

**AN EVALUATION OF THE EFFICACY OF RULES OF STATUTORY
INTERPRETATION: THE CASE OF CELTEL ZAMBIA LTD (T/A ZAIN ZAMBIA)
V. ZAMBIA REVENUE AUTHORITY (2010/HPC/668)**

By

SPR
LLB
PHI
2012
C-1

Brenda Rachael Phiri (89076290)

A directed research essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB)

**School of Law
University of Zambia
Lusaka**

**THE UNIVERSITY OF ZAMBIA
LUSAKA**

2013

**AN EVALUATION OF THE EFFICACY OF RULES OF STATUTORY
INTERPRETATION: THE CASE OF CELTEL ZAMBIA LTD (T/A ZAIN ZAMBIA)
V. ZAMBIA REVENUE AUTHORITY (2010/HPC/668)**

By

CPR
LLB
PHI
2013
C-1

Brenda Rachael Phiri (89076290)

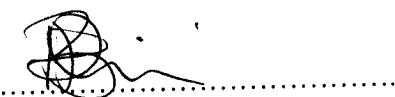
A directed research essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB)

School of Law
University of Zambia
Lusaka

**THE UNIVERSITY OF ZAMBIA
LUSAKA**

2013

I, **BRENDA RACHAEL PHIRI**, do hereby declare that this research paper represents my own work and where other peoples work has been used, due acknowledgments have been made. This paper has not been previously submitted for any academic awards at this or any other university.



BRENDA RACHAL PHIRI


2nd August 2013

DATE

I recommend that the directed research prepared under my supervision by Brenda Rachael Phiri entitled:

An Evaluation Of The Efficacy Of Rules Of Statutory Interpretation: The Case Of Celtel Zambia Ltd (T/A Zain Zambia) v Zambia Revenue Authority (2010/Hpc/668)

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations governing directed research.


.....
Chipso Mushota Nkhata
(SUPERVISOR)

02/08/2013
.....
DATE

I recommend that the directed research prepared under my supervision by Brenda Rachael Phiri entitled:

An Evaluation Of The Efficacy Of Rules Of Statutory Interpretation: The Case Of Celtel Zambia Ltd (T/A Zain Zambia) v Zambia Revenue Authority (2010/Hpc/668)

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations governing directed research.


.....
Chipso Mushota Nkhata
(SUPERVISOR)

02/08/2013
.....
DATE

I recommend that the directed research prepared under my supervision by Brenda Rachael Phiri entitled:

An Evaluation Of The Efficacy Of Rules Of Statutory Interpretation: The Case Of Celtel Zambia Ltd (T/A Zain Zambia) v Zambia Revenue Authority (2010/Hpc/668)

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations governing directed research.



.....
Chipso Mushota Nkhata
(SUPERVISOR)

02/08/2013

.....
DATE

Abstract

Statutory interpretation is one of the most common tasks undertaken by Courts. Such interpretation is often necessitated by several factors that include ambiguity and omissions. Judges have over the years developed rules that are used as aids to interpretation. Yet it has been generally observed that there are inconsistencies in the manner the rules are applied and this unpredictable use of the rules has not only raised questions on their efficacy but also impedes the objectives of statutory interpretation in that it greatly lessens the certainty of the law.

This work therefore endeavours to provide an evaluation of the efficacy of rules of statutory interpretation as applied in the case of *Celtel Zambia Ltd (T/A Zain Zambia) V. Zambia Revenue Authority (2010/HPC/668)*. The case study approach is the prime methodology adopted in this paper. Specifically, the paper will analyse whether it was sound for the Court to hold that even though the law that formed the basis for collecting of the tax that was in dispute was legal, a component of the collected tax namely that relating to data transfer services, was *bona vacantia*, that is, without an owner.

The paper is divided into five chapters with chapter one providing the background and case details. Chapters two and three provide the theories and application of the rules of statutory interpretation in Zambia while chapter four endeavours to evaluate the efficacy of the rules of statutory interpretation as applied in the case under review. Chapter five concludes the paper by recommending inter alia that judges should be slow to adopt an interpretation which tends to make any part of the statute meaningless or ineffective and that they should objectively and accurately present the real reasons for their decision as such decisions become law.

DEDICATIONS

I would like to dedicate this work to my late mother Sara Cynthia Shawa for her enduring love and educating me to the level where I have managed to achieve so much in my life. Words cannot express all that I have to say. I miss you so much and may your soul rest in eternal peace.

To my husband Lubasi Mundia for the love, support and enduring my absence when I had to dedicate time to complete this study. You are the pillar of my strength.

To my son Musa Mundia, the greatest gift that God has ever given me. You bring so much joy in my life and I pray to God that you too will be encouraged by mummy's achievements.

To my brother Caddy, sisters Pokani, Dumase, and my nieces Wendy and Sara, you are the best family that I could ever ask for and I give God the glory that we share such a bond that no man can break. I love all you.

ACKNOWLEDGEMENTS

Firstly I would thank the Almighty God for continuing to sustain me and blessing with love and wisdom. I give Him the glory for this accomplishment.

Special thanks to my supervisor Mrs Chipo Mushota Nkhata for supervising and guiding me in this work.

I would also like to extend my heartfelt thanks to my niece Laura Inonge Malawo for the study materials and encouraging me to continue with the programme despite the challenges.

Special thanks to my employers Zambia Revenue Authority for according me the support through funding and study leave that enabled me to concentrate and achieve my study objectives. I will surely apply the knowledge acquired to perform even more effectively.

Finally to all that contributed in one way or the other in supporting me towards completing this work, I say thank you. May the Lord richly bless you all.

TABLE OF LEGISLATION

- 1. Acts of Parliament Act, Chapter 3 of the Laws of Zambia
- 2. Customs and Excise Act, Chapter 322 of the Laws of Zambia
- 3. English Law (Extent of Application) Act, Chapter 10 of the Laws of Zambia.
- 4. Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
- 5. Penal Code, Chapter 146 of the Laws of Zambia
- 6. Preservation of Public Security Regulations, Chapter 106 of the Laws of Zambia
- 7. Public Order Act, Chapter 104 of the Laws of Zambia
- 8. Zambia Revenue Authority Act, Chapter 321 of the Laws of Zambia

TABLE OF CASES

Attorney General and Another v Lewanika and others (1993-94) Z.R. 164

Attorney General for Canada v Halién & Carey Ltd [1952] AC 427

Attorney-General of the Gambia v Jobe [1985] LRC (Const.)

Attorney General v Lamplough (1878) 3 Ex D 214

Attorney General and The Movement for Multiparty Democracy v Lewanika and 5 Others
(SCZ Judgment No. 2 of 1994)

Becke v Smith [1836] 2 M&W 195

Buchanan (James) & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1978] AC 141,
160H

Cape Brandy Syndicate v IRC [1921] 1 KB 64

Celtel Zambia Ltd (T/A Zain Zambia) V. Zambia Revenue Authority (2010/HPC/668)

Edith Tshabalala v Attorney-General SCZ Judgment No. 17 of 1999

Grey v Pearson [1857] 6 HL Cas 61

Heydon's case [1584] 76 ER 637

IRC v Gittus [1920] 1 KB 563, 576

James v Inland Revenue Commissioners [1977] 2 ALL ER 897

Magor and St Mellons RDC v Newport Corporation, [1952] AC 189 -190

Mazoka and 2 others v. Mwanawasa and 2 others (2005) ZR 138

Mmembe and others v The people SCZ Judgment 4 of 1996

Miyanda v Raymond Handahu (1993-1994) Z.R. 187

Motor Traders Association Of Central Africa and Others v Municipal Council of Mufulira
(1967) Z.R. 1

Mulundika and Seven Others v The People (1995) ZR 20 (SC)

Mutale v Attorney-General (1976) Z.R. 139 (HC)

Ngwira and others v Attorney-General (1985) Z.R. 206 (HC)

Nkhoma v Miyanda (1995) S.J. (SC)

Notham v London Borough of Barnet [1978] 1 WLR 220

Quaker, Hall & Co Ltd v. Board of Trade [1962] Ch 273

R v Barnet LBC [1983] 2 AC 309

R v Vine [1875] 10 L R QB 195

Resident Doctors Association of Zambia and Others v The Attorney-General
SCZ Judgment No. 12 of 2003

Shadreck Mwiinga v The Queen (1963-1964) Z And NRLR 81

The People v Edward Jack Shamwana and 12 Others (1982) Z.R. 122 (HC)

West v Gwynne [1911] 2 Ch 1

Zambia Consolidated Copper Mines v Siame and 33 Others (2004) Z.R. 193

TABLE OF CONTENTS

PRELIMINARY ENTRIES

Abstracti

Dedicationii

Acknowledgements.....iii

Legislationiv

Table of Cases.....v

CHAPTER 1	INTRODUCTION	Page
1.0	Introduction	1
1.1	Problem Statement	4
1.2	Objectives of the Study	4
1.3	Hypothesis	5
1.4	Significance of Study	5
1.5	Methodology and Sources of Information	6
1.6	Scope and Limitations of the Study	6
1.7	Organisation of the Paper	7

CHAPTER 2 **THEORIES OF STATUTORY INTERPRETATION**

2.0	Introduction	9
2.1	Overview of Statutory Interpretation and Purpose	9
2.2	Rules of Statutory Interpretation	11
2.3	Traditional Approached to Statutory Interpretation	11
2.3.1	Literal Rule	11
2.3.2	Mischief Rule	12

2.3.3	Golden Rule	13
2.4	Contemporary Approaches to Statutory Interpretation	12
2.5	Theories of Statutory Interpretation	12
2.6	Special Rules of Interpretation	15
2.6.1	Doctrine of casus omissus	16
2.6.2	Presumption against retrospective operation of statutes	16
2.6.3	Presumption of strict interpretation of taxation statutes	17
2.7	Criticisms of Rules of Statutory Interpretation	18
2.8	Conclusion	20

CHAPTER 3 STATUTORY INTERPRETATION IN THE ZAMBIAN CONTEXT

3.0	Introduction	22
3.1	Legal framework on Statutory Interpretation	22
3.2	Evaluation of the Commonly Applied Rule	24
3.2.1	Literal rule	25
3.2.2	Golden Rule	26
3.2.3	Purposive approach	28
3.2.4	Legislative intent /Mischief rule	30
3.3	Application of Special Rules in Taxation Cases	32
3.4	Conclusion	32

CHAPTER 4 ANALYSIS OF THE CASE OF CELTEL (Z) LTD (T/A ZAIN ZAMBIA V ZAMBIA REVENUE AUTHORITY

4.0	Introduction	34
4.1	Legislative Context and background	34

4.2 Analysis of the interpretive approach37

4.2.1 Legality of Schedule39

4.2.2 Effect of the Customs and Excise (Amendment) Act, No.2 of 200941

4.2.3 Application of doctrines of bona vacantia43

4.3 Conclusion45

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.0 Summary of Findings and Conclusions47

5.1 Other General Findings on Statutory Interpretation47

5.2 Recommendations and Way Forward48

BIBLIOGRAPHY50

CHAPTER 1

1.0 Introduction

A fundamental principle of a good legal system is that it should have certain and clear laws to guard against injustice in society¹. The same principle of certainty and clarity applies to legal rules and practices that Courts apply in determining cases before it. In Zambia, there is the Interpretation and General Provisions Act² which provides for general interpretation of terms that are used in statutes. However, the said Act is not exhaustive as it does not provide for rules and procedures that must be applied in interpreting statutes in the absence of express statutory provisions or where the provisions are ambiguous. This is left to the Courts that apply the long developed common law rules of statutory interpretation. The case under review offers a good illustration of how the Courts apply these rules to often complex legal questions that require a comprehensive understanding of the statute in dispute. Statutory Interpretation becomes even more complex when it is not the text that is in question but the effect of drafting mistakes, omissions, or conflicting provisions.

This paper will therefore evaluate the efficacy of the common law rules of statutory interpretation as applied in the case of *Celtel Zambia Ltd (T/A Zain Zambia) v Zambia Revenue Authority*³. The brief facts are that the Appellant, Celtel Zambia Ltd appealed to the High Court against the decision of the Revenue Appeals Tribunal (RAT) that had dismissed its appeal against the Respondent's decision to disallow their claim for refund of excise duty. The Appellant argued that the RAT had erred in law when it failed to find that the Appellant was entitled to the refund of the excise duty that had been paid in error between 2004 and 2008 due to

¹ Glanville Williams, 'Learning the Law', 11th Edition (New Delhi: Taj Press, 2002),

² Chapter 2 of the Laws of Zambia

³ 2010/HPC/668

an erroneous interpretation of the provisions of the Customs and Excise Act⁴ on the part of the Respondent.

The main arguments advanced by the Appellant were that the Schedule relied upon by the Respondent to compute and collect excise duty between 2004 and 2008 was illegal for the reason that there was no enabling provision in the main body of the Act, that is, a section linking the Schedule to the principle Act. The Appellant stressed that in the absence of an inducing provision; a schedule has no legal anchor to trace its legality and is therefore *void ab initio*. A further contention was that the definition of airtime (or talk time) did not include data transfer services⁵ but the Respondent, in determining the value for taxation purposes, had erroneously grossed up the values for both voice calls and data transfer services. This grossing up, it was argued, had resulted in overpayment of excise duty by the Appellant, hence the claim for a refund. It was further argued that the Respondent had in fact conceded to the defect in the law by making corrections through the Customs and Excise (Amendment) Act No. 2 of 2009.

The Respondent cross-appealed against the RAT's order that the required the Appellant and the Respondent to engage the regulator of the communications sector, Zambia Information and Communications Technology Authority (ZICTA), in finding modalities of how consumers could be compensated for the alleged erroneously collected excise duty on data transfer services from 2004 to 2008. The Respondent further maintained that the absence of an inducing provision was not fatal to the validity of the Schedule citing provisions of section 9 of the Interpretation and

⁴ Chapter 322 of the Laws of Zambia

⁵ Data Transfer Services include non-vocal services such as short message services (sms), internet access and multi-Media services (MMS). These services also require the use of air time.

General Provisions Act⁶ and the enacting words of the Customs and Excise (Amendment) Act No.3 of 2004 that had inserted the disputed schedule into the principle Act. A further argument was that the Appellant was not entitled to a refund on grounds that the tax in issue was a consumption tax which falls on the consumers and not the Appellant and that the Appellant was merely an agent in this case. However it was conceded that there had been a defect in the definition of airtime prior to the 2009 amendment but that strong circumstances existed to hold that the said Amendment Act had retrospective effect.

The High Court acknowledged the manifest error in law but proceeded to uphold the decision of the RAT with regard to the legality of the contested schedule. The rational was that despite the drafting error, the Court could not frustrate Parliaments' intention. On the effect of the 2009 Amendment Act, the Court held that the Amendment did not have a retrospective effect. The Court stressed that this holding did not affect the ruling that the schedule was legal. However, the order to involve the regulator of the communications section in finding modalities to compensate consumers was set aside and instead an order was made to the effect that the revenue from data transfer services be escheated to the State on the ground that it was *bona vacantia*, that is without an owner.

In an effort to appreciate this decision, the Courts reasoning will be discussed as follows-

- (i) The effect of the error in drafting on the legality of the schedule relied upon by the Respondent to levy, charge and collect excise duty;

⁶ Chapter 2 of the Laws of Zambia

- (ii) Whether the **Customs and Excise (Amendment) Act No. 2 of 2009** whose principle objective was to correct the manifest errors in the Customs and Excise Act had a retrospective effect;
- (iii) Whether it was permissible for the respondent to levy, charge and collect excise duty on the basis of the defective law between 2004 and 2008; and
- (iv) Whether it was sound for the Court to hold that even though the law that formed the basis for collecting of the excise duty was legal, a component of the excise duty namely that relating to data transfer services, was *bona vacantia*, that is, without an owner.

1.1 Problem Statement

The apparent contradiction in the ruling in **Celtel Zambia Ltd (T/A Zain Zambia) v. Zambia Revenue Authority** has created uncertainty in the law particularly that there is limited precedent and legislative guidance on the subject.

1.2 Objectives of the Study

The main aim of this study is to evaluate the efficacy of the rules of statutory interpretation when the problem arises from a manifest omission in the drafting process of a statute and its schedules. Further, the paper also aims to examine the concept of retrospective application of statutes, as raised in relation to **The Customs and Excise (Amendment) Act, No 2 of 2009** and the doctrine of *bona vacantia*, as applied in the case under review. Furthermore, it is also the incidental objective of this paper to ascertain whether omissions or commissions in legal drafting can legally and successfully be challenged in light of the Courts inherit power to rectify any ambiguity or omissions through use of rules of statutory construction.

1.3 Hypothesis

The study will test the hypotheses that the case was in part wrongly decided by declaring that -

- a) lack of an enabling section is not fatal to the validity of a schedule as it can be cured by application of the rules of statutory interpretation; and that
- b) revenue collected under the alleged illegal schedule and obscure provisions was not *bona vacantia*;

1.4 Significance of the Study

This research is undertaken at the time when there is a proliferation of legislation in Zambia that is a consequence of the liberalisation of the economy. Government has been compelled to balance the policy of liberalisation with regulation by setting up a plethora of regulatory institutions that are basically statutory bodies with the mandate to regulate specific sectors of the economy.⁷ With regard to fiscal policy the most prominent regulatory bodies are the Bank of Zambia and the Zambia Revenue Authority. The latter is responsible for revenue collection and matters incidental thereto. The Institution is charged with responsibility of enforcing six Acts of Parliament among which is the Customs and Excise Act⁸. The Act has several objectives among which are revenue collection, regulation of imports and exports, trade facilitation and excise duty management. Excise duty is a domestic tax that applies to both locally and imported goods and was subject of litigation in the case under review. The Excise schedule that was contested is one of the eight schedules to the Act. Both the Act and its subsidiary legislation have cumulatively twenty one schedules.

⁷ Adapted from Sangwa, J. (2010), 'L341 Administrative Law Lecture Notes', unpublished

⁸ Chapter 322 of the Laws of Zambia

Considering the numerous schedules, coupled with the fact that the Act under review is amended every year often with new schedules being added, it is inevitable that errors, omissions and commissions are bound to occur and consequently the judicial system may constantly be flooded with litigation that questions the legality of amendments that may have drafting errors or are not incorporated in the main law in a manner that has come to be accepted as the norm. Hence, it is very appropriate and vital that this research investigates the law on the specified areas of the decision in the case under review in an effort to contribute to the body of knowledge and policy framework on legal drafting and statutory interpretation in this specific area.

1.5 Methodology and Sources of Information

The case study approach is the prime methodology adopted in this paper. The research is primarily qualitative in nature rather than quantitative. The information and data used comes from secondary sources. In this respect, the main sources of secondary data were Law Reports, papers on the subject by learned authors, text books, journals, dissertations under obligatory essays and those anchored on the award of the Masters degree in law, classroom lectures as well as the internet.

Lastly, it should be understood that works from other common law jurisdictions was extensively consulted as it was found that there is limited precedence in Zambia on the subject under review.

1.6 Scope and Limitations of the Study

The scope of this study is limited to statutory rules of interpretation as understood and applied in common law jurisdictions. While acknowledging that the subject is quite broad, the focus is

limited to those rules that are relevant to the case under review. Therefore special rules of interpretation such as Latin maxims and presumptions are discussed only to the extent necessary to assist in attaining the objective of the paper. Further in literature review, English case law has mostly been used as statutory interpretation in Zambia is influenced by the inherited English law.

Several shortcomings of this study while inevitable need to be pointed out. Among this is the lack of an elaborate investigation on some of the aspects of statutory interpretation that this study seeks to review. In most cases only persuasive authority from a limited number of learned writers could be found. Further there is hardly any coherent work done regarding the evaluation of the rules of statutory interpretation especially of a comparative nature.

Therefore the paper relies heavily on work done on the wider subject of statutory interpretation in evaluating the efficacy of the rules of statutory interpretation as applied in the case under review.

1.7 Organisation of the Paper

Chapter 2 presents the literature review and analytical framework employed in the discussion of this paper. Specifically the paper discusses the concept of rules of statutory interpretation in general and also the various methods used in statutory interpretation. Special rules of interpretation such as the doctrine of *casus omissus*, presumption against retrospective operation of statutes and presumption of strict construction of taxation statutes are specifically discussed as a prelude to detailed evaluation of the Court's interpretative approach in the case under review. Theories that have emerged on the subject are also discussed in addition to highlighting some of the criticisms of these rules. The criticisms are discussed with a view to provide a basis for

effective evaluation of the efficacy of the rules. The chapter concludes by outlining the general thrust governing statutory interpretation.

Chapter 3 attempts to evaluate how the rules of statutory interpretation have been applied in the Appellant Courts of Zambia, these being the Supreme and High Court. It provides an overview of the legal frame that governs statutory interpretation in Zambia and identifies the commonly applied rules in interpretive process. Drawing on some decided cases, an assessment of the effectiveness of the interpretive approach is then provided. The chapter concludes by providing a summary of the efficacy of the interpretive approach applied in Zambia.

Chapter 4 endeavours to give a detailed analysis of the efficacy of the interpretative approach applied in the case under review. In providing such analysis, the chapter begins by providing the background and legal context of the case. The interpretive approach and final decision of the court is then assessed against discussed literature and analytical framework in chapter 2 and the findings and observations in chapter 3. Specifically the chapter discusses in greater detail the Courts decision regarding the legality of the contested schedule and the effect of the **Customs and Excise (Amendment) Act, No.2 of 2009** and evaluates its implications.

Chapter 5 concludes the paper. A conclusion resulting from analysis of the case under review is first given. This is followed by a summary of general findings and finally the paper makes recommendations on the way forward.

CHAPTER 2

THEORIES OF STATUTORY INTERPRETATION

2.0 Introduction

The chapter discusses the various methods applied by the judges in the interpretation of statutes. Theories that have emerged on the subject are also discussed in addition to highlighting some of the criticisms of these rules. Special rules of interpretation such as the doctrine of *casus omissus* which outlines the circumstances when a court can supply a clearly unintended omission by the legislature in drafting a particular provision and the presumption against retrospective operation of statutes are specifically discussed as a prelude to detailed evaluation of the Court's interpretative approach in the case under review. The chapter concludes by outlining the general law governing statutory interpretation.

2.1 Overview of Statutory Interpretation and Purpose

It is important that we first understand what statutory interpretation is before proceeding to discuss the actual rules that are subject of this paper. Black's Law Dictionary defines statutory interpretation as "The act or process of interpreting a statute" or "Collectively, the principles developed by courts for interpreting statutes."⁹ Therefore by analogy, statutory interpretation could be said to be the process by which the Courts through judges determine and also clarify the meaning of a statute. Such interpretation is often necessitated by several factors that include but not limited to drafting errors or omissions; expansiveness of language; and unforeseen situations such as new technologies or other innovations that may make application of existing legislation difficult.

⁹ Black's Law Dictionary 8th ed. Bryan A. Garner (West Group, 2004)



It must be noted that statutory interpretation is also known as statutory construction, with the difference between the two being considered more semantic than substantive. The learned author Francis Bennion in his paper titled ‘Statutory Interpretation: Part II’, 1990 at page 84 argues that there is no material distinction between construction and interpretation as the terms are interchangeable.¹⁰ This view is supported by this researcher and for this reason; the two terms are used interchangeably in this paper.

A statute that may be subject of interpretation or construction is thus defined as “An act of the legislature; or a particular law enacted and established by the will of the legislative department of government.....”¹¹ In an effort to achieve clarity and brevity, some content of a statute may be moved from the main body of the enactment to the end of the document and annexed as a schedule. Brett L J observed in *Attorney General v Lamplough*¹² that ‘a schedule in an Act is a mere question of drafting, a mere question of words. Therefore such a schedule, though supplementing the main statute is a part of that statute, and is as much an enactment, as any other part’. Thus whether material is put in the main body of the enactment or in a Schedule is usually a mere matter of convenience. In matters of statutory interpretation, the same rules and principles will apply. These rules that have been developed by the Courts for interpretation of statutes are discussed below.

¹⁰ Francis Bennion,, ‘Statutory Interpretation: Part II’. Doc No.1990.002.082, Longman, 1990 at page 84 (available at <http://www.francisbennion.com>: accessed 18 March 2013)

¹¹ Black’s Law Dictionary 8th ed. Bryan A. Garner (West Group, 2004)

¹² [1878] 3 Ex D 214, 229

2.2 Rules of Statutory Interpretation

Rules of statutory interpretation include any of the legal principles and concepts devoted to establishing the meaning of statutes. It must be noted that unlike statutes, the general methods of statutory interpretation are not themselves regulated by legislative bodies but have been developed by the judges.

A general principle is that a statute will be interpreted so as to be not only internally consistent but also in harmony with other linked legislation or legislative intent. Flowing from this general principle is also the presumption that a statute shall not be interpreted so as to be inconsistent with other statutes. Where there is an inconsistency, the judiciary will attempt to provide a harmonious interpretation. In providing such harmonious interpretation, judges use various tools and methods that include internal aids to interpretation, traditional rules of statutory interpretation, legislative history and purpose, permissible external aids to interpretation, legal maxims and presumptions. Some of the methods are very ancient, having been developed as far back as the 16th century, while others are rather recent.

2.3 Traditional Approaches to statutory interpretation

The well-known traditional approaches to statutory interpretation include the following:-

- **Literal rule:** This rule instructs that statutes are to be interpreted using the ordinary meaning of the language of the statute, unless a statute explicitly defines some of its terms otherwise. Among the several cases that illustrate the application of this rule is *Miyanda v Handahu*¹³ in which it was held that when the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the

¹³ (1993-94) Z.R. 187

fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as policy, expediency, justice or political exigency, motive of the frames and the like.

- **The Mischief rule** attempts to determine the legislator's intention. This rule is one of the earliest and has its origins in the 16th century case famously known as the *Heydon's case*¹⁴. The main aim of this rule is to determine the "mischief and defect" that the statute in question has set out to remedy, and the ruling that would effectively implement this remedy.
- **The Golden rule** allows a judge to depart from a word's normal meaning in order to avoid an absurd result. It said to be based in part on the dicta by Lord Wensley Dale in *Grey v Pearson*¹⁵ in which he stated that:

“We are to take the whole statute and construe it together, giving the words their ordinary significance , unless when so applied, they produce, an inconsistency, so as to justify the court in placing on them some other signification, which, though less proper, one which the court thinks the words bear”

The gist of this rule is that if the words are given their ordinary meaning and it is clear that this meaning does not correspond to the intention of the legislature, then one can depart from the ordinary meaning of the word so as to give effect to the intention of the legislature.

2.4 Contemporary Approaches to Statutory Interpretation

Over time the three traditional methods of statutory interpretation discussed above appear to have been fused. Reference is now frequently made by judges to the concept of “purposive statutory construction”, that is, one that will “promote the general legislative purpose underlying

¹⁴ [1584]76 ER 637

¹⁵ (1857) 6 HL Cas 61

the provisions"¹⁶. In *R v Barnet LBC*¹⁷, Lord Scarman observed that a purposive interpretation may only be adopted if judges can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy.

The evolving of the rules did not end with the development of the purposive approach as the learned author Ruth Sullivan¹⁸ introduced what she termed “the modern rule” to statutory construction. She contended that an appropriate interpretation is one which can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; (c) its acceptability, that is, its outcome is reasonable and just.

It is debatable whether Sullivan’s “modern rule” introduces any novel method of statutory interpretation. At best, it can be acknowledged that it does attempt to provide clarity on the process of statutory interpretation.

2.5 Theories on Statutory Interpretation

Further to the foregoing an influential school of legal theory has in recent years emerged with some seeming offering alternative approaches to statutory interpretation. For instance, Dworkin has developed a theory of law out of a theory of adjudication. He maintains that interpretation is concerned with intentions or purposes, and takes the construction of such purposes as essential to what interpretation is all about. He thus propounded the principle of ‘*constructive interpretation*’

¹⁶ Per Lord Denning MR in *Notham v London Borough of Barnet* [1978] 1 WLR 220) at page 1246; Also cited in *Mazoka and 2 others v. Mwanawasa and 2 others* (2005) ZR 138 SCZ

¹⁷ [1983] 2 AC 309

¹⁸ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed. (Toronto: Butterworths, 1994), p.131

which according to him is a methodology for interpreting social practices and texts.¹⁹ Although Dworkin's claims have proven controversial, its impact remains revolutionary.

✱

Dworkin's view is similar to the proposition by the earlier legal philosopher Roscoe Pound, who emphasized that 'the Object of genuine interpretation is to discover the rule which the law maker intended to establish; to discover the intention with which the law maker made the rule or the sense attached to the words wherein the rule is expressed.'²⁰

Scalia advances a contrary view by setting forth the principle of what he calls "textualism" and others call "original intent". He argues that judges should interpret statutes and regulations by focusing on the text itself. He further posits that statutes and the Constitution should be interpreted by urging that judges resist the temptation to use legislative intention and legislative history.

It is the researchers observation that Scalia's' concept of '*textualism*' and, to a certain extent, 'originalism' could be said to be an elaboration and modernized version of the literal rule. On the other hand, Dworkin and Pounds propositions may be aligned to the mischief and golden rules of statutory construction while Sullivan's modern rule approach could be considered as a recasting of the purposive approach. As for the latin maxims and other special rules of interpretation, these could be said to be relevant tools in application of the purposive approach or perhaps Sullivan's modern rule.

¹⁹ Ronald Dworkin, 'Laws Empire' Cambridge Mass: Belknap Press, 1986.

²⁰ Roscoe Pound, 'Spurious Interpretation,' 7 COLUM. L. REV. 379. 381 (1907) as cited by Cheryl Boudreau et al in 'Statutory Interpretation and the Intentional(ist) Stance', 38 Loy. L. A. L. Rev. 2131 (2005) accessed at <http://digitalcommons.lmu.edu>

2.6 Special Rules of Interpretation

There remains a host of other aids to statutory interpretation in addition to those discussed above. Some of these have been expressly mentioned by Sullivan in the description of the “modern rule”. These include latin maxims and presumptions that guide the courts in arriving at an outcome that is reasonable and just. These external aids are termed as special rules of interpretation. Discussed below are some of these special rules that are particularly relevant to the purpose of this paper.

2.6.1 Doctrine of *casus omissus*

A *casus omissus* is a gap in a statute and the doctrine outlines the circumstances when a court can supply a clearly unintended omission by the legislature in drafting a particular provision. The three rules considered above do not in themselves provide a satisfactory approach to *casus omissus*. Cross describes it as “the inexplicable and probably inadvertent failure of the draftsman to use words entirely apt to cover the instance case”²¹. Bennions’ view is that it exists when the literal meaning of the enactment goes narrower than the object of the legislature.²² The courts apply this rule with caution due to the argument that inserting words or phrases amounts to making of laws or amending which is a function of legislature. The case of *Attorney General and The Movement for Multiparty Democracy v Lewanika And 5 Others*²³ illustrates its’ limited application in Zambia. The brief facts are that the Respondents had challenged their expulsion from Parliament on grounds that even though they had resigned from the ruling party, they had not joined any other political party. Further they argued that Article 71(2) (c) of the Constitution of Zambia only applied to Members of Parliament that crossed the floor to join another party.

²¹ Rupert Cross, John Bell and Sir George Engle, *Statutory Interpretation*, (London, Butterworths, 1987) P. 11

²² Francis Bennion, *Statutory Interpretation*, 4th Edition (London, Butterworth, 2002), p. 344

²³ SCZ Judgment No. 2 OF 1994

The Court held the cited constitutional Article to be unfair and discriminatory and to remedy the situation, the words “vice versa” were read into the provision.

❖

The rule on *casus omissus* may be considered as being broad enough to cover all manner of drafting omissions. However, it remains to be seen whether an entire omitted provision, other than a phrase or word, that falls within the general scope of the statute may be inserted using this rule.

2.6.2 Presumption against retrospective operation of statutes

The general rule is that statutes are not to be construed as having retrospective operation unless such construction appears clearly in the terms of the Act or arises by necessary and distinct operation.²⁴ Dreidger²⁵ considers that if the intent is to punish or penalise a person for having done what he did, the presumption applies because a new consequences is attached to a prior event. If the statutes confers a benefit or the new punishment is intended to protect the public, the presumption does not apply. This position was affirmed in *R v Vine*²⁶ where Cockburn C. J. construed the statute in dispute as applying even to persons convicted before or after the statute was passed. In this case, the question arising from a statutory provision was whether a person who had been convicted of a felony before the Act was passed became disqualified on the passing of the Act from dealing in liquor. It was held that the object of the statute was not to punish offenders but to protect the public; therefore the presumption did not apply.

²⁴ In *West v Gwynne (1911) 2 Ch 1*, Cozens Hardy MR assented to the proposition that a statute is presumed not to have retrospective operation unless the contrary appears.

²⁵ Elmer Dreidger, construction of statutes, 2nd ed. 1983, p. 202-203

²⁶ [1875] 10 L R QB 195

Other exceptions to this presumption are when the enactment is merely procedural or evidentiary in nature as was affirmed in *Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 others*.²⁷ The case was an appeal against the Industrial Relations Court's ruling that the provisions of Act No. 30 of the Industrial and Labour Relations (Amendment) Act of 1997, did not apply to the Applicants whose rights accrued long before the Industrial and Labour Relation Act²⁸ was amended. It was held that the general presumption against retrospection, does not apply to legislation concerned with matters of procedure. The amendments brought in by Section 85 of the Industrial and Labour Relations (Amendment) Act were procedural.

2.6.3 Presumption of Strict Interpretation of Taxation Statutes

The presumption against retrospective operation of statutes also extends to taxation statutes due to the fact that such statutes are not just procedural but impose liability on taxpayers. Added to this is also the presumption of strict interpretation of taxation statutes. The general rule is that Tax statutes should be strictly construed and any ambiguity must be resolved against the imposition of tax. The operation of this presumption is illustrated in *Cape Brandy Syndicate v. IRC*²⁹ in which Rowlatt J. state at page 474 that:

“There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look at the language used” (p. 747) Thus, when the language of a taxing statute is clear, if an assessee falls within the four corners of the statute, he is to be taxed; if not, no tax is to be levied.”

²⁷ (2004) Z.R. 193 (SC)

²⁸ Chapter 269 of the Laws of Zambia

²⁹ [1921] 1 KB 64

However, the legislature still maintains the power to enact fiscal legislation that operates retrospectively. In the case of *James v Inland Revenue Commissioners*³⁰ it was held that:

“Parliament had the power to enact a fiscal law which was of a retrospective nature. If the wording of retrospective legislation was clear the Court has to give effect to it and has no power to refuse to give effect to it on the ground that to do so was necessary for the protection of private citizens.”

The principle articulated in *James* is in effect a statutory provision under **Article 79 (7)** of the *Zambian Constitution*. The said Article empowers the legislature to enact statutes with retrospective effect while **Sections 10 (4) and 10(5)** of the *Acts of Parliament Act*³¹ provide for the entry into force of an Act that is made with retrospective effect which is the date from which it is given or deemed to be given such effect and that such an Act has no effect if there is no notification in the *Gazette* as to the date of its publication.

The import of these statutory provisions is that in Zambia, retrospective operation of a statute can perhaps never arise “by necessary and distinct operation”. It has to be clearly provided for in the law.

2.7 Criticisms of Rules of Statutory Interpretation

The rules of statutory interpretation have been attacked as inconsistent, uncertain, and undesirable, both in what they say and how they are applied by the courts.³² In the 1950s, Henry Hart and Albert Sacks, recognised leaders of “legal process”, suggested that a coherent theory of

³⁰ [1977] 2 ALL ER 897

³¹ Chapter 3 of the *Laws of Zambia*

³² Friedman, *Statute Law and its Interpretation in the Modern State*, 26 *Canada Bar Review*, 1277 (1948); Horack, *Cooperative Action for Improved Statutory Interpretation*, 3 *VAND. L. REV.* 382 (1950);

statutory interpretation did not exist³³. Antonin Scalia argues that while legal scholars have been at pains to rationalise common law, they have been “seeming agnostic as to whether there is even such a thing as good or bad rules of statutory interpretation”³⁴. More recently, a Canadian Scholar has expressed similar sentiments by arguing that:

“Statutory Interpretation can never be wholly objective, and courts cannot avoid some degree of law-making in their role as participants in the process of refining and applying statutory policies. Whether engaged in the interpretation and application of statutes or common law, courts must somehow discover what are the enduring, shared moral standards and purposes of society and give them effect.”³⁵

While the criticisms discussed above have been directed at the rules generally, there are others that target only certain types of rules, especially the literal rule, legislative intent and those rules pertaining to the use of extrinsic aids in the interpretive process. For instance, the literal rule has been criticized as permitting or even requiring judges to disguise the real reasoning process leading to the adoption of one interpretation over another. The argument is that most statutes must be ambiguous to a degree because they refer to broad, general classes of things.³⁶ Therefore courts resorting to the plain meaning rule are merely rationalizing decisions actually based on other reasons.³⁷ Yet despite these criticisms, the literal rule approach has continued to thrive in common law jurisdictions, even though it is not consistently applied.

³³ Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in Making and Application of Law*, edited by William Eskridge and Philip Frickey (Westbury, N.Y.: Foundation Press, 1994), p. 1169

³⁴ Antonin Scalia, *A Matter of Interpretation*, Princeton: Princeton University Press, 1997, p. 14

³⁵ W. H. Charles, *Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context*, *Dalhousie Law Journal*, Volume 7, Number 3, October 1983, p. 21 <http://heinonline.org> (accessed 16th March 2013)

³⁶ Harry Wilmer Jones, *Statutory Doubts and Legislative Intention*, *Columbia Law Review*, 40 (1940) 957-63

³⁷ Johnstone, Quintin, *An Evaluation of the Rules of Statutory Interpretation*, (1954). Faculty Scholarship Series. Paper 1908. http://digitalcommons.law.yale.edu/fss_papers/1908 (Accessed 18th March 2013)

The concept of legislative intent which accords with the mischief rule has also not been spared from criticism. Scalia argues that the method of looking to legislative intent has serious flaws among which is the danger that looking to legislative intent can be anti-democratic and may mask the fact that the court is actually enacting what it thinks the legislature ought to have enacted, not what it actually did enact.³⁸

The modern rule too has not been spared and one of the observed shortcomings is that it focuses attention on certain types of interpretation issues, namely those involving disputes about the meaning of a text, and ignores others, such as gaps and mistakes or conflicting provisions. This has, on occasion, derailed proper analysis of the issue before the court. A specific complaint about the modern rule approach is that “it does not adequately delineate what is included in the entire context”.³⁹

If such attacks are justified, then we concur with the view that the effect of statutes is unpredictable, particularly that there appears to be flaws with each rule and further one cannot predict what rules of interpretation a court will choose to follow or ignore in any given case.

2.8 Conclusion

This chapter has unveiled the significance of statutory interpretation and also shown the various methods that courts apply in determining the meaning of a statute. It has also demonstrated that there are some identified flaws with each of the methods of interpretation. However what remains of paramount importance is that despite the weaknesses, the rules are still desirable. The

³⁸ Antonin Scalia, *A Matter of Interpretation*, Princeton: Princeton University Press, 1997 at p. 18-22

³⁹ Ruth Sullivan, *Statutory Interpretation in Canada: The Legacy of Elmer Driedger*, online at [http://www.judcom.nsw.au/publications/education-monographs-1/Monograph 4/06_sullivan.pdf](http://www.judcom.nsw.au/publications/education-monographs-1/Monograph%204/06_sullivan.pdf) (accessed 18th March 2013)

chapter has further demonstrated that the underlying thrust of statutory interpretation is not only to ascertain the meaning of a statute but also to maintain both internal and external consistence of the statute so that the resulting interpretation projects the object for which the statute was enacted.⁴⁰

The question is whether in applying any of the rules of statutory interpretation, the judge will always arrive at an appropriate interpretation that can be justified in terms of its compliance with the legislative text and its efficacy in promoting the legislative purpose. It is on the basis of such questions that we proceed to examine the application of these rules in Zambia.

⁴⁰ As observed by Lord Radcliffe in *A-G for Canada v Haliu & Carey Ltd* [1952] AC 427 at page 449

CHAPTER 3

STATUTORY INTERPRETATION IN THE ZAMBIAN CONTEXT

3.0 Introduction

This Chapter endeavours to evaluate the application of the rules of statutory interpretation within the country context with the view to providing a further comparable basis for analysis of the case under review. It begins by providing an overview of the legal framework that governs statutory interpretation in Zambia and identifies the commonly applied rules in the interpretive process. Drawing on some decided cases, an assessment of the effectiveness of the interpretive approach is then provided. The chapter concludes by providing a summary of the efficacy of the interpretive approach generally applied in Zambia.

3.1 Legal framework on Statutory Interpretation in Zambia

The approach to statutory interpretation in Zambia is heavily influenced by English law. The reason for this state of affairs is due to the country's colonial history. Thus in *Shadreck Mwiinga v The Queen*⁴¹, Charles J. rightly observed that "in a country in which the basic law is the common law of England, statutory law is necessarily to be interpreted according to the common law principles of statutory interpretation in the absence of a statutory provision to the contrary..."

The import of this authority is that statutory provisions take precedence over common law rules. It is important that we briefly look at the statutory guides to interpretation in the Zambian context

⁴¹ (1963-1964) Z and NRLR 81

before we consider the application of the common law rules. As we stated in chapter 2, a fundamental principle is that the judiciary is obliged to provide a harmonious interpretation of statutes. In Zambia, the **Interpretation and General Provisions Act**⁴² and the **Acts of Parliament Act**⁴³ are very instructive in this regard. Specifically section 10 of Interpretation and General Provisions Act directs the court to take notice of “all parts of a statute in order to ensure that the resulting construction is not inconsistent with the object of other parts of such law”. Further, section 3(2) of the Acts of Parliament Act stipulates that ‘The words of enactment shall be taken to extend to all sections of the Act and to any Schedules, tables and other provisions contained therein’.

The significance of these provisions is that the court should first look to the internal aids to statutory construction which include context, preamble, long and short title, parts, sections, marginal notes and schedules. Narrowing down to schedules, it will be recalled that in chapter 2, we quoted Brett L J in *Attorney General v Lamplough*⁴⁴ as having observed that a schedule is as much an enactment as any other part of a statute. In Zambia section 9 of the Interpretation and General Provisions Act expressly provides that ‘every schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.’

In elaborating on how the schedule is linked to the main enactment, the learned author Bennion adds that ‘a schedule is an extension of the section that induces it. It is to be read in the light of

⁴² Chapter 2 of the laws of Zambia

⁴³ Chapter 3 of the Laws of Zambia

⁴⁴ (1878) 3 Ex D 214, 229

the wording of that section and if by mischance the inducing words were omitted, the Schedule would still form part of the Act if that was the apparent intention'.⁴⁵

3.2 Evaluation of the Commonly Applied Rules

With regard to the common law rules of statutory interpretation, an examination of some decided cases in the *Zambian Supreme and High Courts* illustrate the various methods that have been adopted albeit with varying degrees of consistency. At least one can discern that three main rules of statutory interpretation have widely been applied. These are the purposive rule; the literal rule and the mischief rule that we have equated to the “legislative intent” rule. The special rules such as presumptions and Latin maxims have also occasionally been cited. One may argue that there is precedent supporting application of the golden rule in *Zambian cases*. However, there is hardly any case in which it can be shown that the court applied the golden rule in its actual sense of providing flexibility to judges to depart from a word's normal meaning in order to avoid an absurd result. Our assertion is supported by arguments presented in the later part of this chapter.

The three stated methods are commonly applied based partly from the legal reasoning within the judgment and also from express mention in cases where the method is stated. A general observation though is that in some cases, the court has expressly stated the methodologies applied and has sought to justify those methodologies. Often however, it has supplied neither a methodology nor a theory of statutory interpretation but rather simply undertaken the task. The

⁴⁵ Francis Bennion, ‘Statutory Interpretation: Part II’. Doc No.1990.002.082, Longman, 1990. P. 122 at <http://www.francisbennion.com> accessed 18 March 2013

results in some cases have raised doubt not so much on the rules but their application.⁴⁶ Consequently we argue that there is some level of inconsistency in the application of the rules and this is precisely what tends to create uncertainty in the law and even raises the question of efficacy of the rules.

It is our contention that there is generally considerable variation in the courts' approach and considerable confusion about a number of important issues. To support this contention, we discuss below some cases in which the mentioned interpretation methods have been applied.

3.2.1 Literal Rule

Despite the highlighted criticisms of this rule, it has continued to thrive in the Courts of Zambia, although by no means consistently too. In *Nkhoma v. Miyanda*⁴⁷ the Court, took the literal rule approach to its extreme, holding that "If the precise words used are plain and unambiguous, the court was bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice".

This holding the *Nkhoma case* is contrary to the objective of statutory interpretation as it is recognized that by virtue of the golden rule, judges are allowed to depart from applying the literal rule in order to avoid an absurd result and above all to give effect to the intention of the legislature. The Courts holding is also contrary to its own observation in *Ngwira and Others v Attorney-General*⁴⁸. In this case, the Court rejected the literal rule and expressed the view that '...the rules of interpretation ... have tended excessively to emphasise the literal meaning of

⁴⁶ Examples include *Nkhoma v. Miyanda* (1995) S.J. (SC) contrasted with *Ngwira and Others v Attorney-General* (1985) Z.R. 206 (HC) on application of the literal rule. These are among the several cases whose decisions are contrasted in this chapter

⁴⁷ (1995) S.J. (SC)

⁴⁸ (1985) Z.R. 206 (HC)

statutory provisions without giving due weight to their meaning in the wider contexts...literalism has in a number of recent cases been in effect repudiated ...’



The brief facts of the *Ngwira* case are that the appellants were detained on a presidential order on allegations of engagement in criminal activities. They sought a declaration that their detention made under regulation 33 (1) of the Preservation of Public Security Regulations⁴⁹ was unlawful. The word “crime” appearing in section 2 of Act was subject of interpretation. The court opted to apply an expansive meaning as opposed to the meaning assigned to it in the cited statute. Another manifestation of the application of the literal rule approach with a variation is in *Mutale V Attorney-General*⁵⁰ in which the Court held that ‘In construing a statute words should be taken in their literal meaning which is not necessarily the dictionary sense but the sense in which the words are used in common parlance, i.e. the popular sense.’

The inconsistency in the application of the literal rule is manifest in the cases discussed above. On one hand, strict application is emphasized while on the other, a liberal approach is advocated. These are some of the issues that raise uncertainty and doubt on the value of the statutory interpretive rules.

3.2.2 Golden Rule

The golden rule is considered as a modification of the literal⁵¹. In assessing application of the rule in the Zambian context, we reiterate our earlier remarks that there are hardly any cases in which it can be shown that the court actually applied the rule in its actual sense. We discerned a

⁴⁹ Chapter 106 of the Laws of Zambia

⁵⁰ (1976) Z.R. 139 (H.C.)

⁵¹ J. Langan. Maxwell on interpretation and Statutes, 12th Ed (London: Sweet and Maxwell), p.43

purposive approach than the golden rule in cases where attempts were made to apply it. In some cases, it has been misconstrued all together. For instance in *Motor Traders Association Of Central Africa And Others v Municipal Council Of Mufulira*⁵² the Court provided an incomplete definition of the rule by stating that “The golden rule is that the words of an Act are prima facie to be given their ordinary and natural meaning”. No explanation or clarification was given beyond the cited incomplete definition. Having noted that the issue in this case was one of interpretation of two apparently conflicting provisions within the same statute, it can only be speculated that perhaps the court intended to refer to the literal rule or at best it was a recording error.

Yet another manifest illustration of attempts to apply the golden rule approach is in the often cited case of *Attorney General and The Movement for Multiparty Democracy v Lewanika And 5 Others*⁵³. As earlier illustrated, this was a case of *casus omissus*, that is, a gap in the statute. This view is informed by the fact that the Court admitted that Article 71(2) (c) of the Constitution of Zambia omitted the inclusion of a situation where a Member of Parliament resigned from one party and does not join another party. Further, a closer examination of the interpretative approach that was applied shows that the Court actually alluded to a ‘purposive approach’, ‘intention of Parliament’ and ‘use of their good common sense’ to arrive at the ruling. Further, the remedy that was applied was not a modification of the text but an insertion into the provision of the words “vice versa”. Perhaps we could speculate that changing the meaning of a statute by way of insertion is generally a way of achieving Parliaments intention.

⁵² (1967) Z.R. 1

⁵³ SCZ Judgment No. 2 OF 1994

The approach adopted in the case discussed above may be contrasted with the statement in *Samual Miyanda v Raymond Handahu*⁵⁴ in the Court stated that:

“When the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on ground such as policy, expediency, justice or political exigency, motive of the frames and the like.....”⁵⁵

It is apparent that this statement goes against the justification given for the reading of the words into Article 71(2) (c) of the Constitution of Zambia in the *Lewanika case*. However, inquiring into the underlying and possible motives for this variance is beyond the scope of this paper. Suffice that the researcher has shown that there are inherent challenges in application of the rules of statutory interpretation.

3.2.3 Purposive Rule

The purposive statutory interpretation approach is said to be one that will promote the general legislative purpose underlying the provisions⁵⁶. It is observed however, that this rule may only be adopted if judges ‘can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy.’⁵⁷

⁵⁴ S.C.Z. Judgment No. 6 of 1994; (1993-1994) Z.R. 187

⁵⁵ This statement was also affirmed in *Mmembe and others v The people* (SCZ Judgment No. 4 Of 1996)

⁵⁶ Per Lord Denning MR in *Notham v London Borough of Barnet* [1978] 1 W.L.R. 220 at page 1246

⁵⁷ Per Lord Scarman in *R v Barnet LBC* [1983] 2 AC 309

In Zambia, this approach appears to have operated more strongly in cases where the constitutional validity of a statute or statutory provision has been questioned. Specifically it is in cases that involve claims of guaranteed rights that a *generous purposive approach* has been adopted. The same cannot be said of cases of a pure criminal or civil nature. Authority for this generous purposive approach in constitutional matters is traced to the much echoed statement of Lord Diplock in *Attorney-General of the Gambia v Jobe*⁵⁸ at page 565 when he said that “a constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and a purposive construction”. This statement was affirmed in *Mulundika and Seven Others v The People*.⁵⁹ The brief facts are that the appellants challenged the constitutionality of Section 5(4) of the Public Order Act⁶⁰ on grounds that it contravened Articles 20 and 21 of the Constitution. In construing the provisions in issue, the Supreme Court found in favour of the appellants and held that Section 5(4) of the Public Order Act was null and void for unconstitutionality. In *Resident Doctors Association of Zambia and Others v The Attorney-General*⁶¹, a case with similar facts to *Mulundika*, the Court applied the same generous purposive approach and found the Police to have infringed the Petitioners rights enshrined in Articles 20 and 21 of the Republican Constitution.

The significance of the constitutional cases cited above is that they show the liberal approach that Courts adopt in interpretation of constitutional provisions that deal with fundamental rights. However, it is not in all cases where claims of infringement of fundamental rights have been advanced that this liberal purposive construction has been applied. For instance in *Mmembe and*

⁵⁸ [1985] LRC (Const.) 556

⁵⁹ (1995) ZR 20 (SC)

⁶⁰ Chapter 104 of the Laws of Zambia

⁶¹ SCZ Judgment No. 12 of 2003

*others v The people*⁶² the appellants were charged with the offence of defamation of the President. The question before the Court was whether section 69 of the Penal Code⁶³ contravened provisions of Articles 20 and 23 of the Constitution. In interpreting the provisions of Article 20, the Supreme Court opted to apply the literal by following the decision in the earlier cited case of *Samuel Miyanda v Raymond Handahu*⁶⁴. Thus on the basis of the exceptions enumerated under Article 20, it was held that the legislature had qualified the right to freedom of expression by those exception and therefore section 69 was reasonably required in a democratic society.

It is hard not to question why in the *Mmembe case* the Court failed to consider the generous purposive approach that is associated with constitutional cases. Suffice that it has been shown that the nature of the claim in case has little or no bearing on the interpretive approach the court will adopt and above that the result is often if not always unpredictable.

3.2.4 Legislative intent/Mischief rule

The mischief rule, as earlier stated attempts to determine the legislators' intention for enactment of the statute in question. There are numerous authorities that may be cited, however the case of *The People v Edward Jack Shamwana and 12 Others*⁶⁵ offers a good example of application of this rule by the High Court of Zambia. In this case, the accused were convicted with the offence of treason. During trial, the accused had raised the question of special requirement of witnesses before one could be convicted of treason. Before the enactment of Act 35 of 1973 that changed the law in Zambia, the law required that in treason cases, one could be convicted unless there

⁶²SCZ Judgment 4 of 1996

⁶³ Chapter 146 of the Laws of Zambia

⁶⁴ SCZ judgement no. 6 of 1994

⁶⁵ (1982) Z.R. 122 (HC)

have been two witnesses to an overt act or one witness to one overt act and another witness to another overt act of same kind of treason. They had argued that the English Treason Act, 1795, previously in section 47 of the Penal Code, was still law in Zambia by virtue of section 2 of the English Law (Extent of Application) Act⁶⁶. It was held that the English statute did not apply as Zambia had enacted a statute with similar provisions. Further that under the Zambian statute, there is no special requirement as to number of witnesses to testify before one is convicted. It was stated that the mischief that the legislature set out to cure in enacting the Zambian statute was the same special requirement relating to number of witnesses in such matters.

The mischief and defect that the quoted statute set out to remedy could be considered controversial. Nonetheless, the concern of this paper is the manner in which the rule was applied. Even though the court accurately endorsed the mischief rule, it fell short of considering other principles of interpretation such as the strict construction of penal statutes. Bennion clarifies that “.....a penal statute must be construed with due regard to the principle against doubtful penalisation, along with all other relevant criteria.”⁶⁷

In the earlier cited case of *Attorney General and The Movement for Multiparty Democracy v Lewanika and 5 Others*⁶⁸, the mischief which the enactment intended to remedy by Article 71(2)(c) of the Republican Constitution was identified as the crossing of the floor by Members of Parliament. The Court observed that the expressed intent failed to take account of MPs that did not join another party, the result was that the Court imputed intent on the legislature. Contrast

⁶⁶ At the time of the case, it was Chapter 4 of the Laws of Zambia. Currently it is Chapter 10 of the Laws of Zambia.

⁶⁷ Francis Bennion, *Statutory Interpretation*, (2nd edn Longman, 1983) at www.francisbennion.com/1983/006/htm (accessed 26 March 2013)

⁶⁸ SCZ Judgment No. 2 OF 1994

this with the holding in *Edith Tshabalala v Attorney-General*⁶⁹ that the fundamental rule of interpretation was the intent expressed by parliament, **not imputed on Parliament** (Emphasis added). The researcher is not suggesting that the intention cannot be imputed on Parliament but simply stressing that lack of consistency in the manner the rules of statutory interpretation are applied can be detrimental to achievement of the purpose for which these rules were developed.

3.3 Application of Special Rules in Taxation Cases

It was demonstrated earlier that the general rule in interpretation of Tax laws is that they are subject to the presumption of strict construction, and any ambiguity must be resolved against imposition of the tax. This presumption was expressly pleaded in the case under review. However, there is hardly any comparable authority, specific to taxation that illustrates how both the Supreme and High Courts of Zambia have applied this presumption. This is largely due to the fact that most disputes in taxation are rarely appealed beyond the Revenue Appeals Tribunal and very few are ever end up at the High Court. Cases that have been appealed to the High relate to contravention of the substantive law and not necessary decisions arising from misinterpretation of the taxation statute. Therefore the case under review offers an opportunity to evaluate the effective of the application of the rules of statutory interpretation to taxation cases.

3.4 Conclusion

In this chapter we attempted to show the legal framework that governs statutory interpretation in Zambia. Through a sample of decided cases, the chapter has illustrated the interpretative approach generally used by the Appellant Courts. Above all, the chapter has shown that there

⁶⁹ SCZ Judgment No. 17 of 1999

are inconsistencies in the manner the rules of statutory interpretation are applied. The cited authorities have highlighted not only the inconsistencies but also some of the inherent challenges in the statutory interpretation approach applied in Zambia. Inconsistencies in statutory interpretation are not unique to Zambian courts. The divergent approaches among English judges also speak to this fact. For instance in *Magor and St Mellons RDC v Newport Corporation*,⁷⁰ Lord Denning expressed an expansive approach to statutory interpretation by stating that “We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis”. It can be inferred from Lord Denning’s dictum that by applying the literal rule, the intention of Parliament could be destroyed. When the same case was appealed to the House of Lords Denning’s approach was considered by Lord Simonds as “a naked usurpation of the legislative function under the thin disguise of interpretation…… if a gap is disclosed the remedy lies in an amending Act”.

The case of **Magor and St Mellons RDC** and the earlier cited authorities are a reminder that judges constitute what is known as the Court and that these judges are human beings. Their reasoning is influenced not just by the rules and principles of law but also the broader environment in which they operate. However, simply because there are flaws in the manner the rules are applied does not mean that this entire body of interpretive authority should be abolished. This simply means an evaluation of the approach and also efficacy of these rules such as we have undertaken offers scope to suggest alternative approaches to statutory interpretation. It is on this premise that we now proceed to evaluate the case of *Celtel Zambia Ltd (T/A Zain Zambia) v Zambia Revenue Authority*.

⁷⁰ [1952] AC 189 -190

CHAPTER 4

ANALYSIS OF THE CASE OF

CELTEL ZAMBIA LTD T/A ZAIN ZAMBIA V ZAMBIA REVENUE AUTHORITY

4.0 Introduction

The previous chapters discussed the theoretical framework and provided illustrations of how the courts have applied the rules of statutory interpretation in Zambia. Further it was shown that there is more to statutory interpretation than deciphering the meaning of the text. In the case of *Celtel Zambia Ltd T/A Zain Zambia V Zambia Revenue Authority*⁷¹, hereinafter, the Celtel case, the facts given in chapter 1 show that the dispute was on all fronts, that is, a gap in the legislative scheme and the meaning of the text.

On the basis of the argument that the case was in part wrongly decided, this Chapter therefore gives an analysis of the efficacy of the interpretative approach applied in the Celtel case. Specifically the chapter examines in detail the Court decision regarding the legality of the contested schedule, the effect of the **Customs and Excise (Amendment) Act, No.2 of 2009** and the status of the revenues collected under the contested legal provisions. Perspectives on the efficacy of the applied rule(s) of interpretation and implications of the Court's decision form the last part of the chapter.

4.1 Legislative Context and background

The statute that was the subject of litigation is the **Customs and Excise Act, Chapter 322 of the laws of Zambia**. The object of the Act is 'to provide for the imposition, collection and

⁷¹ 2010/HPC/668

management of customs, excise and other duties,and for other matters connected therewith or incidental thereto.’⁷² This is therefore a taxation statute and like other taxation statutes in Zambia, this Act is amended every year. Reasons for amendment vary from according tax relief, to increasing taxation or just effecting house-keeping measures. The structure of the Act is such that it is supplemented by several schedules. At the time of authoring this paper, it was established that the Act had nine (9) schedules and the subsidiary legislation equally had fourteen (14) schedules. The legal framework at hand is therefore one that collectively has twenty three (23) schedules that form part of the written law and are required to be construed and have effect of such written law⁷³.

With regard to the excise duty on airtime that was subject of litigation, it was introduced through the **Customs and Excise (Amendment) Act No. 3 of 2004**. The Amendment Act introduced both substantive provisions in the body of the principle Act and also two additional schedules, these being the seventh and eighth schedules. The eighth Schedule provided for the rate of excise duty to be charged while the seventh schedule provided for the method of determining the value for purposes of levying and collecting excise duty on airtime. However, it was established that the provision that was quoted on the seventh schedule as the enabling section, specifically section seventy-six *B*, in fact only applied to the eighth schedule. The said section reads as follows-

“76B. There shall be charged, levied, collected, and paid in respect of services rendered, imported into or provided within Zambia excise duties at the rates specified in the service

⁷²Object has remain unchanged since enactment of the Customs and Excise Ordinance, 1st July 1955

⁷³ As per provisions of sections 3 and 9 of the Interpretation and General Provisions Act, Chapter 2 of the laws of Zambia

excise tariff set out in the Eighth Schedule, in this Act referred to as the service excise tariff.”

In addition to this manifest omission, the definition of talk time as enacted under the 2004 Customs and Excise (Amendment) Act No. 3 of 2004 appeared to suggest the excise duty was limited to voice calls only. Before the 2009 amendment⁷⁴, section 139A defined talk time as ‘the minutes of calls a subscriber makes from a mobile cellular telephone’.

It is on the basis of the foregoing that in October 2008, the Appellant Company commenced its legal challenge first at the Revenue Appeals Tribunal and then the High Court. The facts of the case as provided in Chapter 1 show that the Appellant claimed for a refund alleging overpayment of excise duty due to erroneous interpretation of the provision of the law on the part of the Respondent. Specifically the three main grounds of appeal centered on the -

- (i) Legality of the seventh schedule as a basis for levying excise duty.
- (ii) The failure by the Revenue Appeals tribunal to pronounce itself on the effect of the Customs and Excise (Amendment) Act No.2 of 2009; and
- (iii) computation of the value for purposes of levying excise duty.

All the grounds of appeal failed as the High Court held that -

- (i) The error in drafting did not affect the legality of the schedule relied upon by the Respondent to levy, charge and collect excise duty;
- (ii) The Customs and Excise (Amendment) Act No. 2 of 2009 whose principle objective was to correct the manifest errors did not have a retrospective effect;

⁷⁴ Customs and Excise (Amendment) Act No. 2 of 2009 was enacted to correct the omissions and provide clarity and

(iii) The tax which was allegedly erroneously levied and collected from subscribers during the period 2004 to 2008 is *bona vacantia* and should be escheated to the state so that it forms part of the general revenues of the State.

The researcher is of the considered view that there is some apparent contradiction in the Courts ruling. The contradiction arises on the basis that having found the law that formed the basis for collecting of the tax in dispute to be valid, contrary to its own findings, the Court proceeded to declare that a component of the collected tax namely that relating to data transfer services, was without an owner. Like the Tribunal, the High Court also failed to pronounce itself with sufficient clarity on the effect of the 2009 Amendment Act.

It is thus on the basis of the foregoing that we now proceed to examine in greater detail the decision of the court and specifically the efficacy of the applied interpretive approach.

4.2 Analysis of the interpretive approach

4.2.1 General Observations

The necessity for certainty and clarity in a statute before it can be used to levy tax can never be overemphasized. It is for this reason that the presumption against retrospective operation and the general rule that Tax statutes should be strictly construed and any ambiguity must be resolved against the imposition of tax in favor of the taxpayer were developed by the Judges.⁷⁵ As rightly observed by the learned authors of Maxwell on the Interpretation of Statutes⁷⁶, the rule against

⁷⁵ *Cape Brandy Syndicate v IRC* [1921] 1 KB 64 offers a good illustration of the operation of this rule. In this case Rowlatt J observed that in interpretation of a taxing statute 'there is no room for any intendment. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look at the language used'

⁷⁶ J. Langan. Maxwell on interpretation and Statutes, 12th Ed (London: Sweet and Maxwell), p. 215 and 225

retrospective operation is a presumption only, and as such it may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it.

✱

Whether there were circumstances sufficiently strong to displace the presumption in the case under review is a matter that is discussed below. Suffice to mention that in Zambia, by virtue of Article 79 (7) of the Republican Constitution, Parliament is empowered to enact any fiscal law, whether of prospective or retrospective nature.

In light of the foregoing observations, the case under review is one that called for a purposive approach to interpretation, that is, one that takes into account the entire context of the law in dispute. It is in this regard that the researcher agrees with the observation by the Learned author Ruth Sullivan in 'Driedger on the Construction of Statutes', 3rd edition at page 131 that 'Courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of the proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids.'⁷⁷

Thus, having observed that this was a clear case of a drafting error, one special rule of interpretation that ought to have been considered is the doctrine of *casus omissus*. As was explained in the preceding chapter, the rule of *casus omissus* outlines the circumstances when a court can supply a clearly unintended omission by the legislature in drafting a particular provision.⁷⁸ It is recognized that Courts apply this rule with caution due to the argument of usurpation of powers of the legislature. However, the point being made is that the Court ought to have explained with sufficient clarity what should happen in the face of such a manifest drafting error notwithstanding the ruling that the error was of no legal effect. Certainly adoption of the

⁷⁷ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed. (Toronto: Butterworths, 1994), p.131

⁷⁸ Rupert Cross, John Bell and Sir George Engle, *Statutory Interpretation*. (London, Butterworths, 1987) P. 11

statement by Lord Simonds in *Magor and St Mellons RDC v Newport Corporation*,⁷⁹ that ‘..... if a gap is disclosed the remedy lies in an amending Act’, would have provide the missing clarity.

Conversely, in the case under review, the High Court neither supplied a clear methodology nor a theory of statutory interpretation in arriving at its decision. From the reasoning within the judgment however, it may be inferred that some form of purposive approach in interpretation of the provisions in dispute was applied. This view is substantiated by the fact that the Court expressly declined to apply the literal rule in interpreting section 76B of the Customs and Excise Act. The Learned Puisine Judge stated in obiter that ‘the court should not frustrate Parliament’s intention by applying the literal meaning of Section 76B of the Customs and Excise Act. Instead, it should apply a corrected version.’

Paradoxically however, the Court only saw it fit to apply the corrected version to the issue of the validity of the schedule and not to the other issues that were in contention. This is precisely why the result has raised doubt not so much on the rules but their efficacy and perhaps value in the adjudication process. We now examine those specific areas that have raised uncertainty in the law.

4.2.2 Legality of the Schedule

The question of the effect of the error in drafting on the legality of the schedule is one that could be said to have been the only issue aptly addressed by the High Court in terms of interpretation. The Court held that while the error was manifest and beyond denial, it did not make the Seventh

⁷⁹ [1952] AC 189 -190

Schedule null and void and of no legal effect. The reason for the decision was that the apparent intention of the legislature was that the Schedule should form part of the Act. In holding that the drafting error was of no legal effect, the Court cited with approval the view by the Learned Author Francis Bennion⁸⁰ that the practice of inserting inducing words to link the Schedule was to main statute was no longer done, being regard as unnecessary. If by mischance the inducing words were omitted, the Schedule would still form part of the Act if that was the apparent intention.

While the researcher agrees that the cited statement by the learned author is of immense persuasive value, it cannot be ignored that the schedule in contention forms part of the Customs and Excise Act due to the rule in *Shadreck Mwiinga v The Queen*⁸¹, in which Charles J. rightly stated that ‘statutory law is necessarily to be interpreted according to the common law principles of statutory interpretation in the absence of a statutory provision to the contrary...’

Thus, there are binding statutory provisions that ought to have formed the basis for the Courts ruling such as the internal aids to interpretation within the 2004 Amendment Act itself and section 9 the Interpretation and General Provisions Act⁸² which provides that ‘Every Schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.’

On internal aids to interpretation, section *eleven* of the Customs and Excise (Amendment) Act, No 3 of 2004 inserted the schedule in the Customs and Excise Act by providing that ‘The

⁸⁰ Francis Bennion, *Statutory Interpretation*, 3rd Ed. (London, Butterworth, 1997) p.554

⁸¹ (1963-1964) Z and NRLR 81

⁸² Chapter 2 of the laws of Zambia

Principal Act is amended by the insertion after the Sixth Schedule of a new Seventh Schedule as set out in Appendix III to this Act.’

✱

To further underscore the foregoing, the enacting words of the said Amendment Act provide that ‘This Act may be referred to as the Customs and Excise (Amendment) Act, 2004 and shall be read as one with the Customs and Excise Act, in this Act referred to as the Principal Act.’ Therefore, it is clear that Parliament intended that the schedule in contention should form part of the Customs and Excise Act.

It is thus due to the foregoing that the Courts approach to interpreting the legality of the schedule is supported. However, the same cannot be said of the Courts approach to interpretation of the effect of the 2009 Amendment Act and the declaration that part of the revenues collected under the contested provisions were without an owner.

4.2.3 Effect of the Customs and Excise (Amendment) Act, No.2 of 2009

In adjudicating on the effect of the Customs and Excise (Amendment) Act No. 2 of 2009, the High Court rightly acknowledged that the said Amendment Act was enacted to correct the manifest errors in the Customs and Excise Act. The question to be addressed therefore is whether the said 2009 Amendment Act whose principle objective was to correct the manifest errors in the Customs and Excise Act had a retrospective effect.

The Courts position was that the Act in question did not have a retrospective effect on grounds that there was no such clarify in said Amendment Act No. 2 of 2009. The Court did not explain with sufficient clarity why the Amendment Act could not be held to have retrospective effect.

Questions have remained as to whether the Court was limited by the rule against retrospective operation of tax laws. Having established that the rule is a presumption only, and as such it may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it, one is then left with the question of whether the circumstances in the instance case were not sufficiently strong to hold the contrary.

The Court rightfully acknowledged the purpose for which the Customs and Excise (Amendment) Act, No 2 of 2009 was enacted. It was to correct the error in the law in order for the law to read the way it was intended to read when it was first enacted. In other words, there was no change in the law. It is therefore the authors considered view that had the Court applied this analogy; it would perhaps have arrived at a different conclusion. This view is informed by the fact that Article 79 (7) makes provision for enactment of retrospective legislation by Parliament. Further, Section 10 (4) the Acts of Parliament Act ⁸³ provides that 'Where an Act is made with retrospective effect, the commencement of the Act shall be the date from which it is given or deemed to be given such effect.'

The law does not state with precision that deeming can only be expressly provided for in the enactment. Deeming may also be by interpretation by the Courts of law where strong circumstances exist for doing so.⁸⁴ This may be the case where the exception to the presumption against retrospective operation applies. Such exceptions apply to enactments that

⁸³ Chapter 3 of the Laws of Zambia

⁸⁴ In *West v Gwynne (1911) 2 Ch 1*, Cozens Hardy MR assented to the proposition that a statute is presumed not to have retrospective operation unless the contrary appears.

are merely procedural or evidentiary in nature as was affirmed in the cited case of *Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 others*.⁸⁵

It is therefore the researchers considered view that the interpretive approach adopted by the Court in holding that the 2009 Amendment Act did not have retrospective effect lacked the depth necessary to remove the ambiguity that now characterizes the judgment on this particular issue. We now proceed to consider the holding on revenues collected on data transfer services that were declare to be without an owner.

4.2.4 Application of the Doctrine of *bona vacantia*

In order to aptly evaluate the Courts decision to apply the doctrine of *bona vacantia* to only part of the revenues collected under the disputed legal provisions, the question to be addressed is whether it was sound for the Court to hold that even though the law that formed the basis for collecting of the excise duty was legal, a component of the excise duty namely that relating to data transfer services, was *bona vacantia*, that is, without an owner.

Firstly it must be appreciated that the Latin term *Bona vacantia* (literally "ownerless goods") is a legal concept associated with property that has no owner. It exists in various jurisdictions, with consequently varying application, but with origins mostly in English law. No property or goods can be said to be ownerless. Under the common law, if legal ownership cannot be established by anyone else, it falls to the crown to deal with assets concerned.⁸⁶ The crown in this instance represents the state.

⁸⁵ (2004) Z.R. 193 (SC)

⁸⁶ http://en.wikipedia.org/wiki/Bona_vacantia

In the instant case, the state was only allowed to retain the disputed taxes under the doctrine of bona vacantia. By interpretation it may be argued that even the state was not entitled to retain the disputed taxes except under the said doctrine. The contradiction and above all confusion of the ruling on this issue arises when one considers the Courts holding that there were legal provisions entitling the state through the Respondent to collect the tax in dispute. Granted the question of subscribers being entitled to the disputed revenues also arose in the course of the trial as the Appellant was said to have been only agent in the collection of the taxes. The subscribers in this instance are the taxpayers. Thus the taxpayers could as well have been declared as the rightful owners. The state is empowered by law to lawfully imposed and collect taxes under a valid law. This analogy was never considered as it remains unclear as to what factors and considerations that led the Court to declare that the taxes in dispute were without an owner. It appears the declaration was in consequence of the observed defect in the definition of talk time which, as noted above was construed as not extending to data transfer services, hence the claim by the

Appellant that it had paid the said taxes in error. As noted under item 4.1 above, the Customs and Excise (Amendment) Act, No 2 of 2009 deleted the definition of talk time and replaced it with a broad definition of airtime that covers all services consumed through use of a mobile phone. Thus, the intention of Parliament as manifested in this amendment was to charge and collect excise duty even on data transmission services, this being a service incidental to the use of a mobile phone. The amendment that was effected to the definition of airtime underscores the already stated purpose of the 2009 Amendment Act which was to correct the error in the law in order for the law to read the way it was intended to read when it was first enacted.

It is thus hard not to question whether the Court considered the meaning of the disputed legal provisions in their total context as envisaged by the learned author Ruth Sullivan⁸⁷. This question is raised in light of the observed lack of consistency on the part of the Court in applying the rules of statutory interpretation within the same judgment. On one hand, the Court stated that it should not frustrate Parliament's intention. Instead, it should apply a corrected version [of the law] (emphasis added). On the other hand, the same Court failed to apply this principle within the same judgment.

It is therefore the researchers' considered view that it was not sound for the Court to hold that even though the law that formed the basis for collecting of the excise duty was legal, a component of the excise duty namely that relating to data transfer services, was *bona vacantia*.

4.3 Conclusion

The case of *Celtel Zambia Ltd T/A Zain Zambia V Zambia Revenue Authority*⁸⁸ has illustrated that there are often flaws in the manner in which Courts apply the various methods of statutory interpretation. As rightly observed by one Canadian Scholar, 'statutory interpretation can never be wholly objective, and Courts cannot avoid some degree of law-making in their role as participants in the process of refining and applying statutory policies.'⁸⁹

The criticisms therefore that the rules of statutory interpretation are inconsistent, uncertain, and perhaps undesirable are not without a basis. One cannot predict what rules of interpretation a

⁸⁷ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed. (Toronto: Butterworths, 1994), p.131

⁸⁸ 2010/HPC/668

⁸⁹ W. H. Charles, *Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context*, *Dalhousie Law Journal*, Volume 7, Number 3, October 1983, p. 21 <http://heinonline.org> (accessed 16th March 2013)

Court will choose to follow or ignore in any given case. As observed in the reviewed case, the Court was a liberty to ignore some rules that the researcher considered fundamental in aiding to arrive at a decision that can be justified in terms of 'plausibility, compliance with the legislative text; efficacy, that is, the promotion of the legislative purpose; and acceptability, that is, being reasonable and just'.⁹⁰

Finally the foregoing observations do not necessary imply that the rules are without value. It is their application by the very institution that developed them that presents the challenge. Thus an evaluation as presented in this paper offers room for exploration of alternative approaches to statutory interpretation.

Chapter 5

Conclusions and Recommendations

⁹⁰ Adapted from Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed. (Toronto: Butterworths, 1994), p.131

5.0 Summary of Findings and Conclusion

This study set out to evaluate the efficacy of the rules of statutory interpretation as applied in the case of *Celtel Zambia Ltd (T/A Zain Zambia) V. Zambia Revenue Authority*⁹¹. The hypotheses that the study was testing have been proved. On the basis of the discussed theories of interpretation and cited authorities, the study found that the Court was on firm ground when it held that while the error in drafting was manifest and beyond denial, it did not make the Seventh Schedule null and void. However, the Court contradicted itself when it held that the revenue collected on data transfer services was without an owner.

It is also a finding of this study that in holding that the Customs and Excise (Amendment) Act, No 2 of 2009 did not have retrospective, the Court failed to fairly and accurately present the real reason for its decision. Consequently the ruling on this issue has contributed to creating the very thing it was intended to eliminate which is ambiguity. The researcher has thus attempted to propose an interpretive approach that could have possibly eliminated this ambiguity.

5.2 Other General Findings on Statutory Interpretation

The study has shown that the rules of statutory interpretation can never operate with measured accuracy. There are some identified flaws with each of the methods of interpretation. It has been shown that in applying any of the rules of statutory interpretation, particularly the permissible external aids, presumptions and other special rules, there is no guarantee that the judge will always arrive at an appropriate interpretation. Further, the study has illustrated that there are inconsistencies in the manner the rules of statutory interpretation are applied. The unpredictable use of statutory-interpretation doctrine seriously impedes the objectives of statutory

⁹¹ 2010/HPC/668

interpretation in that it greatly lessens the certainty of the law. However, simply because there are flaws does not mean that this entire body of interpretive authority should be abolished.

5.3 Recommendations and way forward

The foregoing conclusion points to the fact that even though statutory interpretation can never become a simple, easy art, there are changes that can be made to the approach and practices of legal institutions to more fully realise its basic objectives. It is suggested that the following recommendations are considered:

- 5.3.1 Need for the Courts to always be cognizant of the basic objectives of statutory interpretation:** Rules of interpretation were developed by the judges to ease ambiguities, inconsistencies, contradictions or lacunas. Therefore, while recognizing judicial discretion, it is important that in cases requiring statutory interpretation, rules of interpretation should always be applied with this objective in mind.
- 5.3.2 Need for constant harmonious interpretation of statutes:** It is a basic principle of statutory interpretation that a statute should be read as a harmonious whole. Therefore in construing a provision of a statute the Court should be slow to adopt an interpretation which tends to make any part of the statute meaningless or ineffective. An attempt must always be made to reconcile the relevant provision as to advance the true intention of the legislature.
- 5.3.3 Need for judges to objectively and accurately present the real reasons for their decisions:** In consideration of the fact that decisions by judges become law, it is imperative that when adjudicating on matter requiring interpretation of a statute, judges should objectively and accurately present the real reasons for their decisions. This makes their decisions more useful as precedent, gives a better basis for informed and effective

criticism, and increases the likelihood that the Courts will carefully think through their decisions on future matters with similar facts.

✱

5.3.4 Need for skilled drafting in order to eliminate ambiguity: There is need not only for skilled drafting but more careful and complete drafting in order to eliminate much of the ambiguity that necessitates interpretation of statutes by the Courts. This can be achieved firstly by laying the foundation through introduction of such a specialized course in law schools and secondly offering such a course to practitioners a part of their continuous professional development program. An encouraging development is the recent seminar organized by the University of Zambia law school on legal drafting. There is need to go further by adding a component that focuses on statutory interpretation from which the bench and bar could also benefit.

5.3.5 Need for regular review of legislation in order to achieve clarity in the legal text: Such a practice of regular legislative review would eliminate some of the poor drafting and inconsistent provisions in the existing laws. This can be achieved by setting up a dedicated unit within the Ministry of Justice to work with the implementing government agencies. Such a practice of regular legislative review is already inherent in taxation statutes. This practice should be extended to other laws of Zambia.

The recommendations given above, if adopted would help reduce the amount of litigation associated with interpretation of statutes and above all unambiguous provisions would ease the task of interpretation by the Courts.

BIBLIOGRAPHY

BOOKS AND ARTICLES

- Bennion, Francis. 'Statutory Interpretation: Part II'. Doc No.1990.002.082, Longman, 1990.
<http://www.francisbennion.com>
- Bennion, Francis. Statutory Interpretation, 2nd edition, Longman, 1983.
www.francisbennion.com/1983/006/htm
- Bennion, Francis. Statutory Interpretation, London, Butterworth, 2002.
- Boudreau Cheryl et al. Statutory Interpretation and the Intentional (ist) Stance, 38 Loy. L. A. L. Rev. 2131 (2005) <http://digitalcommons.lmu.edu>
- Bryan A. Garner, ed. Black's Law Dictionary, 8th ed, West Group, 2004.
- Charles, W. H., Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context, (1982-1983) 7 Dalhousie Law Journal, Volume 7, No.3, (October 1983): 7- 41
<http://heinonline.org>
- Cross, Rupert and Others. Statutory Interpretation, London, Butterworths, 1987.
- Dickerson, Frederick, R., Legislative drafting, Connecticut: Greenwood Press, 1977
- Dreidger, Elmer. Construction of Statutes, 2nd ed., Toronto, Butterworths, 1983.
- Dworkin, Ronald. Laws Empire, Cambridge Mass: Belknap Press, 1986.
- Friedmann, W. Statute Law and its Interpretation in the Modern State, 26 Canada Bar Review, 1277 (1948)
- Hart, Henry and Albert Sacks, The Legal Process: Basic Problems in Making and Application of Law, edited by William Eskridge and Philip Frickey (Westbury, N.Y.: Foundation Press, 1994)
- Horack, F. E., Cooperative Action for Improved Statutory Interpretation, 3 Vanderbilt Law Review, 382-388 (1950)
- Jones, H. W, Statutory Doubts and Legislative Intention, Columbia Law Review, 40 (1940) 957-963
- Langan, J., Maxwell on interpretation and Statutes, 12th Ed (London: Sweet and Maxwell),
- Quintin, Johnstone. An Evaluation of the Rules of Statutory Interpretation, (1954). Faculty Scholarship Series. Paper 1908. http://digitalcommons.law.yale.edu/fss_papers/1908
- Sangwa, J. (2010), 'L341 Administrative Law Lecture Notes', unpublished

Scalia, Antonin. *A Matter of Interpretation*, Princeton: Princeton University Press, 1997

Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd Ed., Toronto: Butterworths, 1994.

Sullivan, Ruth. *Statutory Interpretation in Canada: The Legacy of Elmer Driedger*,
[http://www.judcom.nsw.au/publications/education-monographs-1/Monograph
4/06_sullivan.pdf](http://www.judcom.nsw.au/publications/education-monographs-1/Monograph4/06_sullivan.pdf)

Thornton, Garth, C., *Legislative drafting*, London: Butterworth, 1987.

Williams, Glanville. *'Learning the Law'*, 11th Edition, New Delhi: Taj Press, 2002.