bolam' test.

DEVELOPMENT OF THE BOLAM TEST

The 'Bolam' test is used to determine medical negligence. It measures whether medical practitioners have fallen below the standard of care that is required of them when attending to their patients. This test although does not only apply to medical practitioners, but to all professionals. It sets the standard at which a skilled man must conduct and exercise their duties. However, this does not demand that the practitioner be at their best. Instead, it requires that they perform what is generally accepted as the appropriate standard of performance by others in their profession.

In the courts of law, the burden is often undertaken by summoning an expert witness to show how other medical practitioners of similar standing would have exercised their skill on any other patient in a similar situation.^[2] The 'Bolam' test was coined in the English case of **Bolam v Friern Hospital Management Committee**.^[3]

in which the court brought out two elements that must be considered in order to determine as to whether the medical practitioner was being negligent or not.

The first element for consideration is where the defendant purports to have a special skill, their conduct is judged according to the standard of a reasonable person having the same skill the defendant claims to possess. The second element states that the law will not regard the professional as having fallen below the required standard of care if it is shown that their conduct is regarded as proper by one responsible body of professional opinion.

It is apparent to this author that the test, as it is being highly criticized, has brought more harm than good to people receiving medical treatment.

SUMMARY OF THE CASE

The 'Bolam' test was developed and applied in the English courts and has now been adopted in the Zambian legal system where different cases have been decided, one of which being **Duff Kopa Kopa v University Teaching Hospital Board of Management**.^[4] The issue that the courts were challenged with was whether or not the defendants were negligent and whether the correct procedure was carried out during the surgical operation of a child.

The facts were that the plaintiff's son, Chuubo Kopa Kopa, who at the time was eight years of age, swallowed the lid of a Coca-Cola bottle on 25th December, 1998. He was taken to the University Teaching Hospital (UTH) by his mother for medical treatment. At the hospital, an x-ray was conducted which revealed that the bottle top was lodged at the top of the boy's oesophagus. The first doctor who attended to the child performed a procedure termed as an 'oesophagoscopy'. This involved the use of an oesophagoscope; a machine consisting of a tube with a light used for the purpose of locating a foreign body inside the oesophagus of the patient, and then either extracting it through the mouth, or pushing it down towards the stomach.

^[1] Scz no.8 of 2007

^[2] K Shanmugam, 'Testing The Bolam Test' (2001) Vol 43(1) *Consequences Of Recent Developments* 1

^[3] (1957) 1 WLR 582

^[4] *Supra* Note 1

The first doctor was not successful, in removing the bottle top. However another doctor, a consultant surgeon, conducted the same procedure on 26th December, 1998, but was equally unsuccessful in removing the bottle top. Additionally, the consultant surgeon repeated the same procedure on 28th December, 1998, but then abandoned it because the child had excessive bleeding. The bottle top was eventually removed by a senior doctor who conducted a thoracotomy operation, which involved the opening of the chest wall and oesophagus to extract the alien object. Despite the operation, the child died on 4th January 1999. The courts then applied the 'Bolam' test and concluded that the defendants were not liable for negligence because they had acted according to the approved, accepted and current practice.

COMMENTRY

It can be observed from the above case that the 'Bolam' principle seems to favour the medical practitioners over the people receiving medical treatment from the doctors who were being negligent in performing their duties. In this case, the child was being operated by two different doctors who performed an act that contributed to his death. They would have taken reasonable care had they resorted to finding other methods of removing the foreign body from the child, especially considering it was a bottle top. However, simply because the medical practitioners performed what was opined by a number of medical experts that the doctors' treatment was done according to what is medically sound does not mean that they should escape liability for the acts they performed. This was observed in the case of **Bolitho v City and Health Authority**.^[6] Therefore, it is this authors' view that the two medical doctors should have been held liable for performing the wrong treatment on the child.

CONCLUSION

The 'Bolam' test, when applied, seems unfair on patients and favorable to medical practitioners. The only way to create a balance between the rights of patients and the right of doctors is when the 'Bolam' test is properly applied by also including the principle brought out in the case of **Bolitho v City and Health Authority**.

^[6] (1997) *ALL ER* 71

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THE CHILDREN'S CODE ACT: DETERMINATION OF THE BEST INTEREST OF THE CHILD



MWABA MUSUNGA

INTRODUCTION

For the longest time, children in Zambia have lacked laws that fully protect them. However, through the enactment of the **Children's Code Act**^[1], Zambia has taken a commendable step to foster the protection. With effective enforcement of the provisions of the Act, there is a guarantee that children will to some extent be protected. In ensuring protection of children, the Act highlights the principle of the best interest of the child. One might wonder what then constitutes the best interest of the child and what guidelines are set in determining what is best for children. This article will shed light on what constitutes the best interest of the child and how the Zambian courts are guided when making such determination.

BEST INTEREST UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD

The Children's Code Act has domesticated some international instruments that aim at protecting children. One of the international instrument is the Convention on Rights of the Child. **Article 3(1) of the Convention on the Rights of the Child**^[2] recognizes the best interest of a child and such interest to be the primary consideration in all actions that concern children. This Article of the Convention on the Rights of the Child has been codified in **Section 3 of the Children's Code Act**^[3]. It is worth noting that although the Act does refer to the best interest of the child, it has no provision on what

the best interest of the child is or what constitutes the best interest of the child^[4]. Nevertheless, the principle is complex yet flexible in its implementation, such flexibility makes it suitable for different children. It is for this reason that the Committee on the Rights of the Child in its **General Comment No. 14 of 2013**^[5] commentated that, "when determining what is in the best interest of the child, such determination should be done on a case-by-case basis."

DETERMINATION OF THE BEST INTEREST IN ZAMBIA

To assess what would be in the best interest of the child, **Section 3(2) of the Children's Code**^[6] has established factors that courts, authorized officers or administrative institutions are to consider in determining what is best. Thus, these factors act as guidelines which are to be considered together with the circumstances of a particular case. The route taken in Zambia is the same as that under the Convention on the Rights of the Child that is, determining what is in the best interest of the child on a case-by-case basis.

This inference can be drawn from the case of *Xirocostas v Poma*^[7] wherein it was stated that "judges are not to look at what would be ideal but rather what would be best in the particular circumstance." The circumstances in that particular case that led to the respondent having custody of the child instead of the appellant were found not to be favorable to the child. Although ideally, one would say that the appellant would have been suitable due to his better financial position as compared to the respondent, a deep analysis of the circumstances show that the child would not have been safe had custody been given to the appellant.

^[4] Luyando Muloshi, 'THE CHILDREN'S CODE: HIGH WAY TO PROGRESSIVITY?' *Diggers News* (Lusaka, 3rd October 2022) 6

^[5] UN Committee on the Rights of the Child (CRC), *General Comment No. 14: Article 3(1) (Best interest of a child)*, 62nd Sess, adopted 29th May 2013, UN Doc CRC/C/GC/14

online: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 26th April, 2023

^[1] No. 12 of 2022

^[2] The Convention on the Rights of the Child, Treaty Series, vol, 1577, November 1989 ^[3] No. 12 of 2022

^[6] Act No. 12 of 2022

^[7] [2020] ZMSC 136

How the circumstances were determined in the case stresses the significance of analyzing all circumstances in order to reach at a decision that is not only best but that which equally ensures a child's safety. Further, what is ideal maybe perceived as that which sets perfect standards. The law however does not look at what is perfect. It is for this reason that the court in the *Xirocosta* case took the course of not considering circumstances that are perfect but those that put children in a safer position thereby fostering their best interest. What is perfect might not be the most suitable for a child, hence the need to consider all circumstances for a better determination.

To add on, decision makers in fully considering all circumstances of the case, are entitled to make their decisions and conclusions based on evidence adduced where such evidence would be sufficient in promoting the child's best interest [8].

Additionally, by virtue of being flexible [8], the principle is relatively fair thereby making it less disadvantageous, this is because it has no fixed or strict standard that can be used to ascertain what is in a child's best interest, thereby making it open for interpretation to fit a particular circumstance.

Further, where decision makers are to consider what is in the child's best interest, such circumstances are to be looked at in a holistic manner as was determined and illustrated in the case of *Colange v Chikachi*[10]. Therefore, although the Children's Code Act has no provision of what constitutes the best interest of the child, holistically considering the circumstances of a case can aid in ascertaining the principle.

CONCLUSION

In summary, despite the Children's Code Act not providing for what constitutes the best interest of the child, where need arises to determine what is in the child's best interest, it is the author's view that such determination should be done holistically, guided by the factors set in the Act and coupled with the circumstances at hand as provided by the law.

[8] Mponda v Mponda (Appeal No. 199 of 2015) [2018] ZMSC 350

[9] UN Committee on the Rights of the Child (CRC), *General Comment No. 14: Article 3(1) (Best interest of a child)*, 62nd Sess, adopted 29th May 2013, UN Doc CRC/C/GC/14
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[10] [2016] ZMHC 153

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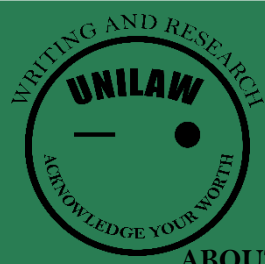
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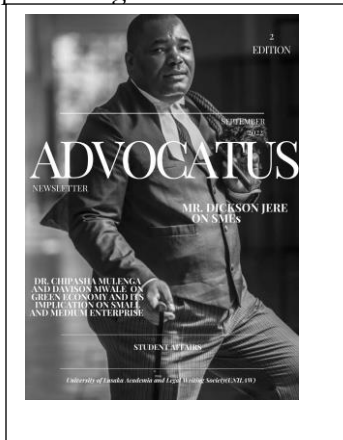
ABOUT THE UNIVERSITY OF LUSAKA LEGAL RESEARCH AND WRITING SOCIETY

The Legal Research and writing society known as The University of Lusaka Legal Research and Legal Writing Society (**UNILAW**) is a student-led Editorial Board of the University Of Lusaka School of Law established in October 2021. The Society through its Editorial Board performs the duty of promoting legal debate within the University of Lusaka School of law by encouraging legal scholarly publications through the peer reviewed newsletters called the "**ADVOCATUS**". This is done through the submission of legal articles from law students and any other guest writers as may be required. The newsletter is the first student-led peer reviewed publication of the University of Lusaka initiated by law students with the support from school management.

The editorial board is comprised of 14 students involved in scouting for feature guests, interviewing featuring guests, article writing, editing, calling for articles and preparing the final product newsletter in readiness for publication.

Through its activities , the society aims to motivate law students to develop a creative spirit through a network of joint activities among law students; To encourage the enhancement of the capabilities of Law students in order to become critically minded, socially responsible, academically committed, and legally skilled; To promote world objectives of economic, social, cultural and humanitarian character in law students; To educate ourselves and others in these legal areas of knowledge through discussion, speakers, research, publications and other appropriate means, and; To promote the exchange of knowledge and experience between lawyers and students.

Since its inception, the student-led editorial board has published two newsletters. The inaugural issue published in first academic semester of 2022 featured Ms Linda Kasonde the Executive Director of Chapter One Foundation. The second issue which featured Mr Dickson Jere, former aid de state of the late Republican President Mr Rupiah Bwezani Banda and Partner at Dickson Jere and Associate. This was published in the second academic semester of 2022. The society has a calendar aimed at publishing each semester.



The editorial board held a **LAW STUDENT SEMINAR** with the theme "**HOW A CITIZEN OF ZAMBIA CAN PETITION TO THE NATIONAL ASSEMBLY TO AMEND AND/OR REPEAL AN ACT OF PARLEMENT**" in an effort to encourage students to actively participate in legal debate through article writing and submissions for the **ADVOCATUS**. The guest of honor was Mr. Lungisani Zulu, the President of the Law Association of Zambia. Other speakers were, two officials from the Undikumbukire Project Zambia, as well as Ruth K. Kangwa, a campaigner for youth and gender equality and UNILUS alumni. The New Hall at Leopard's Hill hosted this event on March 16, 2023.



THE ADVOCATUS

AN ARTICLE EXPLAINING SECTION 158 OF THE PENAL CODE, INDECENT PRACTICES BETWEEN MALES.



KAREN CHABALA

INTRODUCTION

This article addresses indecent practices between males in the Republic of Zambia and how it is considered a crime. The internet has become a powerful tool of giving and receiving information yet on the other hand it has brought more harm than good, it is being misused for illegal purposes such as promoting indecent practices.

A situation in which the mentioned issue occurred was when two men who were openly gay officially got married and when one of them believed to be gay was identified that he served as a soldier in the Zambian Army, upon hearing of his gay marriage he was dismissed from service. This indicated that gay people had no place in the Army. The act between the two men was condemned by the citizens of Zambia, they believed that it aimed at promoting immoral traditions and diminish Christian values.

MORALITY AND HUMAN RIGHTS

Generally, morality is defined as the standard on what is considered right or wrong in society. According to dictionary of law morality is defined as laws to which individuals feel themselves subject to through their religious beliefs^[1]. This is what is considered right and acceptable while Human Rights has been defined as rights and freedom on which every human being is entitled^[2]. Having distinguished the two, the question that has to be asked is how do they relate to each other? Human Rights and morality relate but

contradict each other to an extent. In most cases moral laws are not written but where there is an agreement to do certain actions, each person has an obligation to perform their various duties. Whereas human rights are considered to be legally enforceable and binding on every person.

According to **section 158 of the penal code**^[3] “which states that any male person who, whether in public or private, commits any act of gross indecency with another male person, or produces another male to commit any act of gross indecency with him, or attempts to produce the commission of any such act by any male person with himself or with another person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.” It is essential to note that homosexuality is illegal in Zambia, the country’s laws criminalizes same sex activity and is clearly expressed in the Penal Code Act.

CRITICISM ON HOMOSEXUALITY

The issue is that there is a strong criticism that their human rights have been violated because of sex orientation and gender identity.

According to **article 23(3) of the constitution of Zambia** ^[4] it entails that “no one should be discriminated based on race, tribe, sex, place of origin, marital status, color and creed where such persons are subjected to disabilities or restriction.”

In 2020 it was reported by the US Department of state that there was substantial evidence of the laws that the citizens of the United States of America who belong to the LGBT community had suffered some form of discrimination, violence and harassment in employment, education and housing. The government made no attempt to address this discrimination. According to research published in 2019 it was found that 53% of the LGBT people had experienced physical violence, with 27% reporting incidents in the previous year, 34% had experienced sexual violence in the last year additionally, 70% had experienced verbal harassment related to their sexual orientation and gender identity.^[5]

^[3] Penal code, chapter 87 of the Laws of Zambia

^[4] No 18 of 1996

^[5] <https://www.humandignitytrust.org/country-profile/zambia>>accessed on 27 April.2023 at 14:35hrs

^[1] Law.J and Martin.E.A, (2009) Oxford Dictionary of law (7th ed,p 358) Oxford University Press. ^[2] *ibid*

ENFORCEMENT ON THE OFFENCE

On 27th November, 2017. The Lusaka High Court sentenced two men Japhet Chataba and Steven Samba to 15 years imprisonment for engaging in same sex relations. They booked themselves into a hotel and indulged in an immoral act, they were convicted by the Kapiri Mposhi Magistrate's Court last year and appealed to the High Court. However, the High Court Judge sentenced the two men to 15 years imprisonment. This sentence was opposed with strong criticism from the US Ambassador to Zambia Daniel Foote who stated that he was horrified and passed words to the local Government that it would cause damage to Zambia's international reputation by demonstrating that Human Rights within the Republic are not a universal guarantee [6].

In the Ministerial Statement on LGBT by Jack Mwiimbu the minister of Home Affairs stated that the law of this country is very clear, that any sexual practice different from what the society has considered right over a period of time as normal or the correct practice and which is against the law is enshrined in

- (a) **Section 155 of the Penal Code** [7], which states that any sexual intercourse between men constitutes a criminal offence.
- (b) **Section 156 of the Penal Code** [8] also criminalizes any attempt to commit unnatural offences prohibited under section 155 and
- (c) **Section 158 of the Penal Code** [9] criminalizes acts of gross indecency both between men and women.

CONCLUSION

While the constitution of Zambia does not explicitly recognize gay rights or sexual orientation, it provides for protection against discrimination, which should apply to everyone, regardless of their sexual orientation. However, the country's law criminalizes homosexuality and the government does not recognize same sex marriages.

[6] *ibid*

[7] *Supra note 3*

[8] *ibid*

[9] *ibid*

THE UNIVERSITY OF LUSAKA PARTICIPATION IN MOOT COMPETITIONS

The JESSUP WHITE & CASE INTERNATIONAL ROUNDS MOOT COMPETITION

This year, the University of Lusaka took part in the 2023 Jessup Zambia National Rounds moot competition. After the competitive pre-rounds, UNILUS advanced to the finals and emerged victors of the national rounds. UNILUS as the winner of the national round represented Zambia in the 2023 Jessup White & Case International Rounds which were held in Washington DC at Hyatt Regency on Capitol Hill from the 8th to 15th of April 2023.

Team UNILUS was represented by Lameck Munkanta, Chiti Lavanka Chipampe and Yaiman Bande



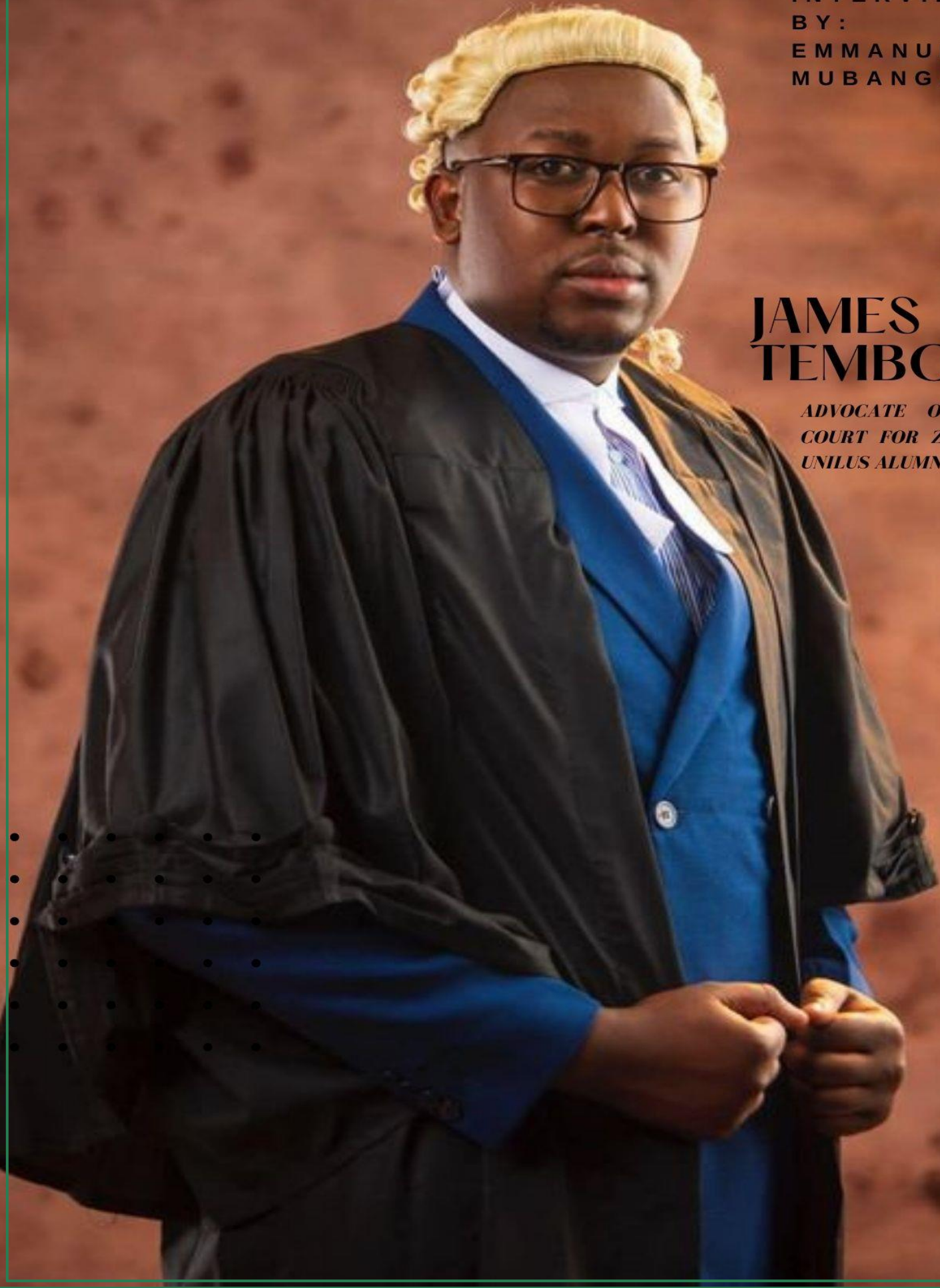
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UNILUS ALUMNI CORNER

INTERVIEW
BY:
EMMANUEL
MUBANGA

**JAMES
TEMBO JR**

*ADVOCATE OF THE HIGH
COURT FOR ZAMBIA, LL.M.
UNILUS ALUMNI*



WHO IS JAMES TEMBO JR JR

“James Tembo, this must be one of the hardest questions to answer, James is a young man starting out his career in the legal profession and who is slowly developing interest for litigation. One who is passion about God, loves people and loves to have fun. In a nutshell, that’s James, I am sure you will get to know more about me as the conversation carries on.”

CAN YOU KINDLY SHARE WITH US A BRIEF ON YOUR UPBRINGING?

“Thank you for your question, I actually one of those that doesn’t agree with the phrase “humble background”. So, I will say, I come from a background where we didn’t have much and it was upto oneself to decide what you had to make out of your life. I attended many schools during my primary education. However, I went to Kabulonga Boys in high school and then transferred to Serenje Boys Technical School, from there I completed high school. From an early age I have always been fascinated with the various co-curricular activities that my schools provided, particularly, those that required me to write and speak. I was the debate school president and went on to represent the school on many occasions where we would debate with other schools. I was also the editor in chief of the eye which was a school newspaper. Because of these activities I always thought that I had a career in Journalism, so thinking that I was meant to be viewed by the public on live television I applied for media school. Unfortunately, my journalism career didn’t work out, perhaps a conversation for another day.”

HOW DID YOUR JOURNEY AT UNILUS START?

“My journey at UNILUS was an interesting one. Once I was accepted, I was really ecstatic about the entire thing. UNILUS helped me highlight my talents and is one of the reasons for what I have become today.”

KINDLY SHARE WITH US A BRIEF INSIGHT INTO YOUR LIFE AT UNILUS AND WHAT ROLE THE UNIVERSITY PLAYED IN SHAPING THE MAN YOU ARE TODAY?

“Whilst at UNILUS I was approached by Ms Kayuma about starting some kind of mentorship program, this program was established in order to help students who struggled in some courses by asking students in higher semesters to tutor them. I was the leader of the mentorship program and I tutored part-time students as well as my immediate juniors. One of the courses I tutored was Human Rights. During my time at UNILUS I was the leader of the Legal Aid Clinic. The Legal Aid Clinic was established in order to help people from the local community and beyond who could not access proper legal care. During my time there I stood out because I was committed, always proposing programs and trying to help the locals with alternative dispute resolutions. Because of this I was selected as the student coordinator of the Legal Aid Clinic.”

WHAT DID YOU DO AFTER YOU FINISHED SCHOOL AT UNILUS?

“After University I went to tutor students at a named university. There and I found joy in doing this, so much so that I wanted to become a lecturer. However, Ms Chizinga influenced me to become a litigator. I was convinced and when I finished ZIALE and my masters I found myself loving litigation and this is when I discovered that God’s plans are not always those of an individual’s.”

DID YOU ALWAYS SEE YOURSELF TAKING THE NEXT STEP FROM GRADUATE TO ADVOCATE?

“Funny story, I never really thought of ZIALE. In my head the most important thing was lecturing, so I wanted to do that instead of trying to become an advocate, however after speaking to Ms Chizinga who convinced me otherwise as well as meeting Mr Makebi Zulu who played a very vital role in putting me through ZIALE. I decided to go to ZIALE and initially I was scared but that fear was quickly overtaken by excitement. I managed to clear 10 of the 11 courses on my first attempt and on my second I managed to clear the course I failed initially.”

IN YOUR PREVIOUS ANSWER YOU MENTIONED MR MAKEBI ZULU, WHO IS HE AND WHAT SIGNIFICANCE DOES HE HAVE IN YOUR LIFE?

“Mr Makebi Zulu is the managing partner at the law firm I am currently working at which is Makebi Zulu advocates, in much simpler terms he is my boss. He has played such an instrumental role in shaping the man I am today. He offered me a job after I was done with my studies at UNILUS as well as paid for my ZIALE. If it weren't for him, I don't think I would have achieved everything that I have today.”

WHAT ARE SOME TIPS YOU CAN SHARE WITH STUDENTS TO PREPARE FOR ZIALE.

“Here are some 10 quick tips students can use when preparing for ZIALE:

1. Do not be negative
2. Live in the moment
3. Be diligent
4. Read
5. Have an inquisitive mind, be analytical
6. Follow the lecturer's instructions
7. Join a firm, learn skills like drafting
8. Think positively
9. Build a strategy
10. Have a goal”

HOW WOULD YOU ADVISE YOUNG PEOPLE OUT THERE ON THE BEST WAY TO HANDLE FAILURE?

“Handling failure is one of the key aspects that every student of law should be able to manage because it can happen to anyone. Initially at ZIALE I only wanted to pass 8 I didn't really believe in myself, but through studying and preparation I only failed 2 courses during my mid-year exams. After this my mindset changed and I believed that I could pass every course. Finals came and results were published, upon receiving my results I cried at the fact that I failed 1 course, my boss where I was interning Mr. Makebi Zulu was very much impressed at the fact that I almost passed everything but at the same time was shocked at the fact that I was crying about it. He made it clear to me that what I achieved was amazing and I should be able to pick myself up after failure. The next year I managed to pass the course I initially failed. I always believe that in terms of failure one should not be negative and should be able to take it lightly move on and continue to live in the moment.”

IF ANY, WHAT CHALLENGES HAVE YOU OBSERVED THAT THE CURRENT LEGAL SYSTEM HAS IN ZAMBIA HAS AND WHAT DO YOU THINK NEEDS TO BE CHANGED TO MAKE IT BETTER?

“I don’t think Zambia has many challenges in the sector but however I do think that High Level cases should be televised just like they do in Kenya. I feel such important issues such as election petitions should be televised.”

WHO ARE YOUR ROLE MODELS?

“Professionally I assume is how you’re asking this question; I look up to Mr Makebi Zulu and I am not only saying this because he is responsible for offering me a job at his firm as well as sponsoring my studies at ZIALE. But it is because of how focused and determined he is, as well as how he carries himself in an esteemed manner. Another man I look up to is Mr Robert Simeza, his level of thinking and brilliance is amazing he is a very brilliant man indeed.”

LASTLY WHAT IS OR HAS BEEN YOUR OVERALL GOAL EVER SINCE YOU WERE ADMITTED TO THE BAR?

“The Overall goal I think for me is to be the best you can be at your career; people talk about role models and I personally want to be that to people. I want to be brilliant in everything I set my mind on. I want to grow professionally and academically and I strongly think the two are linked.

Thank you very much for interviewing me, I would like to say it was such an honour. I would like to just give a special thanks to everyone who took part in raising me as well as the Makebi Zulu family, the members of staff at the University of Lusaka. I am extremely grateful for each of the roles they all had to play in making me the man that I am today.”

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THE DEATH PENALTY: THE THRESHOLD OF DETERRENCE IN A DEMOCRATIC STATE



NICODEMUS
MWIMBA

INTRODUCTION

The concept of law and its attributes such as peace, morals, justice, order, fairness, and equality is a means of social balance between economic and political aspirations. This article will discuss and analyse the facets of the law and how they are accustomed from one state to another in order to facilitate political will, economic aspirations and stability. It will also establish how the law when enforced, deters all forms of criminality. Focusing on how the death penalty is used to prevent offenders from indulging in any form of criminality in a democratic state.

THE CONCEPT

The concept of law analysed by Austin in the 'Province of Jurisprudence Determined'^[1] are the simple elements of 'commands and habits'. In many social situations, one may express a wish that another person should do, or abstain from doing something. This wish is not expressed merely as a piece of interesting information or deliberate self-revelation, but with the intention that the person addressed should conform to the wish expressed. It is customary in English and many other languages, though not necessary, to use a special linguistic form called the imperative mood.^[2] This type of expression is what the law embodies which benchmarks all laws, regulations, policies, measures and rules.

[1] H.L.A Hart, *The Concept of Law* (Penelope A . Bulloch and Joseph Raz(eds), 2nd edn, Oxford University Press 1994) 18

[2] Ibid

The distinctive feature in which the law is coined does not merely ask, plead or request, but order all citizens to secure compliance with its expressed wishes to which if not followed the would-be offender would face something which a normal man would regard as harmful or unpleasant.

The core of all laws is to 'command' which is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm, a command is primarily an appeal not to fear but to respect for authority.^[3] Hence the standard form even of a criminal statute is generally in two ways; it indicates a general type of conduct and applies to a general class of persons who are expected to see that it applies to them and to comply with it. If the primary general directions are not obeyed by a particular individual, compliance may be demanded or the disobedience may be officially identified and recorded and the threatened punishment imposed by the court.

The nature of the concept of law is that it promotes the intertwined coexistence between the law and its subjects in a democratic state. With that said, it becomes almost impossible to separate laws from habits that are of general practice accepted as legally binding, whether or not in enforcing them some sense of harshness is exhibited on individuals. 'Law' may be defined as a system of rules, a set of rules recognized as commanding or forbidding certain actions which are intended to regulate the conduct of all persons within a particular state and are enforceable by the courts of the state^[4]. Furthermore, O Hood Philips in his book attempts to define the term law as those rules of conduct which are enforced by the duly constituted courts. It could also be called 'a technique for the regulation of social power.' as Otton Khan-Freund^[5] stated. 'As for the common dictionary, it states that law is a rule enacted or customary in a community and recognized as enjoining or prohibiting certain actions and enforced by the imposition of penalties (a body of such rules).^[6]

[3] Ibid

[4] Margaret Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries* (University of Unza Press, 2004) 1

[5] Stevens, *Labour and the Law* (2nd ed, Stevens 1977)

[6] W.H Smith, *Concise Dictionary* (8th ed, Oxford University Press 1990) 670

As stated earlier, one may be more inclined to establish and discuss the relationship that does exist between law and democratic states. Equally, with that said the legal theories that connote what constitutes a law, and how that is a means through which social and economic stability, justice, order, peace, fairness, equality and political aspiration are achieved notwithstanding the harshness that laws such as death penalty or best put as capital punishment may expose individuals to.

A democratic state is a state which is governed by the rule of law and this acts as a deterrent to would-be offenders. In **Patel v Attorney General**,^[7] a democratic state was stated as a country governed under democratic principles, the form of government that exists in such a state is a government in which the sovereign power resides in the people as a whole, and is exercised either directly by them or by officers elected by them. Furthermore, it was stated that in such a state all have equal rights, without arbitrary differences of rank or privilege. **Speiser v Randell** cited in the **Patel v Attorney General** defines a democratic country as a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities.^[8] Therefore, laws passed in a democratic state through the mandate that elected representatives are bestowed by the citizens, are such that they bind everyone and have an elemental force of command and sanction if violated. The end goal is to create an atmosphere where all are treated as they should be. According to the positivist legal theory, the law has three features; that is a command that is laid down by a political sovereign, and that is enforceable by a sanction.^[9] For example it is only reasonable that, in order to facilitate order and the accepted manner in which individuals in a group or society interact and conduct themselves, rules are made which lay down conditions under which men and women may mate and live together and exclude acts which are regarded as inimical to the welfare of the society or the larger groups. To violate these rules will entail a sanction notwithstanding its harshness or flexibility.^[10] For instance, in **Justin Mumbi v The People**, the courts stated that at no point will one with impunity and at will, take away the life

^[7] [1968] ZMHC 24

^[8] (1958) 354 US 513

^[9] V.D Mahajan's, *Jurisprudence and Legal Theory* (5 ed, Eastern Book Company 1987) 31

^[10] Margaret Munalula (n 4) 9

of another with no good reason to excuse him before the law, thus the defence of intoxication as a result of drunkenness failed to be used as an extenuating circumstance that would lessen the appellant's conviction and death sentence which the court had convicted him to for having killed his uncle who had denied to give him his pair shoes.^[11]

Laws such as the 'death penalty' enjoy a certain degree of superiority over requests and wishes which are an expression of desire which may prove to be futile and unenforceable. Death penalty as a sanction is compelling in nature and possesses attributes of conservation of the status quo in society as it acts as a means through which order, peace, stability, and economic and social prosperity are preserved. This essentially helps in partially eradicating criminal offences such as murder which is the taking away of someone's life at will. Criminal offences bare no impunities in nature and their sanctions such as the death penalty are construed in the very harshest possible way so as to foster deterrence.

The 'natural legal theory' echoes a description of the nature of law, though it is a bit divergent from the description given by the positivist theory of law. According to Salmond,^[12] natural law or moral law embodies the principles of natural right and wrong which are the principles of natural justice as best described. Under this theory, law is perceived as that which is reasonably and universally right that embraces moral correctness. It is, therefore, by natural reason or logic that certain acts are perceived by groups of people as unjust or immoral. For example, it is morally acceptable and reasonably expected of a person owning property that is stationed in the comfort of his yard to defend himself, and the property and protect it from being stolen or being deprived of its use or his right of ownership by an armed thief at night and at all times by the use of reasonable force. In **Tembo v The People**, the courts stated that death occasioned unintentionally in trying to prevent the commission of a crime is not excusable at law, rather the unintended act of killing is an extenuating circumstance that could be considered in a court sentence thereby reducing the conviction to manslaughter provided that there is evidence before the courts upon which the accused could reasonably have thought any danger existed.^[13] Zambia is an illustration of how a democratic state that isn't far away from such practices, as it embraces sanctions for certain criminalities in order to deter would-be offenders from committing them, although currently the death penalty has been

^[11] [2004] S.C.Z 12

^[12] V.D Mahajan's (n 7) 66

^[13] [1980] ZMSC 3

repealed and amended as per **Section 14 of the Penal Code**^[14]. The said amendment provides for a sentence to life in imprisonment in replace of the sentence to death (**Section 201 of the Penal Code, Chapter 87 of the Laws of Zambia**) for a crime of murder that existed before the amendment.

Morals consequently give rise to legal duties and rights that are the point at which the law with its coercive resources respectively protects individual freedom and restricts it or confers on individuals or denies them the power to avail themselves of the law's coercive machinery. So whether the laws are morally good or bad, just or unjust, rights and duties demand attention as focal points in the operations of the law which is of supreme importance to human beings and independently of the moral merits of the laws.^[15] With that said, harsher punishment imposed on the culprits of the law such as the death penalty definitely provide recourse to moral tenants and facilitate the eradication of all sort of criminality in order to attain and conserve peace, stability, fairness, equality, unity, order, justice and political and economic aspirations. Their applicability on would-be offenders demands that they are universally applied with no exceptions notwithstanding someone's status in society. This essentially creates acceptance, and radical deterrence and vehemently speaks to the idea of justice being linked with equality treatment. The law is supposed to be applied equally in all situations and to all persons to which it relates. Justice in this sense is really no more than a formal principle of equality and involves three related conceptions, the first being the rules laying down how people are to be treated in given cases, the second being that such rules shall be general in character, and thirdly that these general rules shall be impartially applied.^[16] Once attained it becomes more attempting to state that indeed there can be no doubt to cast as the death penalty is a means to an end-deterrence.

^[14] The Penal Code (Amendment) Act no. 23 of December 2022

^[15] H.L.A Hart, *The Concept of Law* (3rd ed), Oxford University Press 2012) 269

^[16] Margaret (n 4) 10

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CONCLUSION

In conclusion, it can be evidently seen that laws in their nature are created as means to facilitate the deterrence from certain actions. In doing so, certain sanctions regardless of how harsh (death penalty) they may be are adopted by a group typically speaking democratic states so as to facilitate and conserve the peace, stability, fairness and equality that certain individual actions may threaten. It is for that reason the sanction of the death penalty has achieved deterrence in a democratic state, as discussed and demonstrated above.

^[17] The Penal Code (Amendment) Act no. 23 of December 2022

^[18] H.L.A Hart, *The Concept of Law* (3rd ed), Oxford University Press 2012) 269

^[19] Margaret (n 4) 10

**A COMMENTARY ON THE CASE OF
 GEORGE ANDRIES JOHANNES WHITE V
 RONALD WERSTERMAN & OTHERS (1983)
 Z.R. 135**



KELIVIN ZULU

FACTS

The case of *George Andries Johnnes White v Ronald Westerman and others* is a fundamental case as it brings out the effect of a Provisional Certificate of Title.

The plaintiff brought an action for recovery of his property and for mesne profits on the ground that the first defendant and the prospective purchaser had failed to pay the full purchase price and rent agreed. The first defendant had used a Deed of Assignment and Exchange which was only signed by him to obtain a Provisional Certificate of Title from the Lands and Deeds Registry, and thereafter used the same title to transfer the property to the second defendant who in turn moved on to the property, made certain developments and renovations to the property and later used the same title obtained from the first defendant to obtain a mortgage from the third defendant (his employer).

The court was called upon to determine firstly the validity of that Deed of Assignment and Exchange, and secondly to pronounce on the position of the 2nd Defendant and that of his employers the 3rd Defendants (Zambia State Insurance Corporation).

HOLDING

In relation to the validity of the Deed of Assignment and Exchange, the court held that as it was only signed by the first defendant it meant that it was improperly

executed that it ought not to have been registered. The deed of assignment was thereby declared null and void ab initio.

This meant that as the first defendant had obtained the provisional certificate of title using the deed of assignment which was not properly executed, it followed that the first defendant could not have derived any title to the land which he subsequently purportedly transferred to the second defendant. Since the first defendant did not have Title to the land he could not assign it to the second defendant. The assignment between the first defendant and the 2nd defendant was thereby declared null and void.

In relation to the position of the second and third defendant, the court was of the view that as the first defendant had no title to the land, he could not have assigned it to the first defendant and there could have been no assignment between the 1st defendant and the second defendant. The first defendant did not have a proper title to the land, this meant that he too could not mortgage the property to the third defendant since he had no title to it. And the net effect of this was that the Mortgage Deed executed between the second Defendant and the third was invalid. The plaintiff was held to have remained the owner of the property at all material times on the basis that both the first and second defendant's Provisional Certificates of Title had been obtained irregularly.

The court citing **Section 32 of the Lands and Deeds Registry Act**^[1] held that the plaintiff had a better title to the property than that of the first defendant; the second defendant and that of the third defendant.

With respect to the second defendant, the court accepted the argument that he was a bona fide purchaser for value but still ruled that it did not mean that he was entitled to the property. And with respect to the third defendant, the court held that it had itself to blame for employing an inexperienced man to run its legal department.

COMMENT

In as much as the author agrees with the decision of the court in relation to the third defendant, he does not agree with its decision in relation to the second defendant.

^[1] *Cap. 185 of the Laws of Zambia*

The advocates for the third defendants clearly did not exercise due diligence in relation to the conveyancing process of the property as they did not inquire to find out if the property in question had any encumbrances. And as the court in **Kayoba and Another v Ngulube and Another**^[2] established that parties involved in purchasing real properties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has encumbrances, it follows that the defendants' advocates who did not take any steps in line with the principle in this case where to be blamed for the loss suffered by the third defendant.

In relation to the second defendant, the author agrees with the court's interpretation of **Section 32 of the Lands and Deeds Registry Act** to the effect that a Provisional Certificate of Title is subject to any better title. However, he disagrees with the court's ruling regarding the implications of the Provisional Certificate of Title's cancellation.

The said **Section 32 of the Lands and Deeds Registry Act**^[3] provides that;

"The issue of a Provisional Certificate shall confer upon the Registered Proprietor of the land comprised in such certificate all the rights, benefits and privileges under Parts III to VI of a Registered Proprietor holding a Certificate of Title except that the court may at any time upon good cause shown at the suit of any person who claims that he has a better title, cancel or amend a provisional certificate and in that event may order the rectification of the Register accordingly."

The interpretation of the provision cited above provides that once the Provisional Certificate of Title is cancelled, any contract entered into on the basis of the same title would be invalid and that the doctrine of notice will not apply (as was the court's interpretation in the instant case) would be infringing on the right of a *bona fide* purchaser for value as guaranteed by The Equitable Doctrine of Notice, as was observed in the case of **Pilcher v Rawlins**^[4].

CONCLUSION

With the view that in as much as a Provisional Certificate of Title is subject to a better title, if the property which is the subject of a Provisional Certificate has been disposed of to a bona fide purchase, such a purchase must not be affected by the cancellation of the Provisional Certificate of Title.

^[2] (2003) Z.R. 132

^[3] *Supra note 1*

^[4] [1872] 7 CH 259

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3RD EDITION

MAY 2023

ADVOCATUS

PROFESSOR MUNA NDULO

interviewed by Davison Mwale



PROFESSOR MUNA NDULO INTERVIEW WITH DAVISON MWALE ON,” ZAMBIA’S REGULATORY FRAMEWORK ON PUBLIC DEBT.”

ABOUT PROFESSOR MUNA NDULO

Muna Ndulo is an internationally recognized scholar in the fields of constitution making, governance and institution building, international criminal law, African legal systems, human rights, and international law and foreign direct investments. He has published 19 books, 29 book chapters and over 100 articles in academic journals. He is Honorary Professor of Law.

WHAT IS PUBLIC DEBT?

“Public debt is the debt that the state has contracted in various forms. It can be direct borrowing by the state, bilateral by borrowing from other countries, or borrowing from development banks such as World Bank, Africa development bank, Asian development bank, or the regional development banks such as Southern Africa development bank. It could also be borrowing on the market such as borrowing from private institutions that lend money.

Sometimes, the government acts as a guarantee to loans given to parastatals. This is because, mostly parastatals which intend to borrow money have to satisfy the requirement, which is, to provide some form of security that if it fails to pay, and someone will be liable for the debt.

In summation, the term public debt means that the state owes someone money which can be through direct borrowing from various institutions either private or public, bilateral or through guarantees.

Article 208(1) and (2) of the Constitution of Zambia Act No.2 of 2016 provides for the scope and definition of public debt which is also defined in **Section 2 of the Public Debt Management Act No.15 of 2022.**”

WHAT IS THE LEGAL FRAMEWORK GOVERNING SOVEREIGN DEBT IN ZAMBIA?

“The following laws are of significance importance: The **Constitution of Zambia (Amendment) Act No.2 of 2016**, specifically **Articles 198 – 212** which contains pertinent provisions, and the **Public Debt Management Act No.15 of 2022.**”

***Public Debt Management Act No.15 of 2022** was assented on the 9th August of 2022 to provide for the raising of loans and grants; the issuing of guarantees; the approval of loans by national assembly; the establishment of sinking funds; the establishment of the Debt Management Office and provide for its functions; the repeal of the Loans and Guarantees (Authorisation) Act, 1969, and the General Loan and Stock Act, 1931; and matters connected with, or incidental to the forgoing;*

“It can be noticed that the Minister of Finance was the main player years ago. This is still the case today. Recently, the law requires public debt to be approved by parliament. This is not an unusual requirement. In a lot of countries, this is done to make the executive accountable. It is necessary because if parliament does not approve the debt, the executive would be borrowing without anybody providing oversight. Therefore, parliamentary approval is a control measure that there should be some form of oversight. The requirement of parliamentary approval for government borrowing makes it easier to track and manage debt as the former is registered with parliament. This encourages the government to carefully consider their borrowing decisions and their potential impacts. If the debt is not known, it raises debates regarding how much the country owes and to whom.”

WHO IS VESTED WITH THE POWER TO SOURCE EXTERNAL DEBT?

“As per **Section 11 of the Public Debt Management Act No.15 of 2022**, the Minister of Finance is the one responsible and vested with such powers. He is conferred with the statutory power to bind the nation in contractual arrangements with foreign parties.

Parastatals would need a guarantee and the Minister of Finance will act as such. However, the Ministry of Finance is part of the executive and that is why in most countries like Zambia, the aspect of oversight has been introduced where parliament is involved to be notified and to approve the debt. This has its own problems that can be observed even in the USA through debates concerning public debt. Obviously, if a government does not have control of parliament it can be an obstacle in that there will be a stalemate. Government needs money to do things but then parliament would say no which mostly happens in some countries. However this is often not the case in Zambia as governments have always had the majority representatives in parliament. “

REFERENCE TO THE QUESTION ABOVE, IS IT AN ABSOLUTE AUTONOMOUS POWER?

“Obviously no. This is because the Minister has to seek parliamentary approval. Apart from that, he makes the decision on how much should be borrowed and contracts after parliamentary approval.”

MOST CITIZENS ARE IGNORANT ON MATTERS OF PUBLIC DEBT. DO YOU THINK THE LAW CREATES A GAP BETWEEN ITSELF AND SOCIETY IN GETTING INFORMATION ON DEBT MATTERS?

“Information is vital. There are many ways of ensuring that this is happening. There are always discussions on the **Access to Information Act** which in most countries is used as a way to give and get access to information. But there is also a huge role played by the media. I am afraid to say, sometimes our media is too sensational. It is very important to check the facts first. It is more credible when you report something and the facts are true. A factual basis is very important. The provision of accurate information is crucial in making informed and conclusive decisions, especially when it comes to matters of public debt. The media plays a significant role in fulfilling this responsibility by disseminating factual information to the public. They must conduct thorough research before publishing their gathered facts. Information is available, it just takes interest in the matter and Zambians should take an interest. Yes the law may limit, but not all information.”

DO YOU THINK THE REASON WHY MEDIA HOUSES DO NOT GIVE FULL AND CORRECT FACTS IS BECAUSE THEY ARE LIMITED BY LAWS?

“I think it is a combination of many things. The stories that come out of their publication should be checked thoroughly by their respective editorial boards. They must check whether a story is baseless or the facts are correct. Or ask the reporter to investigate more.”

IS THERE A REGULATION THAT SETS A LIMIT TO THE TOTAL AMOUNT OF OUTSTANDING PUBLIC DEBT AT THE END OF THE FISCAL YEAR OR OTHER RELEVANT DATE?

“No. The whole idea of monitoring and parliamentary approval of public debts is to make sure that we know how much debt Zambia is contracting. Otherwise, it would be very difficult to know how much we are contracting and how much we owe. This information should be made available for the purpose of making the executive accountable. The issue of government borrowing is not unique to any particular country. In the United States, for instance, there is a significant ongoing debate between the Republicans and Democrats regarding the upper limit of the state's borrowing capacity. But most countries don't set upper limits but approval controls. There are many ways, and approval control is in itself a control seeing that people know how much is being borrowed. Others put an upper limit. But putting an upper limit of course means that you can predict how much the country needs. This requires a lot of expertise otherwise it becomes a difficult struggle to maintain government operations due to a lack of available funds.”

WOULD YOU SUGGEST THAT PARLIAMENT SHOULD ENACT SUCH AN ACT THAT EXPLICITLY LIMITS THE GOVERNMENT'S BORROWINGS BY PUTTING AN UPPER LIMIT?

“This is difficult because if this is to be put, meaning the government would have to know or else it will be paralyzed. Sometimes it is better to put controls because you do not know how much you will need for a particular period as most circumstances in need of money cannot be predicted. Maximizing accountability is essential in ensuring effective oversight of government borrowing. Accountability serves as an effective check, as it allows for informed decisions to be made regarding the borrowing of funds. Without the necessary information about the purpose and potential productivity of borrowed funds, it is difficult to make informed borrowing decisions.”

IS THERE A REGULATION THAT SETS LIMITS (VALUES OR RANGES) TO THE COSTS AND RISKS ASSOCIATED WITH PUBLIC DEBT AND PROVIDES FOR GUIDELINES TO MEASURE THEM?

“The whole idea of monitoring and parliamentary approval is to make sure that we know how much debt Zambia is contracting. Otherwise, it would become very hard to know how much we are contracting and who we are contracting from. There is always a huge debate with regard to how much the government should be allowed to borrow. Even in America, that has been the debate. Most countries do not set upper limits but approval controls.”

WOULD YOU OPINE THAT SUCH A REGULATORY INSTRUMENT OR PROVISION IS IMPORTANT AND THERE IS A NEED TO ENACT ONE?

“I think this is difficult. This is because this would paralyze the government. Setting a limit means you need to put in expertise to predict what will be needed even in the future which is impossible as a lot of things that cannot be predictable happen. Instead of such, accountability should be maximized.”

IS THERE A REGULATION THAT DETERMINES THE INSTRUMENTS AND MARKETS THAT CAN OR CANNOT BE USED IN THE MANAGEMENT OF PUBLIC DEBT?

“Usually, when a government borrows, they are borrowing on behalf of various sectors. It may be that they are borrowing to build hospitals, the Ministry of Health would have been involved in that. They might also be borrowing to build schools. They are many reasons why the government would like to

borrow. What worries a lot of people is whether or not the money is being borrowed for consumption. The idea is that government should be borrowing for things that are going to produce something that is going to create wealth. For example, to create jobs you need to invest in the economy. There is no country that has grown without investment. For this reason, the money should be for production not consumption.”

WHAT ARE THE CONSTITUTIONAL AND OTHER STATUTORY MECHANISMS SET UP FOR THE PURPOSE OF MONITORING AND CHECKING THE POWERS OF THE MINISTER OF FINANCE AND GOVERNMENT ON PUBLIC DEBT?

“There is a concern. There is a provision that any public debt contract must be approved by parliament. That is a check on itself. You are informed of what the Ministry of Finance is contracting. These are the regulatory measures. What we have to effect is transparency in borrowing. This means information should be provided and that way we will be able to make intelligent comments on whether the debt is necessary or not.”

DOES ZAMBIA HAVE SUFFICIENT LAWS THAT GOVERN PUBLIC DEBT ACCOUNTABILITY AND TRANSPARENCY?

“The ample fact that parliament has to approve before the Minister of Finance can acquire the debt shows that there are laws that aim to ensure that there is transparency and accountability. Governance and transparency are ongoing processes, and any deficiencies or loopholes in these areas must be addressed through the enactment of additional laws and regulations. This ensures that the necessary measures are in place to maintain accountability and transparency in government operations. The key of the laws should be transparency and information on public debt should be in the public. The test should be whether the current law is enough to ensure that there is transparency.”

WHATS YOUR ADVICE TO ZAMBIA?

“Zambia should do a comparative study. This will enable them to have information and make good laws.”

WHAT WORD OF ADVICE WOULD YOU GIVE TO LAW STUDENTS?

“Once you have decided to be a lawyer, you should be open to learning. It is very important to read widely because the law does not come in compartments. For this reason, reading widely is very useful. As they say, “Reading makes a wise man but writing makes an exact person”. In America, you cannot graduate unless you do legal writing. We assume we all know how to write but it takes practice. And it is critical for a lawyer to write well because whatever you express, you have to express it in writing. You will write briefs, judgments, and so on. It is a good skill that you acquire by practice. It is not easy. It becomes easier as you go on.

Make sure that you act with integrity. Integrity is the one thing that only you can give away. No one can take integrity from you. It is critical that young lawyers consider integrity to be very important. Also, look at things critically not based on face value. You can make yourself a great lawyer, there is no secret to it just hard work.”