IN THE SUPREME COURT OF ZAMBIA **Appeal No. 137/2016**
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BP ZAMBIA PLC **1ST APPELLANT**

PUMA ENERGY ZAMBIA PLC **2ND APPELLANT**

AND

RICHARD MUMBA AND 69 OTHERS **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Mutuna, JJS**
on 7th May, 2019 and 20th May, 2020

For the Appellant: Mr. M. Nchito, SC and Mrs. N. Simachela, of Messrs Nchito & Nchito

For the Respondents: Mr. R. K. Malipenga, of Messrs Robson Malipenga & Co.

JUDGMENT

MALILA, JS, delivered the Judgment of the Court

Cases referred to:

1. *National Milling Co. Ltd. v. Grace Simataa and Others (SCZ Judgment No. 21 of 2000).*
2. *Wilson Masauso Zulu v. Avondale Housing Project Ltd. (1982) ZR 172.*
3. *Konkola Copper Mines Plc. v. Jacobus Kenne (Appeal No. 29 of 2005).*
4. *Solomon v. Solomon & Co. (1897) AC.*
5. *Associated Chemicals Ltd v. Hill and Delamain and Another (1998) SCZ Judgment.*
6. *Chanter v. Hopkins (1838) 4 M & W 399 (Exch).*
7. *Associated Chemicals Ltd. v. Hill and Delamain Zambia Ltd and Ellis & Co. (1998) SCZ Judgment No. 7.*

8. *Consolidated Copper Mines v. Sikanyika & Others (SCZ Judgment No. 24 of 2000.*
9. *Kankomba & Others v. Chilanga Cement Plc (2002) ZR 129.*
10. *Associated Chemicals Ltd. v. Hill and Delamain Zambia Ltd and Ellis & Co. (1998) SCZ Judgment No. 7.*

1.0 Introduction

1.1 We regret the delay in delivering this judgment. This is due to a combination of circumstances beyond our control

1.2 The respondents had been employees of the first appellant for different periods up until 1st April, 2011 when they became employees of the second appellant. As well as being employees of the first appellant, they were members BP International Plc, the holding company of the first appellant company, having held varying numbers of shares in that company.

1.3 By virtue of being such shareholders, the respondents claim they were naturally affected by the first appellant's actions, decisions and policies. They furthermore claim that they ordinarily participated, or at least expected to be kept informed of fundamental decisions made affecting the first appellant company.

1.4 The respondents allege that although they used to vote on issues affecting the first appellant, this was not the case with the decision that was taken in about November 2010 regarding the sale of shares in the first appellant company to the second appellant though its holding company. The negotiations leading to the sale were kept secret and confidential, yet they were to have far reaching consequences to the respondents' interests as employees of the first appellant and shareholders in BP International Plc.

2.0 The dispute and its origin

2.1 The genesis of the respondents' grievance was in truth, the decision by BP International Plc to sell its interest in its African Associated companies for strategic reasons. To this end, BP Africa Limited, the majority shareholder in the first appellant company, decided sometime in 2010 to sell its shares in BP Zambia Plc to Puma Energy (Ireland) Holdings Ltd. (Puma Energy). Seventy-five percent of those shares, which were alleged by the respondents to include their shares, were contracted to be sold. Neither the negotiations nor the sale itself was notified to the respondents till very late in time.

1.2 The respondents further claim that the first appellant had made numerous assurances and undertakings that the sale of equity interest in the first appellant to the second appellant would take the respondents' interests, as employees, into account and that the later would suffer no detriment or prejudice whatsoever.

1.3 According to the respondents, examples of such assurances are to be found in the first appellant's letter to the Labour Commissioner dated 29th July, 2010 where the first appellant assured that "employees will continue under their current employment contracts with no change in their terms and conditions." In another letter by the first appellant through its Southern African office dated 13th December, 2010 to its Southern African employees, the first appellant assured the respondents, among other things, that:

> **BP Zambia will ensure that all your current terms and conditions, including benefits, will continue as they did when BP Zambia Plc was a member of the BP Zambia Group**
>
> ...

1.4 A similar undertaking is said to have been made in the first appellants' letter dated 28th September, 2010 addressed to the National Union of Transport and Allied Workers.

1.5 The second appellant is alleged to have equally made undertakings that it had agreed with BP Zambia Plc that it would not make any adverse material changes to the terms and conditions of the respondents without first consulting with the workers and their representatives in relation to the proposed changes.

2.6 When on the 19th March, 2010 the respondents raised with the first appellant the issue of the transfer of their shares in the share-match scheme, the first appellant assured that:

> **At the point the sale occurs, employees will need to take a decision whether to sell the shares accumulated in their name or have those shares transferred into their own name. This will need to be done in accordance with the rules of the share scheme. More details will be provided nearer the date of the sale and employees will be given sufficient time to take the necessary decision.**

2.7 To the surprise of the respondents, the first appellant's Human Resources Manager sent an email to the respondents on 6th April 2011, stating that the share-match program was operated by BP [International Plc] at its discretion and applied to eligible permanent staff. And furthermore that it was not part of their contractual terms of employment. Additionally, if an employee left the BP group the shares must be sold and they would not be able to participate in any future share-match offer.

2.8 Employees were also advised that following their crossing over from BP Zambia Plc to Puma Energy Zambia Plc, the share-match scheme rules were to apply and that all employees who participated in BP's share-match program were to fill in a form (attached to the email) to sell their shares now that they were out of the BP group. A date by which this was to be done, was also indicated.

2.9 In compliance with the directive in the email, the respondents filled in and signed the forms by the appointed date and sent the same to a Mr. Francis Mulenga, the HRA.

2.10 The respondents opined that the contents of the appellants' email of the 6th April, 2011 constituted a fundamental breach of the contract of employment to the extent that it proclaimed that the share-match scheme did not form part of the contractual terms of employment between the respondents and the first appellant. They also contended that the sale of 75% interest or shares in the first appellant to the second appellant terminated the employment of the respondents in that the first appellant is not continuing as a legal entity.

3.0 The respondents commence legal proceedings

3.1 The respondents were prompted by the circumstances as narrated in the preceding paragraphs to take out proceedings in the High Court, claiming a number of reliefs, including:

(i) a declaration that the appellants BP Zambia Plc and Puma Energy on 6th April, 2011 repudiated and breached the contract of employment by unilaterally cancelling the share-match scheme which varied the terms and conditions of the contracts of employment, as a result the respondent's employment was terminated.

(ii) a declaration that the respondent's sale of shares was procured by the appellants by fraud, dishonest, trickery and contrary to the terms and conditions enjoyed by

the respondents and thus unilaterally altered the Respondent's conditions to their detriment.

3.2 In reaction to the respondents claim in the lower court, the appellants denied the claim, most emphatically, contending that the first and second appellants are in fact one and the same company and as such the first appellant is still the respondent's employer. They also contended that not all employees had participated in the share-match scheme and that in fact those employees who had participated in the share-match scheme had no shares or interest in the first respondent but had shares in BP International Plc and that the shares in the first appellant company were sold by BP Africa Limited, which was the majority shareholder.

3.3 The appellants also maintained that there had been no unilateral changes to the respondents' contracts of employment; nor had there indeed been any breach of the terms and conditions of any of those contacts as alleged, the appellants having fully complied with the law, with all the employees enjoying their full benefits.

3.4 It was also the appellant's case that from the commencement of the share-match scheme, the respondents were advised that the scheme did not form part of their contractual terms of employment as it was operated at the discretion of the employer and as such, did not constitute a fundamental term of the respondents employment contracts. The share-match scheme, in any case, only related to shares in BP International Plc and not in BP Zambia Plc (the first appellant).

3.5 According to the appellants, the share-match scheme was a non-guaranteed benefit in terms of the respondent's contacts of employment and was premised on the employer remaining part of the BP group which the first appellant left on 1st April, 2011.

4.0 The High Court decides

4.1 Chawatama J heard the respective position of the parties and considered the evidence deployed before her. She came to the conclusion that the share-match scheme was operated at the first appellant's discretion which decided to make it a term of the contract of employment.

4.2 She found that there was no evidence before her to prove that the appellants procured the sale of shares by fraud, dishonesty or trickery. She nonetheless concluded that the appellants were in breach of both the sale/purchase agreement and the contracts of employment and that the respondents were thus entitled to damages.

5.0 An appeal is launched

5.1 Unhappy with the High Court judgment, the appellants have appealed on four grounds structured as follows:

1. **The court below erred in law and in fact when it held that the appellants were in breach of both the Sale/Purchase Agreements and the respondents' contracts of employment;**

2. **The court below erred in law and in fact when it held that the share match scheme was a fundamental term of the respondents' contracts of employment.**

3. **The court below erred in law and in fact when it held that the appellants did not give the respondents options available to them when in fact the appellant produced evidence to show that the respondents were informed of the options available to them upon cancellation of the share match scheme; and**

4. **The court below erred in law and in fact when it held that the respondent's contracts of employment were terminated on 6th April, 2011.**

5.2 The respondent also launched its own cross appeal on three grounds as follows:

I. **The court below erred in law and fact when it inadvertently did not consider and address some relief in the merit of summons and statement of claim as follows:**

(xi) **A declaration that the plaintiff's employment contracts were terminated by the Defendants and are entitled to separation of redundant benefits as from 6th April, 2011.**

(xii) **An order for payment of redundant or retirement benefits**

(xiv) **Interest.**

II. **The court below erred in law and fact when it inadvertently did not pronounce itself whether the appellants herein in this cross appeal were declared redundant or early retirement as per the authority of National Milling Company v. Grace Simataa and Others[1].**

III. **Respondents agree with the court below when it stated in its Ruling of 11th May, 2010 that only the Supreme Court could address issues raised on the Application for Review of its judgment for which the Respondents, sort review were not clear, are therefore not addressed [sic!]**

5.3 Heads of arguments in support of the appeal were filed on behalf of the appellants by Messrs Nchito and Nchito and their learned counterparts for the respondents equally filed theirs in opposition on behalf of the respondents. There were, however, no heads of argument filed in support of the cross appeal.

6.0 The appellant's case on appeal

6.1 In arguing in support of the first ground of appeal, the learned counsel for the appellants quoted a passage from the judgment of the lower court where it stated that the court could not hold that the sale of shares by BP to Puma was illegal but could state that the new management had neglected to honour its obligations under the various undertakings including those contained in the share sale and purchase agreement dated 12th November, 2010.

6.2 Counsel also quoted another passage where the lower court stated that no evidence was presented to it to show that the appellant procured the sale of shares by fraud, dishonesty or trickery and that there was, in fact, acquiescence by the respondents to the sale of shares but that the appellants were nonetheless in breach of the sale/purchase agreement and the contracts of employment and, therefore, that the respondents were entitled to damages.

6.3 Counsel contended that the appellants were not in breach of the sale and purchase agreement or the respondents' contracts of employment. The lower court thus misapprehended clause 2.3.1 of Schedule 8 of the sale and purchase agreement that provided for the protection of employees' benefits during the Protected Period – which was 12 months from the Sale Completion Date. Counsel quoted the clause in question and submitted that it was an undertaking by the second appellant, as purchaser, not to amend or terminate any employee benefit arrangements and to continue to provide the same or substantially equivalent benefits to the employees where necessary.

6.4 It was further argued that the share-match scheme documents on record show that the share-match scheme was an investment opportunity facilitated by participating subsidiaries and could be amended, suspended or terminated at the discretion of BP International Plc. At the finalization of the sale and purchase agreement, BP Zambia Plc (the first appellant) ceased to be a subsidiary of BP Africa Plc and BP International Plc and could thus not be a participating company in the share-match scheme.

6.5 Likewise, under the respondent's standard form contract of employment, the share-match scheme was listed as a non-guaranteed benefit as it was not meant to be a fundamental contractual term of employment.

6.6 Counsel went further to point out that the obligations of Puma Energy (Ireland) Holdings Limited under clause 2.3.1 of the Share Sale and Purchase Agreement was to provide a similar benefit to the one lost where it was possible and necessary to do so. In the circumstances, Puma Energy Zambia Plc did not run a share incentive scheme similar to the share-match scheme subsisting under the BP group so as to be obliged to

provide a substantially similar benefit. In any case, the share-match scheme was a non-guaranteed benefit in the respondent's standard contracts. The court could thus not make what was a discretionary benefit a mandatory one. Counsel submitted that the appellants were therefore, not in breach and that ground one of the appeal should accordingly be allowed.

6.7 Turning to grounds two and four, which were argued together, it was the contention of counsel for the appellants that the court fell into error when it held that the share-match scheme was a fundamental term of the contract which was breached. He contended that the scheme was in fact a discretionary incentive by BP International Plc, facilitated by the first appellant (BP Zambia Plc) that gave employees an opportunity to be shareholders in BP International Plc which is listed on the London Stock Exchange.

6.8 When the BP Group sold its interest in Africa, the first appellant, being one of the associated companies in Africa, was affected. This, according to counsel, meant that the first

appellant could no longer remain a member of the BP Group and, therefore, the share-match scheme could not survive.

6.9 To buttress the position taken by the appellants that the share-match scheme was discretionary, the learned counsel referred us to the BP Share-Match Brochure which states that:

> **Participation in Share Match does not form part of your contractual terms of employment and is operated at BP's discretion. The Matching Share you receive will not therefore be included for purposes of calculating any of your benefits or any payment due to you on termination of your employment with the BP, except where required by legislation. You are not entitled to any compensation if BP decides not to run Share Match in any particular year or to discontinue or amend Share Match.**

6.10 Counsel also quoted another passage from the BP Share-Match Brochure which reads as follows:

> **Your participation in Share Match is subject to the Rules of the BP Share Match Plan (Share Match). Participating in Share Match is a guide to Share Match but on all matters of interpretation the actual Rules of Share-Match will prevail. A copy of the Rules of Share-Match is available from your Local Share-Match Administrator. BP reserves the right to suspend, terminate or amend the terms of Share-Match. You will be notified of any change to Share-Match which may be relevant to you.**

6.11 We were also referred to the cases of **National Milling Co. Ltd. v. Grace Simataa and Others**[1] in which we stated that an employer who varies, in an adverse way, a basic condition or basic conditions of employment without the consent of the employee, terminates the contract of employment and the employee is deemed to have been declared redundant or early retired – as may be appropriate.

6.12 Counsel stressed a point we made *obiter* in that case, namely that variations to non-basic conditions, even if unilateral and disadvantageous to the employee, would not affect the essential viability of the contract of employment and would, in all probability, not discharge it. Arising from this, the learned counsel reiterated that the share-match scheme in the present case was a non-guaranteed benefit, offered at the discretion of the first appellant. It was a non-essential term of the contract and governed by the Scheme Rules. It was, therefore, a misdirection for the lower court to hold that its cancellation amounted to a breach and termination of the respondents' contracts. For these reasons, counsel urged us to uphold grounds two and four of the appeal.

6.13 In arguing ground three of the appeal, the learned counsel submitted that the trial court was wrong to make a finding that the employees had an option of holding the shares in their own names but this option was not made available to them.

6.14 In the appellants' estimation, the lower court was wrong to so find because a proper view of all the evidence laid before the court would have showed that the respondents were informed of their option. This being a finding of fact, it was counsel's submission that we should tamper with it as it did satisfy the criteria to justify this court's interference of such findings as we articulated them in **Wilson Masauso Zulu v. Avondale Housing Project Ltd.**[2] and in **Konkola Copper Mines Plc v. Jacobus Kenne**[3].

6.15 The learned State Counsel submitted that in the present case, there was an email that was circulated to the respondents by the first appellant which showed that the respondents had a choice which they indicated by ticking one of the boxes to show which option they had selected between selling their shares and owning them independently of the first appellant. In the same email, it is indicated that the respondents had,

through prior presentations and meetings, been made aware of the terms and conditions of the share-match scheme and the options available to them in the event of cancellation.

6.16 Likewise, according to counsel, through the Share Match Scheme Brochures and presentations, the respondents knew that being shareholders in BP International Plc. gave them rights such as participation in its annual general meetings held in London and a right to receive dividends. Consequently, the lower court's finding was a misapprehension of the facts presented before it and the elementary principles of company law.

6.17 Counsel then moved to argue a different point. Citing the case of **Solomon v. Solomon & Co.**[4] and **Associated Chemicals Ltd v. Hill and Delamain and Another**[5] to stress the point that a company has a separate legal personality from its shareholders, he submitted that holding shares in BP International Plc did not by implication make the respondents shareholders in the first appellant (BP Zambia Plc). Counsel referred us to the list of shareholders of BP Zambia Plc produced in the record of

appeal where neither the respondents' names nor their share-match scheme shares appeared.

6.18 At the hearing of the appeal, Mr. Nchito, SC, augmented the heads of argument orally. In respect of ground one of the appeal he reiterated that the lower court misapprehended the provisions of the employment contracts as well as the share sale and purchase agreement. He submitted that neither the first nor the second appellant was party to the latter agreement and could thus not be in breach of a contract to which they were not privy.

6.19 Even assuming that they were party to the share sale and purchase agreement, the appellants, according to the learned State Counsel, did nothing contrary to the provisions of that agreement. The share sale and purchase agreement, subject of the present dispute, was for shares in BP Zambia Plc and BP International Plc was selling its shares in BP Zambia Plc held through BP South Africa Plc. The second appellant could not maintain a share matching scheme in a company it was not related with.

6.20 Mr. Nchito, SC, submitted that a perusal of clause 2.3.1 of the Share Purchase Agreement shows that the second appellant was only obliged to maintain the matching share-scheme if it could, or had a similar scheme. As it was, the second appellant had no such scheme.

6.21 As regards the alleged breach of employment contracts, the learned State Counsel reiterated that the share-match scheme was being run as a discretionary scheme by BP International Plc. If there was any breach of the contract of employment in respect of the share-match scheme — and State Counsel argued there was none — such breach could not be a breach of the employment contact. In developing this argument, the learned State Counsel related it to the argument in ground two that the share-match scheme was not a fundamental term of the respondents' employment contracts.

6.22 It was further argued that the share-match scheme was for ownership of shares in BP International Plc and thus by no stretch of imagination, could ownership of shares in that distinct company be a fundamental term of employment in a

totally distinct company. Even if it could be a term of the contracts of employment, it could not be a fundamental term whose breach would necessitate or lead to a termination of employment.

6.23 State Counsel then argued a point which he associated with ground three, namely that the lower court was totally misdirected to hold that having shares in one company automatically meant that the holder of such shares owns shares in a subsidiary of that company. That holding, according to the learned counsel, defies the basic premises upon which company law is founded, i.e. separate corporate personality as expounded in **Solomon v. Solomon & Co**[4].

6.24 In our continued engagement with State Counsel Nchito, we referred him to the terms of the contracts of employment which included participation in the share-match scheme, and solicited his comments as to whether that did not make the scheme an integral part of the contracts of employment. In response, the learned State Counsel intimated that although the share-match scheme could be said to be part of the terms of employment, it did not become a fundamental term as this

court explained it in the **Grace Simataa case**[1]. According to Mr. Nchito, SC, the discretionary and conditional nature of the share match scheme far removed it from being a fundamental term. He maintained that not every term of a contract of employment is fundamental. He cited, as an example, a term in a contract which required employees to commence work at 08.00 hours. A change of such term so as to require employees to report at 08.30 hours would not be a change of a fundamental term.

6.25 Counsel reiterated that at the conclusion of the share sale agreement, BP International Plc sold its shares in the first appellant and gave the employees the option to sell the shares or own them in their own name because the new holding company was different from BP International Plc. The employees were then paid off for the shares. This is not in dispute; what is in dispute is whether the termination of the share-match scheme terminated the contract of employment.

6.26 Mr. Nchito, SC, admitted that clause 11 of the contracts of employment did confer on all eligible employees participating in the share-matching scheme some sort of benefit, but

denied that removing that benefit deprived those employees of it because they were paid off.

6.27 We were urged to hold that the whole appeal was meritorious.

7.0 The respondent's case on appeal

7.1 In opposing the appeal, the learned counsel for the respondents principally relied on the heads of argument as filed. Counsel contended that there were various undertakings by the management of the appellants through its Managing Director; through the Chairman of Puma; through its contracts of employment and through the sale/purchase agreement.

7.2 The learned counsel also placed an interpretation on the holding by the lower court judge that the respondent had not presented evidence before her that the appellants procured the sale of shares by fraud, dishonesty or trickery. According to the leaned counsel, what the court meant was the sale of shares of BP Africa to Puma Energy and not the forced sale of the individual employees' shares held at the London Stock Exchange. According to counsel, in the lower court the

respondents had demonstrated that it was their shares held at the London Stock Exchange which were sold through fraud, dishonesty and trickery.

7.3 Regarding the argument on the Protected Period, counsel contended that the protected period began on 1st April, 2011 and should have run to 31st March, 2012 but the appellants, barely six days into the Protected Period, gave directives via the email on 6th April, 2011, to cancel the share-match scheme. During the Protected Period, Puma was not to unilaterally amend or cancel any of the benefit arrangements, whether contractual or discretionary in nature.

7.4 Counsel contended that there were procedures stipulated in the contracts of employment on variation, suspension or termination of the share-match scheme, and the rules on the mode of sale of shares, provided for thirty working days' notice. There was no evidence furnished that BP International Plc terminated the share-match scheme. What is available is evidence that Puma terminated it by email of 6th April, 2011.

7.5 It was also argued that although the provisions of clause 2.3.1 of the share sale/purchase agreement obliged the purchaser, Puma Energy (Ireland) Holding Ltd., to provide a similar benefit to the one lost where it was possible and necessary, it failed to do so because it did not run a share incentive scheme similar to the share-match scheme under BP nor did it provide a similar incentive. Puma did not furthermore need to force the employees to sale their shares at the London Stock Exchange as the employees could have remained shareholders in BP International Plc.

7.6 Counsel also submitted that the non-guaranteed benefit nature of the share-match scheme meant that it was not dependent on whether the company made a profit or not for there to be a purchase of shares by employees. Counsel urged us to dismiss ground one of the appeal.

7.7 In regard to the second and fourth grounds of appeal, the respondents' learned counsel maintained that the share-match scheme was enshrined in the contracts of employment under reward and remuneration and was thus a fundamental term. In this regard, the lower court did not err in its holding.

7.8 Counsel referred us to the provision in the contracts of employment where varying, adding to, deleting from or cancelling the agreement had to be in writing and signed by both parties. In this case, the appellants unilaterally cancelled the share-match scheme, a fact which the appellants did not dispute. According to counsel, there was no prior bargain or agreement. All that the respondents saw was an email of 6th April, 2011.

7.9 According to counsel for the respondents, the brochures which the appellants relied upon were mere reading materials which did not form part of the respondents' employment contracts. Counsel submitted that grounds two and four have no merit and should be dismissed.

7.10 Turning to ground three, the learned counsel for the respondent supported the holding of the lower court that the appellants did not give the respondents the opportunity to exercise options available to them. He reproduced the email of 6th April, 2011 and submitted that it did not give the respondents any choice, particularly when it stated that:

[a]ll employees who participated in BP's Share-Match Program must fill in the attached form to sell the shares.

7.11 Counsel concluded that with this directive having been given to the respondents, the court was right to hold as it did. The ground, submitted by counsel for the apppellant thus has no merit and should be dismissed.

7.12 In orally supplementing the heads of arguments, Mr. Malipenga read out the email addressed to the respondents by the first appellant and dated 6th April, 2016 and reiterated that there was no option given to the respondents as they were commanded or ordered to sell.

7.13 Counsel submitted that the appeal before the court appears to have been premised on the brochure and not on the contract of employment. He contended that the brochure, however, never formed part of the respondents' contracts of employment.

7.14 Mr. Malipenga also referred us to the standard contract of employment and identified what he called the breakdown of the remuneration package. The items in that package, according to him, are the basic salary, the 13th cheque, the

flexible cash allowance, the contributory medical aid, the National Pension Scheme Authority, the Madison Pension Scheme, the Non-Contributory Personal Accident Scheme, the Non-Contributory Workers Compensation Fund, the Drivable Pay Program, the Share Match Scheme and lastly Tax. This, in counsel's view, makes the share-match scheme a fundamental term of the contract as it forms part of the remuneration package.

7.15 The learned counsel repeated the point that the appellant appears to base their claim on a brochure rather than the contract of employment and the Personnel Manual. He repeated that the share-match scheme was a fundamental term of the contract enshrined in the contracts of employment as well as the Personnel Manual.

7.16 Participation in the share-match scheme gave the respondent the opportunity to acquire an interest in BP International Plc; to be more closely involved in the fortunes of BP International Plc and its subsidiaries worldwide, including BP Zambia Plc.

7.17 Mr. Malipenga at that point nearly went into his cross-appeal when he raised the issue of failure by the lower court to pronounce itself on the fate of the respondent – i.e. whether they were deemed to have been declared redundant or retired.

7.18 Mr. Nchito, SC, then rose to raise objection to the submission on issues covered in the cross-appeal. His discomfort stemmed from the fact that the respondents had only filed the notice of cross-appeal and not the heads of argument. His clear recollection of the rules was that the notice and grounds of cross-appeal ought, like the main appeal, to be accompanied with the heads of argument. As it was, there were no heads of argument for him to respond to.

7.19 In answer to our question whether heads of argument in support of the cross-appeal had been filed and served on the appellant's advocates, Mr. Malipenga confirmed that none had been prepared, filed and served, but instead that the cross-appeal raised purely issues of the law.

7.20 Upon our making it clear to Mr. Malipenga that a cross-appeal is in the same stead as the main appeal in as far as the need for heads of argument is concerned, Mr. Malipenga

sought an adjournment to enable him file the heads of argument. We declined the application on grounds that the failure to file the heads of argument earlier had no justifiable excuse. The learned counsel thereupon indicated that the would leave the fate of the cross-appeal in the hands of the court.

7.21 In our oral exchange with Mr. Malipenga, we asked him in what respects he viewed the appellants as having breached the share sale and purchase agreement. His response was that, that agreement had protective clauses which indicated what the appellants would do during the Protective Period, namely to maintain the share-match scheme. Just days after the agreement however, the share-match scheme was terminated by email of 6th April, 2011.

7.22 Asked whether the respondents' contracts of employment provided for either retirement or redundancy, Mr. Malipenga responded that they provided for both; that although the contracts did not expressly so provide, every employee on permanent and pensionable terms is expected to retire; that

the law as explained in **Grace Simataa v. National Milling Company**[1] stipulates for redundancy.

7.23 Mr. Malipenga also indicated that the respondents were unhappy with the length of the notice period for the sale of the shares.

7.24 In concluding, not only did the learned counsel for respondents urge us to dismiss the appeal, he also implored us to uphold the respondents' cross appeal.

8. The appellants' response

8.1 In his brief reply, Mr. Nchito, SC, pointed out that the part of the contracts of employment read out by the respondent's learned counsel, does provide in section C for the different kinds of remuneration. First is the fixed component, followed by benefits, and then non-guaranteed benefits. The shares are in the non-guaranteed category and are thus non fundamental. To understand how the shares were to be dealt with, one had to go to the share-match scheme rules and the scheme match brochure. Even the notice referred to by the learned counsel for the respondent was set out in the scheme rules.

8.2 The final point on which counsel responded was on the ownership of shares in BP Zambia Plc. He posited that the naming of BP Zambia Plc in the share-match scheme does not make the holder of shares in BP International Plc a shareholder in BP Zambia Plc.

8.3 State Counsel prayed that we uphold the appeal.

9.0 Analysis and decision of this Court

9.1 We have considered, with interest, the arguments of the parties in light of the judgment of the lower court. The issues for determination, as far as we can ascertain, are first, whether the share-match scheme was a fundamental term of the contracts of employment of the respondents. Second, whether there was any breach by the appellants of the respondents' employment contracts as they implicate the share-match scheme. Third, if the answer to the second issue be in the affirmative, what the consequences of such breach are.

9.2 With these broad issues in mind, we now turn to consider the individual grounds of appeal.

9.3 With respect to ground one, the question simply put is whether the appellants were in breach of both the sale/purchase agreement and the respondents' contracts of employment. This question is intrinsically related to the issue raised by ground two of the appeal namely, whether the share-match scheme was a fundamental term of the respondents contracts of employment.

9.4 We have already recounted the thrust of the appellants' argument in respect of ground one. In a nutshell, it is that the lower court misapprehended clause 2.3.1 of Schedule 8 of the share sale purchase agreement which provided for the protection of employees during the Protected Period; that the share-match scheme was merely an investment opportunities for employees and could be amended or suspended at the discretion of BP International Plc; that the first appellant ceased to be a subsidiary of PB International Plc at the conclusion of the sale and purchase agreement and thus ceased to be a participating company in the share-match scheme. In any event, the share-match scheme was a non-guaranteed benefit and as such was not intended to be a fundamental term of employment.

9.5 The respondent's counsel, of course, disagreed with the appellant on all these aspects and supported the holding of the lower court that the share-match scheme was a fundamental contractual term which was breached.

9.6 We must be clear from the outset that we are here dealing with a claim of breach of employment contractual terms. The respondents' claim, as we understand it, is that the appellants breached their contract of employment as they pertain to the share-match scheme and this in turn terminated their contracts of employment, thus rendering them redundant.

9.7 It should follow, as a matter of logic, that the share sale and purchase agreement concluded between BP International Plc, BP Africa Plc and Puma Energy (Ireland) Holdings Plc, to which neither the first appellant nor the respondents were privy, cannot be a subject of breach of the employment contract subsisting between the appellants and the respondents. The operation of the common law principle of privity of contract precludes the respondents, as third parties to the share sale and purchase agreement, from asserting

rights under or claiming benefits of the contract to which they are not privy.

9.8 Additionally, we think there is merit in the submission of State Counsel Nchito that we need to keep clear of the operation of separate corporate personality. The first appellant is separate and distinct from its parent company or shareholder, BP International Plc or BP Africa Plc, nor is indeed BP Zambia Plc the same as Puma Energy (Ireland) Holdings Limited.

9.9 We accepted, however, on the authorities of **Associated Chemicals Ltd. v. Hill and Delamain Zambia Ltd and Ellis & Co.**[7], **Consolidated Copper Mines v. Sikanyika & Others**[8] and **Kankomba & Others v. Chilanga Cement Plc**[9] that a change of shareholders does not change the legal character of a company.

9.10 In the present case, the company in issue was BP Zambia Plc whose share ownership was transferred from BP International Plc to Puma Energy (Ireland) Holdings Ltd. We surmise that following that change of shareholding, there was also a change of name from BP Zambia Plc to Puma Energy Zambia Plc.

9.11 With the foregoing caveats in mind, we revert to the question whether there was a breach of a fundamental term of the contract of employment to the detriment of the respondents.

9.12 Although the parties have used the term 'fundamental' term, none of them has precisely defined what a fundamental term is. Mr. Nchito, SC, has suggested that the term 'fundamental' should carry the connotation we attributed to the term 'basic' in the **Grace Simataa case**[1] so that a breach of a non-basic term should be the same as a breach of a non-fundamental term — both of which do not lead to the termination of the contract of employment.

9.13 We are, however, not unmindful that as regards terms of a contract, in addition to warranties, conditions and innominate terms, fundamental terms constitute a fourth category. A term of a contract is called fundamental if it goes to the 'core' of the contract. The example provided by Lord Abinger in the old case of **Chanter v. Hopkins**[6] remains relevant. He said there that if a person asks to be supplied beans but is instead supplied peas, the contract has not been

performed. The supply of peas, rather than beans, is a breach of a fundamental term.

9.14 Mr. Malipenga has argued generally that the provision in the contacts of employment of the respondents relating to the share-match scheme was a fundamental term in that it spelt out an important benefit of the respondents. Mr. Nchito on the other hand has argued that the share-match scheme was not a fundamental term and gave his example of an alteration of the employees' reporting time as not going to the root or core of the employment contract.

9.15. We do not think, however, that breach of a term of a contract of employment is only redressible when what is involved is a fundamental term. A breach of any term of the contract is in fact actionable at the instance of the innocent party. The consequence of such breach should depend on the gravity of the deprivation to the innocent party. The key question in this case to begin with should thus be whether or not the appellants, or either of them, was in breach of any term or condition of the contracts of employment with the respondents.

9.16 Before turning to consider that question, we must make the general observation that many employees are familiar with the more traditional benefits under employment contracts such as the ones Mr. Malipenga identified as belonging to the respondents' remuneration packages as we have reproduced them at paragraph 7.14 of this judgment. What many such employees do not normally consider is whether there are any clawback arrangements in respect of such benefits or any of them in the event that they left employment.

9.17 The starting point should be to consider whether or not the benefits in issue form part of the employee's contract of employment in clear and unequivocal terms. If they do, an employer will, of course not arbitrarily alter such benefits to the detriment of the employee without the employee's agreement.

9.18 We have in a number of cases held that an employer is not at liberty to alter an employee's terms and conditions of employment to the employee's detriment without the agreement or concurrence of the employee. Such unilateral alteration of the conditions of service, which negatively

impacts on the employee, amounts to a wrongful termination of the contract of employment and may, in appropriate circumstances, result in liability by the employer to pay damages to the employee. This was effectively the holding in the case of **National Milling Company Ltd v. Grace Simataa & Others**[1] to which both learned counsel made reference in their submissions before us. And this is where the weight of the contractual term becomes relevant to the consequences of its breach.

9.19 It is also, however, the case in many instances that a benefit with other terms, policies and procedures may appear in a staff handbook or company personnel manual, or the company's intranet and expressed to be 'non-contractual' or 'non-binding' or 'for guidance only'. In this case, the employer clearly has much more scope to withdraw or alter the benefit.

9.20 The circumstances and period of the provision of the benefit in question may be such that it has become an implied term of the contract and, therefore, has full contractual status. In that case an employer would face the same difficulties in

forcing an alteration or withdrawal of the benefit as if it was originally a full contractual term.

9.21 Having given this brief perspective, we now turn to situate the share-match scheme in the context of the respondents' employment contracts with the appellants.

9.22 We have examined the Employment Contract Agreement between the first appellant and the respondents concluded on an individual basis but containing identical terms. Section C is titled 'Remuneration Details' and among the listed benefits are non-guaranteed benefits being shares per scheme rules. Clause 11, headed Share-Match Scheme states as follows:

> **All employees are eligible to participate in the BP Group Share-Match Scheme each year. The company will give you matching shares for each share that you purchase subject to a maximum.**

9.23 It will be recalled that the BP Share-Match Brochure as we have reproduced it at paragraphs 6.9 and 6.10 stated that participation in the share-match scheme did not form part of the respondents' contractual term and operated at BP's discretion, and further that the scheme was subject to the

rules of the BP Share-Match Plan rules and that in all matters of interpretation, the rules prevailed.

9.24 Mr. Malipenga invited us to treat the share-match scheme brochure and rules as mere reading material which did not form part of the contract. We cannot, of course, agree with that sweeping submission. Terms can be incorporated into a contract by reference. The issue here being whether the provisions of the brochure and the rules were incorporated into the contracts of employment.

9.25 Whether or not the provisions of the Share-Match Brochure, the Manual and the Rules became an integral part of the respondent's contracts of employment must be considered from the premise whether the contracts of employment themselves made the Brochure, Manual and the Rules part of the contracts.

9.26 Our understanding of common clause 11 of the respondents' contracts of employment is that it, in the first, place grants eligibility or qualification to all employees to participate in the BP Group share-match scheme. In other words their being employees in the first appellant company gave them the right

to participate in the share-match scheme operated by BP International Plc. Eligibility should here be distinguished from entitlement – which is a legal right or just claim to receive something.

9.27 Yet clause 11 does not leave matters at eligibility only. Once an eligible employee purchased shares within the BP Group Share-Match Scheme, the first appellant then undertook to give to such employee matching shares for each share purchased. Taken in context, therefore, the first appellant company assumed an obligation to provide a benefit to the employees under certain conditions.

9.28 The Share-Match Manual, Brochure and rules in the respects referred to by Mr. Nchito, SC, and as captured at paragraph 6.9 and 6.10 of this judgment, do in their provision purport to extend their application to the contracts of employment. We think with respect that the converse should be the case. It is the contracts of employment that should incorporate the Brochure Manual and rules by extension.

9.29 Likewise the first appellant's Human Resource Policy and Administration Manual speaks to the share-match scheme in the following terms:

> **28:00 Policy Statement:**
>
> **The share match scheme gives employees the opportunity to acquire an interest in BP Plc ("BP") and to be more closely involved in the fortunes of BP and its subsidiaries worldwide including BP Zambia Plc.**

9.30 We have no misgivings whatsoever that the share-match scheme was part of the benefits that accrued to qualifying employees, that is to say, those who were employed on permanent and pensionable terms and had served for a continuous period of twelve months. Such employees enjoyed that benefit by virtue of their employment with the first appellant. The provision on share-match clearly conferred obligations as well as benefits to both the first appellant and the employees (respondents).

9.31 Our view, therefore, is that the share-match scheme was part of the terms of the contract which the first appellant was obliged to honour in respect of those employees that participated in it.

9.32 Common clause 15 of the contracts of employment enjoined parties to the contract to only vary the terms upon certain requirements being satisfied. It states as follows:

> **No agreement varying, adding to, deleting from or cancelling this agreement and no waiver of any right under this agreement shall be effective unless reduced to writing and signed by or on behalf of the parties.**

9.33 There was no claim made, let alone evidence led, to the effect that there was any variation of the terms of the contract in a manner envisaged in clause 15.

9.34 Having found that the share-match scheme was part of the respondent's conditions of service, it matter little at this stage whether it was a fundamental term or not. What is of moment is that it was part of the respondent's conditions of employment.

9.35 It follows from what we have stated that ground two of the appeal fails to the extent that we find that the share-match scheme was a term of the contracts of employment of the respondents. We do not, however, think, for the reasons we have articulated, that it was a core or basic term of the

contract in the sense we used that term in the **Grace Simataa case**[1].

9.36 The only pertinent question that now calls for an answer is whether that contractual term was breached.

9.37 The argument of the appellant is that it did not breach the share-match scheme or the sale and purchase agreement or the respondent's contracts of employment. Several arguments are advanced in support of that position including that the scheme was operated at the discretion of BP International Plc and that when the share sale and purchase agreement was finalized, the first appellant ceased to be a participating company in the scheme. Secondly, that the share-match scheme was listed as a non-guaranteed benefit; that the second respondent was only obliged to provide a similar benefit to the respondents where possible and necessary and that in the particular circumstances, the second respondent did not run a share incentive scheme.

9.38 We have indeed closely examined clause 2.3.1 of the sale and purchase agreement and the protection it offered to the employees during the Protected Period. The purchaser under

that agreement made certain undertakings in regard to employee benefit arrangements whether contractual or discretionary in nature. Yet those undertakings were made by the purchase in an agreement to which the employees were not privy.

9.39 In our view, the more relevant undertakings were those made by the first appellant, as employer of the respondents, in the letter dated 29th July, 2010 addressed to the Labour Commissioner as well as those in the letter of 13th December 2010 by the South African Office of BP International Plc through its South African Office in which it made announcements to the employees of the first appellant. We have earlier in this judgment made reference to these undertakings.

9.40 There can be no misgivings whatsoever that the share-match scheme which the respondents, as eligible employees, enjoyed as an incidence of their employment was discontinued following a series of actions set in train by the BP Group. It is not controverted that in the process of BP International Plc selling its shares in BP Zambia Plc held through its South

African subsidiary or associated company, BP South Africa Plc, to Puma Energy (Ireland) Holding Limited, the matching share scheme arrangement hitherto enjoyed by the respondents was ended. The pointed question is whether the coming to an end of that benefit amounted to a breach of a term of the employment contracts of the respondents.

9.41 The chronology of events leading to the termination of the share-match scheme was eloquently narrated by State Counsel Nchito in his submissions. The sale of the shares of BP International Plc in the first appellant to Puma made the share-match scheme unattainable for reasons already articulated.

9.42 The appellant placed particular reliance on the Protected Period as defined in the share sale and purchase agreement. Barely six days into the protected period, the appellants gave a directive via email on 6th April 2011 cancelling the share-match scheme. The relevant part of that email has been reproduced at paragraph 7.10 of this judgment.

9.43 We have already stated that neither the respondents nor the appellants were party to the share sale and purchase agreement in which was contained the Protected Period provision. Much as that provision was for the exclusive benefit of the employees, the respondents were not party to the agreement for them to enforce it. They have not demonstrated that they came in the exceptions on the rule on privity of contract.

9.44 Mr. Nchito, SC, submitted that clause 2.3.1 was an undertaking made by one party to the agreement (the purchaser) to the other party to that agreement (the seller) not to amend or terminate any employee benefit arrangement on to continue to provide benefit arrangements and the same or substantially equivalent terms to the respondents where necessary and possible. We agree that even if there was a breach of a term of the share sale and purchase agreement that could not translate into a breach of the contracts of employment. Ground one thus partially has merit. We shall later in this judgment explain why ground one partially has no merit.

9.45 Although the appellants contend that there was no breach of that obligation because Puma Energy Zambia Plc did not run a share incentive scheme and being a non-related entity to BP International Plc could not be a participating company, we think the alleged non-breach of the respondents' contracts of employment by Puma is anchored in something else.

9.46 We find the argument about Puma not belonging to the BP group baffling as it directly contradicts the appellant's own position that the respondents' employer did not change by reason of the change in shareholding.

9.47 Another reason cited by the appellants as to why they did not believe they were in breach of the respondents' conditions of employment is that the share-match scheme was listed as a non- guaranteed benefit. And here we have two different interpretations placed on the term non-guaranteed benefit. Mr. Malipenga submitted that what being a non-guaranteed benefit meant was that the share-match scheme did not depend on whether the company made a profit or not for the employees to purchase shares. Mr. Nchito on the other hand submitted that by being termed non-guaranteed, the share-

match scheme was discretionary and thus not a fundamental term of the contract and had no effect in calculating the respondents' remuneration.

9.48 We do not find the explanation of counsel for the respondents on the real meaning on 'non-guaranteed' entirely useful. On the contrary, we are inclined to accept Mr. Nchito's submission and hold that the share-match scheme was not a basic or fundamental term. What is obvious to us is that the benefit was not guaranteed – meaning its existence or enjoyment by the beneficiary could not be assured. This seems to be consistent with the assertion of the appellant that it was discretionary and could be withheld. We understand the position to be that an eligible employee could acquire shares in BP International Plc at the discretion of the latter. BP Zambia Plc would then be obliged to offer a matching number of shares to those acquired by the employee. The acquisition of shares in BP International Plc was however not a matter of right for the employees. It could be denied in which case BP Zambia's obligation would not be triggered.

9.49 The situation we are here faced with, however, was that shares were acquired in BP International Plc and the obligation of BP Zambia Plc had kicked in. That obligation could only last for as long as BP Zambia Plc remained part of the BP group.

9.50 The lower court found as a fact that the respondents had the option of holding the shares in BP International Plc in their own name but that that option was not availed them. Mr. Nchito argued that the email circulated to the respondents showed that they had a choice between selling their shares and owning them independently of the first appellant.

9.51 We have at paragraph 7.10 reproduced the relevant part of the email in question. The email came in the form of a directive to all employees who participated in BP's share-match program to "fill in the attached form to sell the shares now that we are out of the BP group". According to State Counsel Nchito, the respondents had a choice by ticking one of the boxes indicating the option the employee had selected between selling their shares or owning them independently of the appellant.

9.52 In fairness to the appellants, it cannot legitimately be claimed that the respondents did not know that they had an option to sell or retain their shares. In addition to its being mentioned in the email, they were informed of this option as way back as 19th March 2010. We have at paragraph 2.5 reproduced the first appellant's assurance which speaks to this fact.

9.53 The same email does make reference to previous representations and meetings through which the respondents are said to have been made aware of their options in the event of termination of the share-match scheme. That this was so is not something the respondents ever contested.

9.54 While we agree that the issue of the termination of the share-match scheme may not have come as a matter of complete surprise to the respondents given the events that preceded their termination, the mandatory rendition of the email of 6th April 2011, coupled with the absence of actual proof of information of the choices available to the respondents at that moment, we are satisfied that no option was in fact given to the respondents at the relevant time. They were directed to sell their shares by a given date. It is the denial of the option

to deal with their contractual benefit that constituted a breach of term of the respondents' contracts of employment. To the extent that the share-match scheme was a term of the respondents' employment contracts, ground one, as we intimated at paragraph 9.44 partially has no merit.

9.55 In her holding the lower court judge stated as follows:

> **It is clear from the email that the decision was unilateral and the plaintiffs were not given a choice as to the options available to them, neither were they engaged in any negotiations at all. This evidence was not challenged by the defence.**

9.56 Our view is that the court below made a finding of fact which can only be disturbed on appeal if the applicants demonstrated that it was perverse or not borne out of the evidence before the court. Beside pointing to the email and its contents, the learned counsel for the appellant did not demonstrate in which respect that finding of fact was perverse or contrary to the evidence. We are loath to tamper with it. Ground three must accordingly also fail.

9.57 Under ground four, the contention of the appellant is that the lower court fell into error when it held that the respondents' contracts of employment were terminated on the 6th April 2011. The fate of this ground is clearly linked to that of first and second grounds.

9.58 We have already held that there was indeed a breach of a term of the respondents' conditions of service when the appellants directed the respondents to complete a form and sell their shares held under the share-match scheme by a given date without allowing them to exercise the option to retain their shares.

9.59 We have explained why the share-match scheme did not constitute a basic condition of employment so as to render its breach a negation of the respondents' employment contracts. We hold, therefore, that the respondents' employment contracts were not terminated on the 6th April, 2011 when the email directing the sale of their shares was written. Ground four is without merit and is hereby dismissed.

9.60 The net result is that grounds one and two partially succeed. The appellants were not in breach of the share sale and purchase agreement as they were not privy to it. They were, however, in breach of the respondents' contracts of employment. The share-match scheme was a term of the contact, albeit not a fundamental one. Ground three fails while ground four succeeds only to the extent that there was a breach of a contractual term.

9.61 The respondents had sought, through its cross appeal to have us make declarations which the lower court should, according to them have made following its findings. That court merely ordered damages to be paid to the respondents.

9.62 The respondents believed that redundancy or retirement benefits should have been ordered instead. However, as is clear from paragraphs 7.17 to 7.20 of this judgment the respondents failed to properly present and prosecute that cross appeal. The result was that the appellants were not able to meaningfully respond to the respondents' case on cross appeal.

9.63 As that cross appeal was effectively abandoned, the decision of the lower court stands. The respondents will be entitled to damages to be calculated on the ordinary principles that the respondents will be placed in the same position they would have been in had the contract not been breached. In so ordering we are mindful of the admitted position that the respondents were paid for their shares and could at best only have held those shares in their names if they had exercised the only other option available to them.

9.64 We refer the assessment of damages to the Deputy Registrar.

9.65 Each party shall bear their own costs.

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I.C. MAMBILIMA
CHIEF JUSTICE

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M. MALILA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE