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***THE IMPACT OF PRIVATISATION ON CONTRACTS OF
EMPLOYMENT***

BY

JULIANA SHOKO

SIGN

***A dissertation submitted to the faculty of law of the University of Zambia in partial
fulfillment of the requirements for the reward of the Degree of Bachelor of Laws
(LLB)***

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(i)

DEDICATION

To Dad and Mum

For promising to be there for me in whatever I do that will lead to my success in life.

Your presence and close guidance to the righteous path will forever be cherished.

“ Listen to your father who gave you life

and, do not despise your mother when she is old.

Buy the truth and do not sell it;

Get wisdom, discipline and understanding.

The father of a righteous man has great joy:

He who has a wise child delights in him.

May your Father and mother be glad:

May she who gave you life rejoice!”

Proverbs 23: 22 – 25

May the almighty God give you many more happy and blessed years together.

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Special gratitude goes to my supervisor, Mr. Leonard Kalinde, who has critically analysed my work, chapter by chapter, keeping me abreast to the need for clarity, and invariably offering me advice and considerable encouragement.

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To my dear brother, Henry and my sisters, Priscilla, Jayne and little Tendai, I would like to say thank you for being who you are to me, for the moral, spiritual and physical

(iii)

Support I receive from each one of you. You are a great pillar to my success. I LOVE YOU ALL.

To my close friends, Yvonne Chisuta and Bwalya Penza, this has been a hurdle where your support has greatly assisted me. I thank God for you and wish you great success.

And most of all, I pay special tribute to the lord almighty for all that I am able to show appreciation for and that which I may have overlooked in my life.

The lord has been, is and continues to be;

“... my shepherd, I shall not want,

...I will not be afraid, because lord,

you are with me.”

Psalms 23: 1 – 4

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Abstract

Zambia, a country in South-Central Africa has undergone massive policy changes both in the political and economic spheres. In the political arena, the country, prior to independence, then known as Northern Rhodesia, developed from a British protectorate under the British South African Company from 1884, to being colonised by the British government from 1924 to 1964. After independence, multi-party politics was the order of the day in which time, the United National Independence Party (UNIP) was the ruling party. Thereafter, the then Republican President, Dr. Kenneth Kaunda, whose political party was UNIP, created a one-party political system. This party ruled for twenty-seven (27) years until the re-introduction of multi-party politics under the Movement for Multi-party Democracy (MMD) government, in 1991. This was as a result of the collapse of Communism in Eastern Europe and the United Soviet Republic (USSR), and also an outcry by the Zambian people to change the one-party system as it was proving to be futile.

In relation to the economic sector, the country discarded the socialist oriented policies propounded by the former government, which was geared towards a centrally planned economy. The MMD government has embarked on policies in favour of a liberalised economy, where free market policies are strongly emphasised.

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It is imperative for us to initiate our research from the time Zambia was under colonial rule and assess how the country has developed its economic policies to reflect the prevailing situation.

During the time Zambia was under colonial rule that is from 1924 to 1964 the mining industry was the single largest employer among all the Zambian industries and the country's chief earner of foreign exchange. It must be noted that employment contracts date back to time immemorial and analysing its evolution and current status to employers and employees will play a vital role in critically analysing the framework of present society, vis-à-vis, and the privatisation process.

At independence, Zambia was among the African countries with a strong economic baseⁱ. However, the UNIP government embarked on socialist oriented policies, providing free education, free medical care, among other facilities, thereafter diverting the income from mines into providing social welfare instead of focusing on the most needed development of manufacturing industries, agriculture and other related infrastructure for sustainable development.

Total dependence on mining brought about serious problems as the prices of copper slumped due to worldwide depression brought about by the sudden increase in the price

of crude petroleum products and the collapse of commodity prices like, copper, on the world market. The saddening thing is that the then government continued on socialist principles. The result was devastating, economic stagnation, run-down infrastructure and a general failure to maintain the industrial sector because of lack of these industries to absorb the ever increasing population in gainful employment. In short, the mining industry failed to spark the growth of the many secondary industries, which could have provided employment opportunities.

The situation continued to deteriorate until 1991 when the Movement for Multi-Party Democracy (MMD) government took over the reigns of power and introduced drastic economic policy changes. When the MMD government took over control of the government through the 1991 Presidential and Parliamentary Elections, the MMD government stated that it was going to seek to undertake “ an unbreakable integrated package” of economic reforms. Their motive dwelled on creating a ‘free market economy’ where private businessmen were able to engage in trade in Zambia. In so doing, they decided to Privatisise State Owned Enterprises in order for the burden placed on government to be alleviated and thus the companies could be run more sufficiently to meet the present day technological advancement.

These policies have been implemented and the process of privatisation has been ongoing. An Act was introduced which was to be used as a yardstick for the process in Zambia.

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Various modes were adopted to carry out the program. However, among the major areas that were affected was the employment sector. Many changes have been made to the work force in the privatised companies. Workers have had their contracts of services altered to suit the new employer's conditions or they have simply been declared redundant due to the fact that they do not have any work for them. Furthermore, these workers have been retrenched claiming that the workforce is too large to sustain, or simply that they do not have any jobs for them. Government's intention was that, as soon as these companies are privatised, many jobs would be created for Zambians and better working conditions shall be advanced. This would be as a result of decentralizing these large parastatals, and making them more specialised in their work. In that way, more qualified people would be employed to work in various positions. Furthermore, more money would be pumped into various organisations for their smooth running by their private owners, which in the long run, would provide good conditions of service for the employees.

These ambitions of government have today, proved to be futile. We see many Zambians stranded and unable to sustain a more positive way of living because of lack of job opportunities to see them survive. Where does the problem lie? Is there a misunderstanding of the concept of privatisation and its application to the labour sector? Who is to blame for the mishap of arriving at an understanding of the workers conditions of service? Is there a loophole in the Law relating to the two areas and their

interrelations? These are among various issues that we intend to discuss in this research paper.

This essay shall endeavour to show how the courts of law in Zambia have responded or interpreted contracts of employment under the privatisation process at different levels in the development of this branch of law.

Chapter one discusses the period of nationalisation in Zambia from pre-colonial times, until the re-introduction of a free market economy in 1991, by the Movement for Multi-party Democracy (MMD).

Chapter Two discusses Privatisation. It is in this chapter that the Zambia Privatisation Act, under the Zambia Privatisation Agency, has carried out various modes of privatisation.

Chapter Three endeavours to show how privatisation has affected the rights of employees as well as the legal obligations. It also provides an in-depth illustration and analysis of a number of cases that have arisen out of a misunderstanding of these terms and conditions of the employment contract.

Chapter Four tries to summarise the study and then proceeds to recommend possibilities of clarifying the whole aspect. From there, a conclusion shall follow.

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1. E.L. Berger, Labour Race and Colonial Rule – p.9
 2. O.S. Saasa: Zambia's Macroeconomic Policies – Is the 1998 Budget hitting the right target? (Paper presented by the Institute of Economic and Social Research an the 1998 Budget, Lusaka, 1998.
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CHAPTER ONE

1.1 Introduction and background to the Nationalist Policy

Zambia, previously known as Northern Rhodesia was, partitioned in 1884 by the Berlin Conference and become a British Protectorate. The British South-African Company (B.S.A Company) ran the administrative and financial sector of the territory from 1885, after a Royal Charter was drawn up. The BSA Company was thus the first government of Northern Rhodesia, which was a government run on capitalist lines.ⁱ

The BSA Company controlled the territory from 1895 until 1924 when Britain took over control of the territory. This was after the BSA Company started to face financial difficulties in its administrationⁱⁱ. The Northern Rhodesia Proclamation of 1911 was the Constitution in force for forty years under which Northern Rhodesia was governed, and gave birth to Zambia in 1964. Despite the British government running administration, the BSA Company controlled the mining sector since it owned the mining concessions. Thus, the company still played a major role in the direction of economic policy.

Many towns that emerged were invariably located along the line of rail as the mining industry continued to develop. Other sectors of the economy, such as the commercial and manufacturing areas were neglected due to two factors: Firstly, the non-availability capital for investment and secondly, the lack of a wide local market. As the bulk of the economy was vested in the hands of privately owned mining industries whose

shareholders steadfastly refused to employ their profits towards the development of other ventures, non-mining development insignificant.ⁱⁱⁱ

“ This was typical of the Philosophy of Capitalism under which the mining companies operated. The duty of the managers was seen primarily as that of maximising returns to the shareholders. Social responsibilities of the companies were of secondary concern to the managers.”^{iv}

1.2 Rise of the Parastatal Sector

In the year 1960, the stage was set, by the formation of the Industrial Development Corporation Limited (INDECO), by the then colonial government, for the creation of what was to become the most dominant economic conceptual force in the next thirty-five (35) years of the Zambian economy, i.e. “The Parastatal Company”. However it was not until independence that parastatal companies took the centre stage in the Zambian economy with the new government adopting a policy of setting up permanently in business, which was a major shift from the policy undertaken, by the pre-independence government. This policy by the new government was manifested by a series of economic reforms namely: The Mulungushi Economic Reforms of 1968: the Matero Economic Reforms of 1969: and the Economic Reforms of 1970, which shall be discussed in detail at a later stage. These reforms were intended to extend government’s active participation to all sectors of the economy as well as to enable government to assume direct control of the economy.

In 1965, the Government's policy was critically reviewed “ and it was decided to articulate certain aspects of the policy. In view of this, the functions of INDECO were redefined and became as follows:

- (1) “To be the holding financing and management institution for government's investments and interests in industry.
- (2) To be a financial institution specifically charged with the function of the promotion of Zambian entrepreneurship in both industry and commerce.
- (3) To be a financial institution charged with the responsibility of issuing loans to private enterprise on normal, commercial terms.
- (4) To have responsibility for the appraisal of industrial projects, which the government wishes to promote, either itself or in partnership with private enterprise.”^{vi}

Although this meant that government was now to participate substantially in the country's commerce, the main role of parastatals was a direct result of the national philosophy of Humanism adopted at a United National Independence Party (UNIP) National Council in April 1967. The philosophy advocated for equal distribution of the nation's wealth so as to restore ‘the equality of man’.^{vii}

Government employed two methods of creating parastatals:

- (1) It formed state owned companies, and
- (2) It acquired majority shares in existing privately owned companies.

The latter method is the one, which characterised the aforementioned series of economic reforms using the principle of the state acquiring fifty-one percent (51%) shares in all major private companies operating in Zambia. Therefore, under the Mulungushi Economic Reforms, the most important aspect of it for present purposes was the government's request addressed to twenty-six (26) privately owned companies to offer 51% of their equity to the state. Most of these companies were accused of lack of interest in the welfare of Zambians by making excessive profits, which were repatriated to other countries to the detriment of Zambia and of organising prices to create a false monopoly position. Of the twenty-six companies named at Mulungushi, only one (Mwaiseni Stores Limited) was a Zambian owned company, but the rest were foreign-owned.^{viii} Government's objectives were clear – to restore certain portions of business for Zambians by wiping out any foreign competition so that Zambian entrepreneurs would be guaranteed success.

Under the Matero Economic Reforms, the same principle was once again used. The government announced, *inter alia*, its intention to take on fifty-one (51%) shares in existing and future operating mining companies. It should be pointed out that, apart from the mining companies, no industrial or commercial companies were asked specifically to offer 51% of their shares to INDECO but all the large enterprises were advised generally to form partnerships with INDECO.^{ix}

The Economic Reforms of 1970 captured the financial sector, comprising mainly of the banks, insurance companies and building societies. Under these reforms, however, the principle of the state acquiring fifty-one percent shares as used in the preceding reforms was abortive. Instead, the government issued a directive on 27th July 1971, requiring that from 1st January 1972, foreign banks would have to be incorporated locally and that at least half of their directors should reside in Zambia. The state resolved to effectively promote the already existing state owned Zambia National Commercial Bank (ZNCB). With regard to insurance and building societies, necessary laws were passed requiring the privately owned insurance companies and building societies to cease operations by certain dates. This ensured the state monopoly through the already existing state insurance corporation and the state owned building society.

1.3 Administration of Parastatals

The Government was now fully entrenched in the Zambian economy and all control lay in its hands. In running the affairs of these parastatals, the Board of Directors comprised Cabinet Ministers. Politicians and civil servants exercised all control. Parastatal Chiefs were appointed and dismissed by the President and financial affairs were supervised by Parliament. Ministers and their Permanent secretaries were Chairmen and vice-chairmen of the holding companies, whilst civil servants below them in the ministries were directors of subsidiary companies. This arrangement came about as a result of the then President's policies of Humanism and an aim to get Government to portray a complete control over the acquired sectors.

It was an obvious picture that government was the major employer of the Zambian populace. With almost all of the areas of control being in the hands of government, they needed much labour force they could get their hands on. This meant that there would be effective manpower to deal with everything under government's control. Government aimed at keeping non-civil servants out of the system of active participation of parastatals.

INDECO, having being the main instrument for creating parastatals had until 1970 held all of government's acquired shares. However, in March the same year, the Zambia Industrial and Mining Corporation (ZIMCO), was formed under the Companies Act to become the 'Master' holding company taking over INDECO's role. The formation of ZIMCO followed the successful completion of the negotiations for the government's take over of fifty-one percent shares in the mining companies. It is important to note that at this time, ZIMCO was a mere paper holding company with no executive management. The actual supervisory control over the boards and company management of subsidiary companies was vested in respective line ministries.

As parastatals comprised of a major section of the economy, there was a clear distinction between the social as well as economic policies in the country. Projects involving social as well as economic considerations that were not viable in purely commercial projects for the development of the nation.^x Projects were undertaken more for their social implications rather than for their commercial potential. More and more funds were pumped into loss making ventures, regardless of their impact on the economic policy. Parastatals became mere manifestations of the government's bureaucratic system and

performed regardless of efficiency, viability or any other commercial trait. Politics prevailed over economics.

The story of parastatals from 1970 to 1995 can neither be simply described as a success story, what could be a more accurate description is probably one of a bit of both. On the one hand government succeeded through ZIMCO in scoring a double. Firstly, the government achieved its intended policy of direct state participation and control of the economy. This enabled the government to diversify industry from a copper-based one, which created an incentive for developing human resources for other new industrial ventures.^{xi} Secondly, by means of the parastatal structure, the government recorded real and rapid growth in the national economy in terms of industrial and social infrastructure, which has scarcely ever been achieved in the past and present.

1.4 The Deterioration of the Zambian Economy

After the Zambian Economy struck great heights, its rapid growth rate dropped to very low levels. “The initial decline in the economy, has by and large, been blamed on the poor performance of the parastatal sector more so being the backbone of the country’s economy. This poor performance had been attributed to the acute inefficiency, which characterised a majority of these parastatal companies accounting for the numerous failures or insolvency’s in the parastatal sector.”^{xii}

Insolvency is as a result of failure by a person, whether an individual, a partnership or a legal person, such as a company, to pay debts of bills as they fall due.^{xiii} Some of the causes of insolvency or corporate failure in parastatal companies in Zambia include:

- (1) Conflict between commercial and political/social objectives.
- (2) Management short comings e.g. political appointees and frequent changes
- (3) Poor capitalisation of companies.
- (4) Imprudent business judgment.
- (5) Big projects accompanied by little or no realistic costing or research and development.
- (6) Lack of accountability and poor supervision and monitoring systems. Boards are weak and ministries too busy to execute effectively as supervising organs.
- (7) General economic constraints e.g. recession and inflation, oil crisis, over dependence on imports etc.

Such causes, it has been argued,^{xiv} characterised the parastatal structure with most subsidiary companies of ZIMCO reaching alarming insolvency levels.

Government took further steps in the reformation of the private sector. In 1988, the government took-over several shops belonging to traders of Asian origin saying that they were causing the rampant black-market.^{xv} The entire exercise was a disaster and most of the shops were eventually given back to their original owners. This had only succeeded in intimidating foreign investors and alienating the donor countries. The international community began to restrict aid to Zambia. The economy kept on plunging and devaluation of the currency and inflation were on the rise.

Various attempts were made to improve or create in some instances, efficiency in the parastatal sector by the government. For example, Cabinet Ministers in the parastatal sector were removed from direct involvement in running ZIMCO companies and an Executive Directorate was appointed to be accountable for the group's operations.

Another major step in reforming the parastatal sector was the articulation of a policy on privatisation. This idea was discussed at the 5th National Convention of UNIP held from 14th to 17th March 1990. This policy was set up in September 1990 and was known as 'Task Force on Privatisation. The main objective of the task force was to examine and recommend modalities for implementing the policy of privatisation.^{xvi} Political events rendered the program of privatisation to be put on hold as the country was undergoing an election process.

After the political excitement had died down, attention once again shifted back to the economy and the government, which assumed power following the elections of 1991 sought to continue from where the previous government had left the privatisation program. The new government, being the MMD government, armed with a policy of total liberalisation of the economy, made a meaningful step in this direction by creating the legal framework upon which the whole program was to proceed, and by which institutions concerned with the privatisation process were to be supported. Such legal framework was the enactment of the Privatisation Act^{xvii}, establishing the Zambia Privatisation Agency, (ZPA). It is in accordance with the rules laid down in this Act that the process of privatisation in Zambia is to be carried out.

ENDNOTES

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- i Mulwila J (1980) *Parastatal Companies and the Law in Zambia*, PHD Thesis.
 - ii British South African Company, Chairman's Statement to the Shareholders, 17th February, 1962, London.
 - iii *ibid* p.12
 - iv J.M Molehill, *Parastatal Companies and the Law in Zambia*, 1980
 - v A Parastatal company in this case carries the same meaning as that of a state owned enterprise under the Privatisation Act. No. 21 of 1992 i.e. a corporation, board, company, parastatal or body where government has direct ownership, but does not include a government (section 2).
 - vi INDECO, Chairman's Statement, in Annual Report 1965, Lusaka.
 - vii Dr. K .Kaunda's speech at the 2nd National Development Plan.
 - viii Zambia towards Economic Independence; an address by President Kaunda to the UNIP National Council. 19th April 1968
 - ix Zambia towards Complete Independence; an address by President Kaunda to UNIP National Council, 11th August 1969.
 - x *Op cit.*
 - xi E.C Kaunga. *Privatisation: The Zambian Experience*, 1994.
 - xii E.g. Zambia Airways (see also Government paper; Parastatal and Industrial Reform Programme.)
 - xiii Davies G. (1997) *Principles of Modern Company Law* p. 631
 - xiv 1994 Budget Address.
 - xv Mulwila.J (1980) *Parastatals and the Law in Zambia*. P.25
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 - xvii Act No. 21 of 1992

CHAPTER TWO

2.0 Privatisation in accordance with the Act

The main legal regime governing the Privatisation process in Zambia is the Privatisation Act No.21 of 1992. The Act defines Privatisation as:

“The transfer to the private sector of part or the whole of the equity or other interest held by the Government, directly or indirectly in a State Owned Enterprise wholly or partly owned by the Government.”ⁱ

This definition has some components, which need closer analysis to give a more satisfactory attempt at the definition. A pre-summary of such legal principles would include:

- (a) Equity
- (b) Transfer
- (c) State Owned Enterprise

(a) Equity

The Act does not specifically assign a legal meaning to the term equity. However, under Common Law, equity refers to stocks and shares in a limited company.ⁱⁱ Regarding stocks and shares, the Actⁱⁱⁱ defines both terms as follows:

“ Stocks and shares include loans, stocks, debentures, and debenture stock and options on any stocks, shares, loan, debentures or debenture stock and rights in relation to State Owned Enterprises.”

This definition although giving us the ambit of what the Act considers as stocks and shares, does not help us in comprehending what these are. Lord Hatherly in MORRICE v AYLMER^{iv} suggested a more satisfactory definition of stock by describing the same simply as a set of shares put together in a bundle.

It is hardly a misdirection to state that ‘shares’ occupy a very central position under the concept of privatization. As might have already been noticed, the term ‘share’ appears in both attempts, above, to define either ‘equity’ or ‘stock’. A share was defined in the BORLAND’S TRUSTEE v STEEL BROS & CO LTD^v as the legal interest of a shareholder in the authorised and issued share capital of a company measured by a sum of money for the purpose of liability in the first place and participation in the second place. In other words, a share is a legal interest belonging to a shareholder measured by a sum of money, namely the nominal amount of the share, and also by the rights and obligations belonging to it as defined by the Companies Act^{vi} and the Articles of Association of the company, and in this case, the Privatisation Act.

An issued share is a chose in action or rather a bundle of contractual and statutory rights (i.e. ensuing from the Articles of Association, from the Companies Act as well as the Privatisation Act in this particular case) each of which constitutes a legal chose in action. A chose in action is a species of intangible property^{vii}. Although described as an interest,

a share does not confer any direct entitlement to or interest in the assets of the company. It is an interest in the company, not its assets.

(b) Transfer of Shares

The legal title to the share is vested in the person entitled to it by allotment by the company or by transfer from a former holder. 'Allotment' refers to the issuing or apportioning or distribution by lot of the shares of a company to a subscriber or purchaser of them directly from the company^{viii}. A transfer may be defined as the shifting of the legal title to the share from a former holder to a new holder.

Under the concept of Privatisation, particular interest is directed as to how the legal title to a share is transferred from the government to the private sector. The Privatisation Act expressly refers to the Companies Act for the manner and procedure in which shares may be transferred in the Privatisation process. In this respect the Companies Act provides that a transfer of shares can only be valid if:

- It is by an instrument in the prescribed form;
- It is of fully paid up shares;
- It is executed by both the transferor and the transferee or by their representatives.

The transfer envisaged above can only be consummated if the company registers the transferee as holder of such shares in the company's register of members.^{ix} In this way the transferee could enjoy all the rights and other privileges attaching to the share.

(C) State Owned Enterprise

Under the Privatisation Act, a State Owned Enterprise (SOE) is a corporation, board, company, parastatal or body in which the Government has direct or indirect ownership, equity or interest and includes partnerships, joint ventures, or any other form of business arrangement or organisation in which the Government has direct or indirect interest but does not include a government department.

2.1 Design of the Privatisation Program

In order to develop the policies for the Privatisation program, the Zambian Government conducted a series of seminars on the topic. These meetings were held both on a national basis and with various interest groups. From the various discussions, the government settled on the following objectives:

The first and most important objective of the Privatisation program is to reduce Governments intervention in business in order to maximize efficiency. State ownership had proved ineffective, inefficient, and costly in terms of subsidies and administration.^x

The second objective is to promote wide share ownership and the growth of capital markets. This objective is subsidiary to, and may even conflict with, the primary objective, because corporate governance is not necessarily achieved by having diverse share ownership. Nonetheless, the economy will not expand without capital market development. Privatisation could provide an opportunity to promote capital market growth by careful selection of the methods of sale of individual SOE's. Judicious selection of enterprises for full or partial flotation could spread the benefits of Privatisation across a larger section of the Zambian population, increasing both the acceptability of and options of their economy, and the real need for new investment and technology which mostly outside private investors can provide.

The third and fourth objectives are to stimulate local and foreign investment and to promote new capital investment. As investment is critical to the survival of the enterprises and to the development of markets, these objectives address the need to improve the efficiency of the enterprises, through both better internal operations and opening the markets to Greenfield investment for increased competition.

The final objective is to derive income for the Treasury from sales of the parastatal enterprises, so that the government can address some of the issues—and costs—of structural change. The government's current capacity to earn revenue is limited because the tax base is very small.^{xi} Generally, all infrastructure development in Zambia is conducted by donors.^{xii} The government recognises that this is both undesirable and unsustainable. Privatisation is seen as an opportunity to raise capital for use on

infrastructure and social development. However the objective of raising revenue from parastatal sales may only be met in so far as it does not compete with other more important and deserving aims of the program.

Once the government had clarified its objectives in pursuing Privatisation, the decision was made to define clearly the Privatisation policies, procedures and practices through legislation. In Africa, where the political commitment to economic processes can be erratic, it is important to ensure that the process is reliant neither on personalities nor political whim, but on a clear set of rules and regulations, which reflect the policies of the government.^{xiii}

One of the strongest features of the Zambian program is its flexibility in the rules and regulations to cater for a diverse portfolio of enterprises, and this was designed into the legal framework. The portfolio of SOE's includes several enterprises in different industries, of different sizes, from different sectors and with different requirements from Privatisation. The program therefore had to be designed so that the regulations governing the process could be applied to all enterprises. The Privatisation Act ("the Act") sets out the structure for Privatisation and designates the key players, rather than attempting to attach specific parameters to the objectives. Instead, the objectives are defined in broad policy statements.

2.2 The Zambia Privatisation Agency

Ahead of delving into the procedure for Privatisation, it is important to note that the Act establishes the Zambia Privatisation Agency (ZPA).^{xiv} This is an autonomous body, independent of the political process, government bureaucracy and the parastatal sector. It comprises 11 members who are mostly drawn from the private sector. There are three government representatives: the permanent Secretary of the Ministry of Commerce Trade and Industry, The Permanent Secretary of the Ministry of Finance and the Attorney general. The private sector are nominated representatives of the following organisations: the Zambia Institute of Chartered Accountants, the Zambia Confederation of Trade Unions, the Zambia Federation of Employees, the Bankers Association of Zambia, the Law Association of Zambia, the Zambia National Farmers Union, the Churches and finally the Dean of the Business School of the Copperbelt University.

The Agency is empowered to plan, manage, implement and control the Privatisation process. In doing so, the Agency could, at its discretion recommend for adoption of the following modes of privatisation:^{xv}

- Public offer of shares on the Stock Exchange
- Private sale via negotiated or competitive bids
- Dilution of Government shareholding
- Sale of assets and business of SOE's
- Management/employee buyouts
- Lease and management agreements

- Re-organisation of SOE prior to sale –wholly or partially
- Any other mode as may be deemed appropriate by the Agency.

From the above list, it appears that there are virtually unlimited methods of sale open to the government.

2.3 Responsibility for the Privatization Process

Although privatization transactions are economic by nature and therefore require the expertise of business professionals, there are also political agendas that must be addressed in the process. The Government's decision to involve the private sector was driven by popular opinion. Zambians have historically been suspicious of the government and the parastatal sector. They expressed the concern that the privatization process would not be concluded in a transparent manner that minimized political interference. Zambians also wished to ensure that the selection of bidders would be based on open competitive bidding. The public advocated that the State's involvement in the implementation of the program be limited. The government therefore decided that the private sector should be involved in the decision-making process.^{xvi} This is the most important feature of the success of the Zambian Privatisation program.

There was clearly a need for the Government to have some input in the process. In the original design of the program (under the UNIP Government), the responsibility for Privatisation was given to ZIMCO. After a change in political power, the President

assigned the responsibility for Privatisation to the Ministry of Commerce, Trade and Industry.^{xvii} The key decision points in the process were identified and the responsibility allocated according to the government's ability to delegate its authority. The criterion was that a statutory body, set up to implement the Privatisation program, would take decisions of a political nature. The political decision points were identified as:

- ***The parastatal to be privatized:*** The parastatals are organized in a Divestiture Sequence Plan (DSP) that is approved by Cabinet. . It is vital to note that under our concept of Privatisation, the program can only proceed on the basis of a DSP. Divestiture according to the Act is defined as 'the disposing of the whole or part of the assets and shares of a state owned enterprise'^{xviii} It follows from here that the DSP means a list of state owned enterprises as approved by cabinet, categorised according to the sequence in which the whole or part of their shares will be disposed of over the period of the Privatisation program.

Clearly, the decision-making authority must be the government as the government is the owner of the SOE's and must therefore make the decision either to sell or not to sell. The DSP divides the enterprises into tranches. The tranching system is merely a method of obtaining approval for a group of enterprises rather than seeking approval on an individual basis. In general, the tranches are approved by cabinet immediately prior to commencing the preparation for divestiture for each tranche. A misunderstanding that elicited criticism from investors was that the DSP was not flexible. What was not understood was that the DSP could be changed, through a Cabinet decision, so that individual enterprises could be brought forward for Privatisation or deferred. In addition,

the enterprises did not strictly have to follow the tranches. Cabinet, however, did not take pro-active decisions but rather reacted to requests for approval from ZPA and did not understand that the decision on the selection of the enterprises and the timing for the Privatisation of those enterprises is essentially the prerogative of the government. There was therefore some unwarranted criticism from the government that certain enterprises should have been included in the early tranches.^{xix}

- ***The method of sale:*** The method of sale is dependant on a range of factors specific to each enterprise e.g. the legal status of each enterprise, the way in which enterprises were nationalized, and the ownership structure (both desired and current). Experience has shown worldwide that Privatisation has spawned a considerable number of innovative selling techniques. However most of the countries have inextricably linked the Privatisation of state assets to public share issues through a formal stock exchange.^{xx} This is particularly the case in Jamaica and Malaysia where the National commercial Bank (NCB) and the Malaysia Airline System (MAS) sales respectively were central to establishing the credibility of the Privatisation programme.^{xxi}

The approach to designing the method of sale has to be enterprise-specific, which is the key to meeting the conflicting objectives of any Privatisation program. For this reason, the government must be responsible for the decision on how the enterprise should be privatised. Here, the government has the opportunity to design the ownership structure, e.g. to give certain bidders or classes of bidders a preferred right, to acquire a “golden share”, to limit bids to nationals, to require that enterprises are divided in the interests of

creating competition, or to maintain a government share.^{xxii} In practice, informed decisions must be taken which will ensure the improved efficiency of the enterprise's operations. In some instances,^{xxiii} economic judgment may be sacrificed for political advantage. A good example of this was the government's decision to select thirty enterprises for preferred bids by management and employee buyout teams (MEBO) in order to promote Zambian participation. Business professionals who believed that the enterprises could be sold, for cash, to more effective managers, criticized this decision. The government recognized this and required that the MEBO bids satisfied the criteria for selection of bidders in that they had to prove sufficient capital and managerial expertise.^{xxiv}

- ***Final sales agreement:*** As the ultimate shareholder, the government must legally ratify each transaction. This is done through the signature of the Minister of Finance, representing the government as shareholder, on the sale and purchase agreement.

The decisions required for the technical divestiture process, given that these were best undertaken by those professionally equipped to make rational decisions, were delegated by the government to the ZPA. These decisions are:^{xxv}

- **Selection of bidder:** In all cases, responsible investors are sought who will fulfill most of the requisite criteria, such as managerial expertise, appropriate technology, capital, job creation, and access of markets. Where there are no legal restrictions, competitive bids

are the easiest way to select bidders in a transparent and fair way, using standard evaluation criteria.

- **Price and valuation**: The price of the enterprise must be based on market value, defined as the price agreed between a willing buyer and a willing seller, both acting in their own self-interest. The price decision is based on technical data such as the business and asset valuations of the enterprise, the enterprise's capital requirements, and the trade-off between price and ownership structure. As an example, a wide public offering may not be as lucrative as private placement but may serve other objectives, such as Zambian participation.

As the final outcome of the Privatisation process would be to render the State holding company, ZIMCO, superfluous, ZIMCO was not included in the decision-making process. Their input was limited to supporting the process by providing information and documentation. However, this created serious problems as ZIMCO lobbied effectively in government circles, and caused severe delays in implementation of the program.

While other methods of sale have been numerically dormant. The single most common method of sale has involved the direct sale of the enterprise (or part of it) to a domestic or foreign purchaser, or to a joint venture consortium of both. In general, the purchasers have been either third parties, or (in the case of a sale of government equity in joint ventures) the existing incumbent shareholder. As stated above, the Agency, in the course

of implementing any of the above mentioned modes of Privatisation can either allot or transfer shares of a state owned enterprise.^{xxvi}

2.4 Duties of the Zambia Privatisation Agency

This section is essentially an outline of the distinct powers, and duties of the Zambia Privatisation Agency (ZPA). Being an autonomous body of the Government for the purpose of planning, managing, implementing and controlling the Privatisation of State Owned Enterprises, ZPA has a number of statutory duties to perform. Included here are:^{xxvii}

- (a) Recommending privatisation policy guidelines to the cabinet
- (b) Implementing the privatisation programme according to the policy guidelines issued by the cabinet
- (c) Overseeing all aspects of the implementation of the privatisation programme
- (d) Monitoring progress of the privatisation programme
- (e) Preparing the long term Divestiture Sequence Plan and submittnig such plan to the cabinet for approval
- (f) Recommending to the cabinet the most appropriate method of sale for each state owned enterprise to be privatised
- (g) Carry out or cause to be carried out a valuation of a state owned enterprise that is to be privatised
- (h) Setting prequalification criteria for the selection of potential buyers or investors of a state owned enterprise to be privatised

- (i) Evaluating offers from potential buyers
- (j) Preparing or causing to be prepared the relevant documentation necessary to effect the privatisation of any state owned enterprise
- (k) Seeking potential investors for state owned enterprises
- (l) Submitting to the Minister, within six months after the expiry of the financial year, a report concerning its activities during the financial year

In order to effectively perform the above named duties, ZPA has wide powers under the Act, a majority of which can be exercised at its own discretion. Chief among such powers include the following:

- Allotment of shares of a State Owned Enterprise
- Offering publicly shares of state owned enterprises
- Offering additional shares so as to dilute Government shareholding in a state owned enterprise
- Selling assets and business of a state owned enterprise
- Reorganising a state owned enterprise before its sale
- Leasing management contracts for state owned enterprises
- Selling a state owned enterprise to management or employees of such state owned enterprise
- Converting, before privatisation, a state owned enterprise originally incorporated as a private company, to a public company
- Liquidating a SOE into receivership

It is important to appreciate that these powers are statutory in nature and can only be exercised by ZPA which is autonomous in nature and carries its functions on behalf of the Government. It is also important to note that ZPA owes its obligations and duties to no one else but the Government in their performance.

2.5 Concerns on the Subject of Privatisation

Zambians voiced several key concerns on the subject of Privatisation. The most important of these are ownership, the absorptive capacity of the domestic market, Labour issues, the responsibility for the Privatisation process, transparency, the use of the proceeds from Privatisation, competition, the protection of government's investment, and employee housing. Solutions were customised to suit the Zambian case and incorporated into the implementation plans for the privatisation program. The issues of labour and employee housing will be discussed in detail in the next chapter.

Ownership

There are several important questions related to the issue of ownership, which are raised in every Privatisation situation. How much of each enterprise should be reserved for nationals? How much foreign ownership is needed for investment, technology, and management expertise? Should the enterprise be offered through private placement or a widespread public offer? Does the enterprise need new investment? If so, how can this be mobilised?

In Zambia the questions are different. The ownership issue is a trade-off between accessing much-needed foreign investment, addressing the concerns of nationals, and ensuring management performance.^{xxviii} Early studies indicated that local private capital in Zambia could provide only one-third of the financing requirements to meet the capital investment needs in SOE's and payments for the government's equity stake in parastatals. Zambian industry needs not only investment from international investors, but also technology, management upgrades and access to markets. There is no question that foreign private investors contribute to improvements in industrial and commercial activities in developing countries. Nevertheless, domestic ownership is important, and there is a real fear by nationals that Zambia will be "recolonised" through economic participation by foreigners.^{xxix}

Privatisation objectives hold internal conflicts, and never more so than when dealing with local ownership and foreign investment and control. As there is more scope to address the conflicts on a case-by-case basis, the government of Zambia decided that the ownership strategy for each enterprise would seek to maximize the aims of Zambian participation and wide share ownership without compromising on efficiency. Early in the process, the Eastern European model for transferring ownership (generally through voucher schemes) rather than ensuring corporate governance was discarded. This model was not considered appropriate because most Zambians are unsophisticated investors and do not have the experience as shareholders of businesses to monitor performance by management.

In Zambia, the best results are expected from strategies to locate a core shareholder who assumes a majority equity stake in each SOE. Core shareholders, because of their capital commitments, aim to enhance their investments by managing the commercial risk of the operations and demanding good performance from management. Zambian investors holding minority interests in these companies, and there is need to educate them on enterprise performance issues gradually.

In employing this concept, the medium to large-size enterprises with profit potential, sustainable markets and a good capital base are offered by a combination of trade sale of a majority shareholding (the core shareholder may be either foreign or local) and public flotation of a minority shareholding (initial offer is exclusively for nationals.) The core shareholder is identified through a competitive bid process, except where the legal status of the enterprise precludes open competition. There are a number of instances where this occurs, as the government nationalized these industries, they only partially nationalized them, creating forced minorities with pre-emptive rights of purchase. These minority shareholders, because of their long-term involvement, are strategically placed to become the core investors in a more open investment climate.

There are also certain enterprises, which are not good candidates for broad based ownership, usually because of their size or profit potential. Ownership strategy is not as critical in these enterprises because they do not have a great impact on the economy. The privatization strategy utilized for these enterprises is generally open tender offers, without restriction. Some small companies do however provide some opportunity to restrict offers

to nationals with the capacity to own and operate them. In Zambia, management and employee buyout teams are given the right of first refusal for selected small companies in an effort to promote local ownership.

Given the foregoing discussion, there are several options to address the ownership issue. The following procedures to promote Zambian ownership are used in the Zambian Privatisation program:

- Small enterprises are only advertised in the local press, and the timeframe for preparing a bid is fairly short. This provides local investors a competitive advantage in identifying the request for tender and in preparing their offer.
- Thirty enterprises were selected to give management and employees the right of first refusal. In this decision to favor Zambian ownership the efficiency objective is not compromised, as bidders must provide evidence that they can operate the enterprises efficiently and an access to capital. Where the offer from the management and employees does not meet the standards set by ZPA in their evaluation of bids, the enterprises that are offered on a competitive basis.
- There are approximately thirty enterprises that would be good candidates for some level of public ownership. A minimum of thirty per cent of the share capital of these enterprises is reserved for Zambians. Where the enterprises have minority shareholders, these shareholders are requested to forego their pre-emptive rights for the shares to be offered to Zambian participation, as they too realize the importance of domestic ownership.

Absorptive capacity of the domestic market

One of the problems with ownership is the relative unavailability of domestic capital. In the early stages of the Privatisation Program, several attempts were made to persuade either the private sector or donors to establish privatization funds whereby Zambians could have access to capital, both for the purchase of shares and for financing operations in newly privatized companies. Neither donors nor the private sector were forthcoming in setting up privatization funds and the government did not have available finance.

A policy established by the ZPA is that investors may not make purchases if they are not able to meet the financing requirements of capital investment and working capital for the enterprise. This policy derives from the government's desire to improve the capacity of the SOE's. Unfortunately, this policy affects nationals more than outside investors.

Given the lack of domestic finance, creative methods to allow Zambian participation were designed. These include:

- Zambian individuals, management and employees are allowed to defer payment for the purchase of shares. This policy created some implementation problems. Companies, which are wholly owned by Zambian nationals, felt that they should have been given the same advantages as if they were individual Zambian citizens. These companies were advised to bid as groups of individuals. From the government's view, it is desirable to limit the number of enterprises offered on terms in order to reduce its administrative responsibilities to safeguard its investment and to collect its debt.

However, in the absence of a privatization fund, this is the only feasible way to allow credit to nationals.

- The Privatisation Trust Fund (PTF) was set up to promote broad based local participation. The PTF has been set up as a warehousing arrangement whereby the minority percentage of the SOE shares reserved for Zambians (usually thirty percent) are retained in trust. The shares are transferred to the PTF at no value. Zambian individuals and institutional investors (e.g. pension funds) are the sole potential buyers of the primary share offers.^{xxx} The PTF arrangement also addressed another problem. The “blue chip” enterprises were selected for privatization early in the process in order to attract new foreign investment. Given the one-off nature of the offers, there had to be some way for Zambians to purchase the shares at a more leisurely pace so that the domestic market would be in a position to absorb the share offers. Therefore, the PTF was set up to act as a buffer, so that shares could be offered based on an analysis of the market’s capacity rather than simultaneously with the offer to the core investor.

The issue regarding availability of funds was particularly contentious, but government addressed it adequately from the view of the local investor audit is no longer seen as a substantive problem.

Transparency

Transparency may be defined as a mechanism, which provides sufficient public information to demonstrate that a given program is fair to all interested parties, and that no person or group of people can influence the system to their own advantage. Transparency is important not only as protection for the implementers of a privatization program, but also gives credence to the process. Other African nations' privatization activities have frozen through public criticism of corruption and political manipulation, essentially a lack of transparency.^{xxx}

It must be recognized that there is a trade-off between pace and transparency. This is a universal criticism of the Zambian program; some feel it is going too fast, with too little available information, while others feel it is going too slow because the documentation process is too onerous. Nevertheless, there can be little doubt that when the political will was waning in Zambia, transparency in the process saved privatization from failure. It was difficult for the Government and the state holding company to stop the process, as long as fair and open treatment of all parties could be demonstrated. All stakeholders, the public, the investors, and the donors, had information on what the delays had been and why the program was stalled. In this way, sufficient pressure could be brought to bear to unlock the process and complete the privatizations of SOE's. A disadvantage of achieving transparency is that the costs are high, both in terms of internal resources and in the cost of contracting professionals to conduct specific aspects of the process.

Transparency in the *Zambian case* is achieved both through timely publication of information and through the use of independent parties at contentious points in the process. The transparency provisions are:

- a) Requirement of the Act that the following public announcements are gazetted:
 - The divestiture sequence plan;
 - The bidders and bid prices;
 - Successful bidders and reasons for success;
 - Price of shares;
 - Special conditions of sale;
- b) Requirement of the Act that a progress report be prepared every six months detailing the activities of ZPA and giving enterprise specific information;
- c) The practice that all information about an enterprise is published as point of sale, including asset and business valuations;
- d) Requirement of the Act that valuations are done by independent contractors who must provide a certificate of valuation; and
- e) Requirement to the Act that negotiations are done by independent negotiators

Use of the proceeds from privatization

In defining the use of proceeds, the government wished to ensure that the proceeds were used only for investment, and that the generation of revenue from the sale of enterprises was not inflationary. The proceeds were therefore placed in a separate account, under the control of the Ministry of Finance and subject to the normal budgetary process for the use

of funds. The use of proceeds is carefully defined and limited in the Act, and covers activities such as funding the costs of privatization, providing sources of finance for Zambian participation in the program, funding capital investment, supporting redundancy payments and funding social projects.

ENDNOTES

- i Privatisation Act, Section 2
- ii Davies P.L (1997) Gowers Modern Principles of Company Law. Sweet and Maxwell. P.281
- iii Privatisation Act, Section 2.
- iv (1875) L.R 7H.L 724, 725.

- v (1901) 1 ch 279,288
- vi Companies Act No. 26 of 1994
- vii Ibid Section 54
- viii (1901) 1 ch 279, 288.
- ix Macaura v Northern Assurance Co. (1925) A.C 619
- x Companies Act No.26 of 1994 Section 64
- xi Kinley L. (1995) Privatisation in Africa: The case study of Zambia. P.6
- xii Zambia Law Journal Vol. 30 (1998) Application of enforcement mechanisms of tax: Tax Fraud and Evasion in Zambia P.149 by N. Sampa.
- xiii Op cit P.6
- xiv Ibid
- xv Privatisation Act, Section 3.
- xvi Ibid Section 22
- xvii Kinley L Privatisation in Africa P.7
- xviii Ibid P.12
- xix Kinley L. Privatisation in Africa P.13
- xx Privatisation Act, Section 2
- xxi Op.cit P.15
- xxii Kikeri. S et al (1992) Privatisation: The lessons of experience. P. 35
- xxiii Op cit P21

- xxv **ibid**
- xxvi Privatisation Act, Section 19.
- xxvii Ibid Section 8
- xxviii Kinley L Privatisation in Africa P.16
- xxix Ibid P.18
- xxx Zimco's Directors Report, 31st March 1995.
- xxxi Adam, Cavendish and Mistry (1992) Adjusting Privatisation P.87

CHAPTER THREE

Essentially this chapter looks at how privatisation has affected the rights of employees and the employment situation in Zambia with regard to privatisation. These rights reflect on contractual, as well as legal obligations. In so doing, the chapter will analyse some case law in this area. As has been noted in chapter two that there are various modes of privatizing a company. It is from these modes that we will see how the rights of employees are affected. There are basically two methods that have been used in Zambia, namely Share Transfer and Asset Transfer methods.

3.0 Objectives of parastatals vs. objectives of privatised firms

In addressing the issue of labour, attention must in the first place be drawn to the motives behind these parastatals and the privatised firms. A basic and distinct feature is that government in forming parastatal companies, generally aimed at providing employment to as many people as possible, having control or a say in the economic affairs of the country and to minimize the free market attitude brought by the colonial masters.¹ Whereas under privatisation, the motive is mainly political on the part of the government and profit making for those who own the means of production, and keeping their expenses as minimal as possible. Governments motive to privatize was to place the economic production of the economy in the private sector, since it had in the past been a lot of strain on the part of government to manage the economy effectively while trying to

impose law and order. We noted in chapter one the reasons advanced for the creation of parastatals, which included the need for industrial diversification of the economy, governments aim to control the economic affairs of the country so that the means of production are not in the hands of private individuals.ⁱⁱ This in turn gave government the opportunity to empower the Zambian people through government to own the economic resources of the country. The Philosophy of Humanism advanced by the then republican President, Dr. Kaunda, was a major contributory factor to nationalization. The philosophy preached that there should be equitable distribution of the nations wealth so as to restore the equality of man. This was an inevitable philosophy at a time when racial discrimination was adamant.ⁱⁱⁱ

Privatisation is more of a Capitalist philosophy. The owners of the means of production are private individuals and investors. Their purpose of ownership is mainly business and they aim to maximize their profits at all costs. Thus, if reducing labour is a means of cutting down on expenses, then they will not hesitate to do so at the expense of job losses.^{iv}

3.1 The effect of transfer on employment contracts

The methods that have been employed in the Zambian privatisation process to privatise parastatal firms have been the transfer of shares from one group of shareholders to the other, that is, a share transfer. While the other method has been the transfer of assets of the company to the new company, that is, an Asset Transfer.^v

Share transfer entails that the shareholders of a company change, while the company per se remains untouched since the company and the shareholders are two separate entities. A share is an item of property and normally freely transferable. It gives its holder an interest in the company measured by a sum of money and entitling the holder to the rights contained in the articles of association.^{vi} The company is a separate person in law, that can own property, commit crimes and conclude contracts. It is this separate legal personality awarded to companies that makes its shareholders different from the directors who run the affairs of the company on a day-to-day basis. Therefore it is possible to transfer the shares from one shareholder to another without affecting the operations of a company.

With regards to an asset transfer, the company's operations are affected in the sense that the assets of the company are the ones subject to transfer, while the shareholding remains in place. Assets of the company include, property, both movable and immovable and all interests, estates, money, interests and rights whether legal or equitable.^{vii} When an asset transfer occurs, the company's operations are affected and this also has an effect on the rights and privileges of the employees and their contracts.

3.2 Legal implication of transfer of contracts of employment

The main provision relating to transfer of contracts is found in section 35 of the Employment Act^{viii}. According to this section, no rights arising under any written contract of service shall be transferred from one employer to another unless the employee

bound by such contract consents to the transfer and a proper officer thereof endorses the particulars upon the contract. Furthermore, before endorsement takes place, the proper officer must be satisfied that the employee has fully understood the nature of the transaction and has freely consented to the transfer without coercion or undue influence, misinterpretation or mistake. Another thing to take into consideration is that where there is any change in the nature of the work to be performed or location of the work place and a medical examination of the employee is desirable, that such employee has been given that examination.^{ix}

This section brings in a lot of rights and conditions to be observed. It is vital for an employee to be informed of the fate of a company, as it will inevitably affect his or her employment contract and thus conditions of service and all accrued rights that go with it. Employment is a major means by which people earn an income and generally the main reason why they work. Therefore this is a sensitive issue as it affects the livelihood of every individual. It is very important that labour matters are handled with care and are kept abreast with the changing society. The rights of employees can be summarized under the umbrella of statutory rights and accrued rights, which are also protected by the law.

The Land Mark case of PETER NG'ANDWE AND OTHERS V ZAMOX LIMITED AND ZPA^x brings out a good argument in relation to the issue of consent to a transfer of a contract of employment. The facts, which emerged from the summary of the evidence, were that, all the applicants had been employees of Zambia Oxygen Company Limited (ZAMOX, herein referred to as the 1st respondent). The company was privatized meaning

In the same case, regard was had to the offer of new terms and conditions of service. This is a continuous process in every employment situation. Conditions of service periodically change especially to enhance and better the working conditions of employees. The most important consideration is that in altering the conditions of service there must be a consensus ad idem, that is, a meeting of the minds between the employer and employee, otherwise the contract will not be binding on the party who has not put his agreement to it.

It is appreciated that whenever there is a change in the conditions that gives rise to a new contract, such a change in the terms of a contract may be effected by a current employer or by a new employer who acquires a controlling stake in the company. Or the change in the conditions of service may be as a result of the employee acquiring new skills or qualifications, which elevate him to a different level or category of employee.^{xiv}

However, it has never occurred that because there has been a change in the conditions of service then the employee should be paid off all his benefits from the previous contract. Had this been the case there would be so many pay-offs that no employee would qualify for gratuity, retirement or other similar benefits. In the circumstances of the Ng'andwe case, the 1st respondent still remained the employer of the applicants in spite of the change of ownership and that notwithstanding such change in ownership, the 1st respondent has a right to revise the applicants' conditions of service subject to their agreeing with the new conditions of service. If they do not agree with the new conditions of service, the applicants have a right to separate from the employment. However, a

revision of conditions does not automatically entitle the applicants to be paid off terminal benefits.^{xv}

3.3 Effect of Privatisation on Conditions of Service

A number of issues create a great deal of uncertainty in the minds of employees in former state owned enterprises as the new owners take over. These relate to the payment of their terminal benefits, to their status after privatisation, to the possible loss of fringe benefits and to the overall nature of the relationship between employees and the new owners.

The ZPA's policy during negotiations over the sale of an enterprise is to ensure that retained workers will enjoy the same or better employment conditions under the new owners. It is responsible for ensuring that certain conditions with regard to the rights and protection of employees are built into initial pledges (known as Memorandum of understanding) and the final sale agreement themselves.^{xvi} The ZPA makes it clear that employees are employees of the SOE not of the business' owners or shareholders and, consequently, existing contractual arrangements, like conditions of service and collective agreements, are legally binding and are transferred unchanged unless renegotiated by the parties. These contracts cover terminal benefits like redundancy payments, pensions, long service gratuities and so on.^{xvii}

However, there are three potential problems with these arrangements. Firstly, it is believed that the strong negotiating position of some new investors has resulted in

development agreements, which relax government regulations for an agreed period. These include indemnities against prosecution for past damage to worker's health in hazardous industries, including mining. The danger arises that new and continuing damage to a worker's health will be classed as past damage with a consequent loss in compensation.^{xviii} The belief is that certain development agreements will allow new investors a window of time before they have to comply with existing pollution requirements and environmental legislation. The investor explains that most of them have taken over run-down industries. They have put a lot of money in capital investment. "Workers will have to sacrifice and be patient for them to start enjoying the so called international standards. They will only reach that level if the whole national economy reaches such standards."^{xix}

Secondly, existing collective agreements are often superceded by new agreements. Many of the new buyers will have a strong hand in negotiations over the future of such agreements and contracts when the real threat of redundancies hangs over the work force. Finally, over and above the role played by unions, it is unclear whether the ZPA or a new government body will be set up to monitor newly privatised businesses and ensure that stipulations in the sale agreements continue to be adhered to.

3.4 Job Creation and Job Losses

On the face of it, Privatisation has either created jobs through investment or else has resulted in further job losses as inefficient businesses and over-manned former SOE's either close or undergo cut in their work force. There is a third way to view this. Some would argue that, given the state of Zambian industry, privatisation should not be viewed in terms of how many jobs will be lost, nor how many jobs will be saved.

The immediate effects of liberalization and privatisation have been the cause of significant job losses. The harsh economic logic of opening the economy up to a private sector, which must be competitive if it is to make profits, has seen many former, uncompetitive state owned enterprises go into liquidation or has seen the shedding of excess labour to make them more efficient and attractive to buyers. The state has, in effect, already undertaken much of the difficult task of retrenching a sizeable proportion of the work force in the run up to the privatisation proper. However, it is unlikely redundancies will end with privatisation as many of the new owners will want to cut their force in order to increase productivity.^{xx}

The ZPA lists eleven companies as having being liquidated from 1994-1997 under the privatisation programme. In addition, as of December 1997, 28 companies are listed by the ZPA as either under liquidation or in the process of being wound up after the sale of their assets.^{xxi} Those in this latter group include enterprises such as National Dairy Produce Board, National Home Stores limited, the National Hotels Development limited,

Zambia Cold Storage Corporation, and others, which were broken up into asset units before being privatised.^{xxii}

The extent of job losses was considerably high. As a result of the UNIP initiated fourth national development plan, formal sector employment stood at a record high in 1992. Government policy on employment changed dramatically under MMD. It maintained that high levels of employment, especially in parastatals and the civil service, were being effectively supported and subsidized by money, which the government did not have. In the past, the solution was to borrow the necessary cash, but the resulting debts could not be repaid. For this reason, inter alia, the MMD government embarked on a restructuring of the economy. In order to do this, it sought to stem the drain on its resources by selling off the parastatals and putting in place the Public Sector Reform Programme in order to cut government expenditure on administration, primarily by reducing over manning in the civil service. The outcome of these policies is the inevitable large-scale job losses.^{xxiii}

Of these job losses, many have been in the parastatal sector. From September 1993 to June 1995, employment in SOE's fell by 40,900 as a result of liquidations and preparations for privatisation.^{xxiv} Although some of this fall can be accounted for by increases in private sector employment as companies are privatised and change ownership, there is still a significant shortfall. Over the same period, private sector employment went up by 11,400. This means that 29,500 jobs were lost in this transaction period.^{xxv} The only conclusion that can be drawn from this is that most of these people must now look for employment in the informal sector if they are to survive. The period

thereafter, showed that there were a further 6,184 redundancies across both state and privately owned industry.

Local and central government employees have also suffered directly as a result of the MMD government implementing its Public Sector Reform Programme on the strong recommendation of the World Bank.^{xxvi}

3.5 Do ZPA and the new owners have information, which they are reluctant to reveal?

The ZPA admits that it is lacking when it comes to hard information about the probable impact of privatisation. It also tends to conceal what it already knows. Many new owners or prospective buyers claim that they too cannot predict the effect of privatisation, for example, on the employment levels of a company. Despite this, they are frequently quoted in the press denying rumours of redundancies.

Evasive replies or outright denials by companies concerning the negative impact on employment of their plans for a newly privatised business hide the fact that the new owners will already have a good idea of who will lose their jobs. On the other hand, companies, which intend to expand, will also have predicted whether they will need to recruit new employees as a result of new investment.

The ZPA has publicly acknowledged that, during negotiations, buyers will normally give details of which employees they will keep and which staff they will let go in accordance with their plans to make a business profitable. Indeed the criteria used when selecting a buyer include the extent to which a proposal offers job protection or the retrenchment of employees. The preliminary business plan, which is required from all bidders, is also assessed in terms of its potential for job creation.

Under the Privatisation Act, everyone, whether employees of a company or members of the general public, are entitled to know details of all bids and, in the case of sales by public tender, the reason why the winning bid was preferred over all other. Given that future plans for the size and nature of the work force are supposedly taken into consideration when assessing and ranking a bid, there are strong grounds for arguing that this information should be reproduced by the ZPA in its progress reports on the sale to date. When a business is sold, no guarantees about employment levels are specified in the sales agreements. The bottom line is that the new owners have the authority to set the optimal size and composition of their labour force.

There are indeed no guarantees. Projections about the number of people employed in a business may change for the better or for the worse, but is not the Zambian public entitled to know what redundancies and new employment opportunities are already on the cards? If this information is available, at least people could then draw some informed conclusions for themselves about the likely impact of privatisation on their own employment prospects.

3.6 Is ZPA reliable to furnish information on new owners' commitments?

The issue of monitoring is vital in an economy when unemployment is high. Employers are in a strong position when it comes to steering working conditions and pay levels for the simple reason that there is a readily available pool of labour in the informal sector should existing employees fail to tow the line.

The ZPA is charged under the privatisation Act with monitoring the progress of the privatisation process in Zambia^{xxvii}. It must be noted that this provision does not mention monitoring what happens after privatisation. Indeed, the whole emphasis in the Act is upon the rapid sell-off of state owned enterprises, not on examining the impact of their privatisation. However under section 49 (h) of the Privatisation Act, there is limited provision for the development of monitoring and guidelines to be implemented once a sale is finalised. The ZPA itself lays out what it is required to do.

3.7 Handling of Retrenchments

Given that many people have been laid off already and given that further widespread redundancies are likely to follow, it is vital to examine what measures have been put in place to ensure that retrenches are treated fairly and receive the terminal benefits, which they are entitled to. Their future depends on this. The Employment Act recognises that an

employee is made redundant – and is therefore entitled to terminal benefits – when a business either closes or the work which an employee is contracted to carry out, either ceases altogether or is reduced to the point where there is not enough work to go round.

A worker is not recognised as being made redundant when a business is sold and his or her contract is transferred to or taken on by the buyer of the business. This has important implications for employees in firms, which are privatised and sold off. It means that they are not entitled to their terminal benefits when an enterprise is sold because workers' contracts are transferred to the new owners. Workers cannot therefore claim their terminal benefits from an SOE earmarked for closure then expect to be re-employed by the new owner of the business on a new contract.^{xxviii}

A principle authority on redundancy payments can be cited here. This is the case of MIKE MUSONDA KABWE v B.P ZAMBIA LIMITED^{xxix} in which, the appellant was employed by the respondent as a Sales Manager and in that capacity was part of the Management. In 1994 there was a general increase in salaries for all employees of the respondent. A Letter dated 13th May 1994 increased the appellant's salary by a large percentage. These increments were later reversed. Two months later the appellant offered to retire early after serving the respondent for 22 years. His terminal benefits were worked out on the basis of the old salary and was sold his personal to holder car not at book value. He then took out an originating notice of motion in the high court seeking the declaration that the appellant was entitled to terminal benefits based on the increased salary of K42, 262,488 per annum and to the purchase of his personal-to-holder vehicle at

book value. According to the ruling in the high court, the learned trial judge held that since the appellant took part in management discussions to reverse the salary increments he must have consented to the reduction of his salary. He lost on this basis and thus appealed.

In delivering the judgment, Justice Muzyamba said that, “it is clear from the minutes of the meeting that management did not agree to resolve or reverse the salary increments. It is also clear from the minutes of the Special Meeting of the Board of Directors of the respondent that the Board of Directors took it upon them to reverse the salary increments after management had failed to make a decision. It took this decision due to government pressure and because the increments were without their approval. On these facts we are unable to support the learned trial judges finding that the appellant consented to the reduction of his salary.”

In the case of MARRIOT^{xxx}, which the trial judges cited, the facts were that the respondents employed the appellant as Electrical Maintenance Foreman. The Respondent decided to reduce the work force in its work department and wrote to the appellant that because of his status his salary would be reduced by £3 a week. The appellant protested and continued working. After some time, the respondent wrote to him again that instead of reducing his salary by £3 a week they would reduce it by only £1. The appellant protested again and gave one week's notice to take up another Job. He claimed redundancy payment, which was refused. He then took the matter to court. The trial court held that since he had continued working before taking up a new job he had accepted the

new conditions and was therefore not entitled to a redundancy package. On appeal it was held that since the parties had not agreed to the variation of the appellant's wages and reduction in status the contract of employment terminated on the date of variation of the essential terms of the contract and that the appellant was entitled to redundancy payment.

We respectfully agree that if the contract of employment is varied without the consent of the employee, then the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment. If the conditions of service do provide for early retirement and not redundancy, then the employee should be deemed to be on early retirement.

The facts of this case are similar to the Marriot case. The fact that the appellant continued working after his salary was reduced cannot be said that he accepted the new conditions. The court held therefore that the contract of employment between the parties was terminated on 9th June 1994 when the respondent reduced the appellant's salary without his consent. Although the conditions of service provide for redundancy and not early retirement, the parties agreed, as a matter of company policy, that the appellant to be on early retirement. The only issue between them therefore is what salary was applicable in calculating the benefits. Was it the increased or the reduced salary? "We have already held that the contract of employment between the parties terminated on 9th June 1994 when the respondent reduced the appellant's salary without his consent. His benefits therefore ought to have been calculated on the increased salary applicable to him then. The appeal on this ground therefore succeeds."

This is why SOE's are often sold at a substantial discount because new buyers agree to take on the liability for paying retrenchment packages to any employees who are later made redundant. If people are to be laid off while a company is being restructured in preparation for privatisation or if workers lose their jobs while protracted sale negotiations are under way, then finding the resources to pay employees their entitlements is often very difficult. However, the Privatisation Act does allow proceeds from the sales to be used to support redundancy payment schemes, although the ministry of Finance must approve release of funds and the actual distribution of these schemes is handled through the ministry of Labour. Few claims have been met in this way.

Under the Government National policy on retrenchments, employees are entitled to six weeks notice if they are to lose their job. Each employer must register details of those to be retrenched with the local labour office and copy this information to the government's special research division. On registration, full information on the compensation package to be paid to retrenches should be provided. Payment of compensation is to be made before the last day of duty of each employee otherwise the employer is responsible for paying salaries and other benefits until the redundancy package is paid. These stipulations apply to both public and private sectors. Again, they are seldom adhered to.

3.7.2 Why the lack of adequate compensation?

The Government admits that there are two critical problems when it comes to the payment of retrenchment packages which employees are entitled to. " The Employment

Act and the Minimum Wages and Conditions of Employment Act are main pieces of legislation that provide guidelines for effecting retrenchments. However with the increased pace of the current adjustment, this issue has become contentious, mainly due to the absence of clear and updated policy guidelines that are responsive to the changed economic circumstances.

The major obstacle affecting the smooth implementation of the ongoing reforms both in the civil service and the parastatal sector has been the inability of both government and the parastatal companies to meet the cost of retrenchment packages for the retrenched workers and the lack of clear policy guidelines on the subject. This has resulted in the following:

- Either delays in paying out benefits or,
- The non payment of terminal benefits to retrenched workers.^{xxxii}

The list of companies whose employees have received late or reduced payments, or no payment at all and who are still fighting their claims is a long one. It includes employees of Zambia Engineering and Contracting Company, General Pharmaceuticals Limited, Kapiri Glass Products, Eagle Travel, the National Drum and Can Company, the United Bus Company of Zambia, the Memaco Group, Zambia Airways and many others besides.^{xxxiii} Furthermore, there is a lottery in which some receive compensation while others, equally deserving, lose out. This has frequently happened when employees are given the opportunity to purchase houses as sitting tenants at seemingly attractive prices in return for the cash, which have been paid to them from their terminal benefits. The

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ZPA confirms that the payment of terminal benefits can be immediate, deferred, cash or kind or any combination developed by the parties involved. In other words, these arrangements are often put in place because a state employer, or ultimately the government, does not have the money to meet the cost of retrenchment packages.

3.7.3 Is there enough concern over the plight of retrenchees?

The failure to monitor the impact of privatisation by the government and the failure of international donors to insist on this flies in the face of their claims that Zambia is a model of development through privatisation. Privatisation in Zambia has little to do with meaningful development for the vast majority of Zambians.

3.8 How reliable is ZPA to make sure that the new owners meet their problems?

ZPA has a responsibility to ensure that an investor lives up to all agreements and commitments made in the negotiations for the sale of each company – including terms of payment, liabilities assumed, capital to be invested, treatment of employees, conditions of service at least comparable to their parastatal terms, and various other commitments such as Zambian participation etc. It is the ZPA's responsibility to see that retrenchments are compensated on a timely basis. However, the responsibility to protect the workers' rights after the company has been privatized lies with the union/worker representatives – and

ultimately the individual employees themselves. It is therefore essential that the employees are educated about their rights as stated in the terms and conditions of their contracts, the labour laws, and the terms of the privatization sales agreements.^{xxxiv}

A number of unresolved issues follow from the answers the ZPA gives.

- It is not altogether clear who is responsible for ensuring that the new buyers meet their obligations towards employees. On the other hand, the ZPA states that it has the responsibility for ensuring that an investor lives up to all the commitments and agreements it has made. On the other hand, it claims that once a company has been privatized, it no longer has a responsibility to protect workers' rights. This situation is contradictory and is in urgent need of clarification. Otherwise, what is to stop unprincipled employers exploiting the work force and going back on their promises?
- To ensure that privatized companies are monitored by the ZPA, an article in the Times of Zambia described this omission to monitor the effects of the sell-off as the greatest weakness in the privatization process thus far and ZPA technical director Stuart Cruickshank was quoted as admitting the ZPA is only depending on hearsay. A performance study of companies sold, to include study of their staff levels and working conditions, was conducted by world bank funding.
- Has the government actually made plans for a permanent, independent, post-privatisation mechanism to monitor whether the privatization has in fact been good for Zambians? In answer to this question, not only are the current levels of monitoring by the ZPA totally inadequate, at present, plans for a permanent

monitoring have not been developed. In the absence of such a mechanism, it will be impossible to judge the success or failure of the new owners to live up to their commitments. Once the ZPA ceases to exist, no single organization in Zambia will have an overall, direct responsibility for monitoring the agreements reached with the new owners. In the absence of such scrutiny, how will malpractices come to light and what will prevent unscrupulous employers from quietly going back on agreements? A heavy burden will be placed on disunited trade union movement. If there is to be any wider protection of employees after privatization, the ZPA accepts that it is essential for workers to be educated, among other things about the terms of the privatization sales agreement.

In a study conducted at the newly privatised company Roan Antelope Mining Corporation, RAMCOZ limited, there was a clear indication that the employees were not adequately informed about the sale of the company. From a questionnaire given to the employees', results indicate that the employees knew about the Privatisation of the company from the general announcements made in the press, or by political talks during and after their campaign to elections in the 1991 Presidential and General elections.^{xxxv}

- But this is, in reality, impossible as these agreements are classed as commercially sensitive by the companies involved and are not released in the public domain. Nor is the Ministry of Finance, whose minister signs the agreements as the representative of the Government of Zambia, willing to disclose the sales agreements, including their associated development agreements.

3.9 Success Story of the Privatisation Process in Zambia

One report on the progress of privatisation in Sub-Saharan Africa concludes that the response to and the results of privatisation have been mixed. But the report shows there is a success story. “Zambia has been the most successful privatisation program and the experience there, offers many examples of best practice.”^{xxxvi} About One hundred and fifty (150) parastatal companies were earmarked for privatisation in 1990 when the program commenced.^{xxxvii} Many of these companies have been privatised or are in the process of being privatised. Others still are pending waiting for the appropriate time for their turn. However, among the success stories of privatization is the case of the sale of Daily Produce Board Zambia Limited, which changed to BONNITA (Z) Limited, after it was hotly contested for by many organisations, both International and local. This story reflects generally on the mode of privatisation and the successful take over of the company by the new owners, BONNITA Africa holding 66.5% of shares, while dairy farmers supplying milk held 28.5%.^{xxxviii} The Dairy Produce Board officially changed hands to BONNITA (Z) limited on 1st May 1996. All the workers were informed of the privatization process to occur and the legal implication on their employment contracts. As the law requires, the management ought to inform the employees of their right to consent or dissent to the transfer of their contracts of employment. Those who agreed with the change over were carried forward, while others decided to be declared redundant, and they were paid off their terminal benefits in due course.

Another example is the case of Luanshya Division of the Zambia Consolidated Copper Mines (ZCCM), which was sold to the Banani group of companies of South Africa and changed its name to Roan Antelope Mining Corporation Limited (RAMCOZ). The sale was effected on the 15th of October 1997.^{xxxix} The aim of Government was to make the Private sector the Engine of the economy as far as productivity was concerned. According to the research carried out at the RAMCOZ, the following analysis was made: In the beginning, employees of companies knew of the sale of the company through the press, or ZCCM officials and others from Government officials. There was no internal awareness of the employees of the intention to sell the conglomerate of, which employees could have prepared for. There was no sign of any consent by the employees to the transfer of the contracts of employment because they had not been informed on that basis. All of those questioned indicated that they knew what privatisation was about, but the implication of the process was not known. Obviously the interest of the employees was the status of their contracts of employment after privatisation including all the conditions that come along with it. They expected better conditions of service but to their great disappointment, many of them witnessed the same conditions of service or even worse. Some were laid off, as is the case most of the times a parastatal is privatised because SOE's are usually over staffed and the laying off process is a way to increase on productivity of the company. Furthermore, all those asked think that the amount paid for terminal benefits is not adequate for a retiree and payment takes a long time to materialise. The workers have expressed that the conditions with the new owners as compared to ZCCM are worse off, to an extent that the relationship between the union and the new owners is almost non-existent. As regards social needs, the standard has lowered,

as the new owners do not sponsor sporting and recreational activities. However, education for the miners' children is highly subsidized as opposed to non-miners children. For example, miners' children pay Twenty thousand Kwacha (K20, 000), per term, while non-miners children pay as much as Four hundred thousand Kwacha (K400, 000) per term.^{x1}

From this analysis, it would appear that the Privatisation process in Zambia has placed too much emphasis on realizing profits from the former SOE's, and in doing so, has tried to cut down their costs to extremely low levels. Maintaining a high number of employees has led to high maintenance expenditure for the companies and all the more reason why it has proved vital to cut down on that cost tremendously.

ENDNOTES

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- i Mulwila J (1980) PhD Thesis: Parastatal Companies and the Law in Zambia p.20
 - ii Mulwila.J (1980) PhD Thesis: Parastatal Companies and the law in Zambia P.44
 - iii *ibid* P.47
 - iv Adam et al (1992) Adjusting Privatisation P 144
 - v OXFAM report on privatisation in Zambia
 - vi Rose.F (1998) Company Law p.18
 - vii Privatisation Act section 2
 - viii Chapter 268 of the laws of Zambia Section 35
 - ix *ibid* Section 35 (2)
 - x 1997/HN/719
 - xi Bourne N (1998) Essential Company Law p 5
 - xii Peter Ng'andwe case
 - xiii cited in the Peter Ng'andwe case
 - xiv Bourne N (1997) Questions and Answers on Employment Law. P65
 - xv *ibid*
 - xvi OXFAM report on privatisation
 - xvii ZPA, progress report 2
 - xviii *op cit* fact sheet 4a
 - xix Unnamed investor, quoted in the Daily Mail, 28 January 1998
 - xx Kikeri S et al (1992) Privatisation: The lessons of experience p.153
 - xxi OXFAM Report Fact Sheet 4a
 - xxii OXFAM Report fact sheet 4a
 - xxiii *ibid*
 - xxiv LuSE report on market sales of Companies
 - xxv *ibid*
 - xxvi Kinley L (1995) Privatisation in Africa: the case study of Zambia p.17
 - xxvii *ibid*
 - xxviii OXFAM report.
 - xxix (1997) SJ 42 (SC)
 - xxx kikeri. S et al (1992) Privatisation: The lessons of experience p. 221
 - xxxi Chapter 276 of the Laws of Zambia
 - xxxii National policy on Retrenchments, Government of Zambia, July 1995
 - xxxiii ZPA, progress report on Privatization
 - xxxiv ZAP, Transparency in the privatization programme.

CHAPTER FOUR

In this chapter we focus on the recommendations relating to possible actions that may be employed to address the technicalities revealed by the preceding chapter relating to the rights of employees in relation to privatisation and the impact it has had on them. The chapter is structured as follows:

- (i) Summary of the preceding chapters
- (ii) Recommendations
- (iii) Conclusion

4.1 SUMMARY OF THE PRECEDING CHAPTERS

Chapter one only serves as a form of introduction. It ventures into a somewhat detailed background of the nationalist policies that prevailed in Zambia and the rise of the parastatal companies in Zambia and how they were administered, until the Zambian economy collapsed. This is the period during the second republic when Zambia was under the one party state.

Chapter two deals with the doctrinal issues ingrained in the concepts of privatisation in relation to the Act. Under the privatisation process, the major concept being the operations of the Zambia privatisation Agency, the design for the privatisation program and the operations and transparency of the program.

Chapter three examines the transfer of contracts of employment when a company has been privatised and the position as stipulated in the employment Act. The Act provides that an employee should consent to the transfer of his employment contract. Furthermore, the chapter looks at the status of job gains and job losses and the survival of employees once they have been retrenched.

4.2 RECOMMENDATIONS

From the brief summary of the paper and particularly from chapter three, it may be deduced that the final product of the government's careless and unethical manner of implementing well-meaning policy has been a mammoth legal hitch or complication. If left unresolved, this legal technicality may trigger a chain of further and more complex technicalities, which may haunt all the players for a long time to come. To solve this complex legal situation requires well thought out remedial measures as opposed to mere clothing with legality through amendment of what may ordinarily have been illegal or unlawful from the standpoint of the situation currently obtaining.

This paper proposes a number of recommendations though the list is obviously not exhaustive and the application or adoption of each recommendation is necessarily dependent on the resultant implication of adopting it. The recommendations may include the following:

(i) *Amending the Employment Act*

An amendment to the employment Act would entail an additional subsection to section 35Aⁱ, which section says that “no rights arising under any written contract of service shall be transferred from one employer to another unless the employee bound by such contract consents to the transfer and a proper officer thereof endorses the particulars upon the contract.” Such subsection shall have the effect of a penalty to employers who fail to abide to this section and who misdirect the employees. Furthermore, the notice period for consent should be adequate to allow the employee make necessary progress, which period should not be less than six months.

(ii) *Amending the Privatisation Act*

The Privatisation Act, is not a permanent Act and this is probably a better solution since it would relieve the pressure of having to amend a perpetual or enduring Act.ⁱⁱ Such an amendment to the Act would have to state that the provisions of the Privatisation Act would prevail notwithstanding the provisions of any other written law. To avoid this, the Act must be able to be subject to frequent changes to suit prevailing situations. For instance, the Act must provide that new owners of companies ensure that matters relating to employee wages and conditions of service are compatible with the employment laws of Zambia. Since the most affected party to the privatisation process is the employee, the Act must lay down conditionalities that will help the people benefit from the program directly, unlike the current situation where, the employees’ concerns are treated as inferior to the whole program.

(iii) **Establish a clear policy on labour**

The following issues require policy definition: redundancy numbers, redundancy payments, investor incentives to create jobs or retain workers, and social safety net activities. Further to ensure that labour policies and privatisation policies are directly communicated to enterprise workers.

Under redundancy numbers, the government should ensure that a large number of the employees are retained in their positions, with very limited number of retrenched workers. The aim of the private employers is to maximize their profits with very minimal expenditure and the cutting down of the work force is a way of doing so. Since many parastatals are over-staffed due to the fact that, providing job opportunities was one of the policies for governments creation of SOE's. However even though there seems to be over-employment, the new owners should be restricted on the levels of retrenchments. This will help to reduce the number of unemployed persons after privatisation has been completed. This is because, Privatisation should be seen as an incentive and not a form of misery to workers.

The current situation prevailing in Zambia reveals that, there is an apparent delay in redundancy paymentsⁱⁱⁱ. There is need for Government therefore, to formulate a strategy ensuring that those responsible for the preparation and payment of redundancy packages are conducting their obligations in the shortest possible time. The criterion for the fulfilling of redundancy payments should be embodied in legislation indicating the minimum accepted amount for different classes of employees.

As these new investors take office, they should be ready to create better conditions of service for the workforce that they retain. The investors' aim should not only be to enhance their economic base, but also, to afford the workers the possibility of sustaining their livelihood under a private sector run economy. Also, since most of the investors in the privatisation program are foreigners, it should be clearly laid down that these investors should not sacrifice qualified Zambian personnel, for foreign employees. Therefore legislation should be put in place as soon as possible to avoid such a situation from prevailing.

From research^{iv} it has been noticed that three quarters of employees are not aware of the privatisation of their companies way before hand. Most of them only hear about it from press statements or by way of discussion among fellow employees, or even through political talk, that is, from politicians. In line with section 35A of the Employment Act, this should not be the case because for an employee to consent to a transfer of his contract he should be well aware of the consequences that are bound to come. This requires prior notice, and thus, the law should specifically indicate the time frame for the notice period that is to be given to the employee and the necessary details as to the expectations of their new employers. Publications in various languages must be made available to employees, as well as specific internal discussions on the privatization of the companies to which they belong.

Many of the state owned enterprises provide social facilities for their employees, *inter alia*, subsidized medical facilities, sporting activities, and educational requirements for their children. However, many private investors do away with these incentives as a cost saving measure. If this so happens, the government must lay down some minimum requirements to

facilitate such amenities, so as to maintain the standard that the government provided for these employees while the economy was state run. If these companies are not able to provide such facilities, the salaries should reflect a situation where employees are able to pay for these facilities.

People are the most effective resource. Governments must ensure that those given responsibility for the process are committed to implementation in an efficient and effective manner. They must believe that privatisation is a policy that will benefit Zambia and Zambians, as a whole. This relates to appointments at all levels. The ministers must take an active interest in achieving the targets for privatisation, and the minister assigned to privatisation should champion the cause.

The professionals assigned to implement the program must also be committed, experienced in private sector operations, and competent. They must be paid at private sector levels in order to ensure that appropriately qualified staff can be recruited and retained.

4.3 CONCLUSION

This paper revealed and analyzed the prevailing problems that are eminent in relation to employment contracts and conditions of service for employees once a company has been privatised. The paper has uncovered the necessary provision of the Employment Act, and to a greater part, the Zambia Privatisation Act. It expresses how the government has decided to implement the program of privatisation. Furthermore, the paper has looked at the plight of retrenchees, the availability of jobs and the rate of job losses. Another issue dealt with in

depth, is that of the social status of employees. In addition, the paper has also addressed the success story of the privatisation program. Therefore, judging from this analysis, there is plenty room for improving the process of privatisation vis-à-vis the plight of employees. They should be treated as an integral part of privatisation and, government should lay down clear-cut policies ensuring that the employees' rights are protected. The privatisation program appears to be promising, as regards rebuilding Zambian economy. However, if hiccups like that of workers plight prevail then the process will become unpopular among the Zambian people.

The government as a major player in this program should learn from past experiences in order to improve on the weaker areas identified. This should be done in the shortest possible time to alleviate the suffering of the people of Zambia. The author hopes that this paper has been able to address loopholes in the area on employment under privatisation, in an adequate manner. Further, that other researchers and policy makers are able to utilize this paper in further studies on the issue of privatisation and conditions of service for employees.

ENDNOTES

- i The section on consent to a transfer of a contract of employment
- ii For classification of statutes see Edgar S.G.G. Craies on statute law 7th edition
- iii OXFAM Report on Privatisation, 1995
- iv Research at Ramcoz conducted by Brenda Mofya, 4th year student, on the human rights implication of the privatisation process.

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