

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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BY

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THE HUMAN RIGHTS IMPLICATIONS OF ZAMBIA'S PRIVATISATION PROGRAMME: The case of Zambia Consolidated Copper Mines (ZCCM), Roan Antelope Mine, Luanshya Division

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**‘The Human Rights Implications of Zambia’s Privatisation Programme: The
case of Zambia Consolidated Copper Mines (ZCCM), Roan Antelope Mine,
Luanshya Division.’**

By

BRENDA MOFYA

**A paper submitted to the University of Zambia in partial fulfilment of the
requirements for the award of the Degree of Bachelor in Law (LLB)**

May, 2000

DEDICATION

This obligatory essay is a dedication to my dear parents, Idah Mpande Mofya and Tresford Kasongo Mofya, my biggest inspirations. I wish to thank you for all the sacrifices you made and the values you instilled in me that have lived beyond your lives.

I wish you were here to see this. R.I.P.

*'What I am teaching you is
Good, so remember it all.
When I was only a little boy,
My parents only son,
My father would teach me.
He would say, 'remember what
I say and never forget it.
Do as I tell you, and
You will live'*

Proverbs 4:2-5

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Having faith the size of a mustard seed is all I need to endure to the end and for that I thank God!

Special Thanks to my supervisor, Mr Michael Holden, for his advice which has been very useful and without which it would not have been possible for me to put this piece of work together. I feel indebted to him for all this and for the time he spared.

I would also like to thank my family and friends for their prayers and support. To the best 'brother one would have Innocent Kasongo Mofya and little sis Aggie, I can't think of anyone else I would go through this again with. I love you! And to the 'absolute truths' Allan Glass, Annette Ching'andu, Cholwe Hamusunse, Caesar Nkombo, Nalukui Milapo, Clement Tafeni, Matilda M. Tembo, Antella Hamusunse, Auntie Alfrida Mwamba and Juliana Shoko, thank you for being a source of inspiration and encouragement throughout my life at the University of Zambia. I owe you!

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Lastly but not the least, I am greatly indebted to all those individuals that provided me with the material I needed for this work, especially those at ZPA and Roan Antelope Mine.

ABSTRACT

Privatisation of state owned enterprises is currently in process the world over, in Europe, North America, Japan and numerous developing countries and newly industrialised countries. In Zambia also, Privatisation is in process.

The main purpose of the privatisation programme has been: to reduce the role of the state in the economy thereby improving business competitiveness and efficiency; to reduce the fiscal deficit by using the proceeds from the sales to retire external and domestic debt; and to generate new cash flows through investment and tax revenues.

This paper argues that human rights standards apply in the privatisation process, although this is often ignored. It argues further that often during privatisation the human rights of the majority of the people are undermined at the expense of economic advancement of a few minority groups. Taking the particular case study of the privatisation of the former Zambia state owned mining company, Zambia Consolidated Copper Mines (ZCCM), Luanshya Division - Roan Antelope Mine, it strives to show the extent to which the rights, especially economic rights have been violated. It also attempts to determine the differing levels of obligations of the various actors involved in the privatisation programme.

The main objectives of this paper are; to assert the impetus behind privatisation in Zambia; to determine whether human rights standards apply in the privatisation process, thereby determining whether any of the various actors involved in the privatisation process in Zambia are under any obligations to respect these rights; to determine whether any specific human rights, particularly social and economic rights, have been violated during the privatisation process in Zambia and whether these are liable to have short or long term implication; and to make recommendation on how best to allocate responsibilities for protecting human rights during and after privatisation.

This research is based on a combination of primary and secondary data. Secondary data involved gathering information from books, articles, journals, newspapers, government documents and conference papers. Primary data involved interaction and interviewing government officials, mineworkers and Luanshya residents.

The first chapter is an introductory chapter, which gives the background to privatisation from a global point of view. This includes the definition of privatisation, factors that led to resort to privatisation and its main objectives. This chapter ends with a brief historical background of the process in Zambia.

Chapter two presents the legal and administrative framework of the process in Zambia. It looks at the Privatisation Act, which is the chief implementing Act for privatisation and which gives the Government the legal mandate to privatise. The provisions of other Acts supporting privatisation are also highlighted in this chapter for the purposes

establishing the basic legal and administrative framework in which the process is being implemented.

Chapter three presents the main actors in the privatisation process and strives to determine the human rights obligations each of them has.

The fourth looks at the privatisation of ZCCM Roan Antelope mine. It presents a discussion of how the sale was done and whether the aftermath of the sale presents any violation of people's rights.

Chapter five gives a brief summary of the paper and recommendations that could help the process of privatisation in the future, both in Zambia and elsewhere.

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CHAPTER ONE

HISTORICAL BACKGROUND

1.0 INTRODUCTION

Many agree that the debate surrounding privatisation in developing countries is based on limited empirical evidence and is often grounded in a questionable analytic framework. Despite this, privatisation continues to lie at the heart of economic adjustment programmes being adopted by governments around the world.

Indeed, the term ‘privatisation’ has been used to mean distinct things to different people. This chapter begins by defining exactly what the term is and proceeds to give a historical background to it. In the historical background the factors that led to the introduction of privatisation, the key objectives underlying the programme and also the main actors involved in the privatisation process, will be outlined.

An argument is advanced in this chapter that privatisation is a global exercise and it was very much inevitable for Zambia to turn to privatisation. The importance of chapter one is that it gives a foundation all the other arguments that will be advanced in the other chapters of this research paper.

2.0 DEFINITION

The term 'privatisation' has been used to describe an array of actions designed to broaden the scope of private sector activity or the assimilation by the public sector of efficiency-enhancing techniques generally employed by the private sector.¹ The Privatisation Act of Zambia² however defines it as:

'The transferring to the private sector of part or the whole of the equity or other interest held by the government, directly, in a state owned enterprise wholly or partly owned by the government.'³

The most common usage of the word refers to the change of ownership of an enterprise or part of an enterprise from the public to the private sector.⁴

From the above definition, it is evident that not in all instances of privatisation are enterprises transferred in their entirety. There are certain times when the government only transfers the controlling interest to a private sector but still keep a significant share holding and that in itself is also referred to as privatisation. The Zambian Government has kept an interest in some of the large enterprises, which it has, privatised.⁵

¹ UNCTAD/GATT, Comparative Experiences with Privatisation, Policy, Insights and Lessons Learned, New York and Geneva, (1995), P. 3

² Act No. 21, 1992

³ Ibid., section 2

⁴ Profit Magazine, No. 1/6 November, 1992

⁵ RIGHTS AND ACCOUNTABILITY, 'Privatisation in Zambia,- what it means to the majority,' Fact sheet No. 1(1998)

3.0 HISTORICAL BACKGROUND

The dominant feature of the post independence economic history of many developing countries was the rapid growth of the public sector. In Zambia for instance, just after independence, the new government undertook a massive nationalisation programme where it took over the running of over 80% of privately owned companies. The experiences of several other countries also review that public intervention in the economy was a prerequisite (sine qua non) of policy throughout the 1960s and 1970s.⁶ This was done for varied reasons, including; to balance or replace a weak or ideologically unacceptable private sector, to produce higher investment ratios and yield a capital surplus for investment in the economy, to stimulate weak indigenous private sectors, to generate employment, to make goods available at lower cost and to transfer technology to 'strategic' firms in mining, telecommunications, transport and heavy industry.⁷

By the early 1980s, state owned enterprises accounted, on average, for 17 percent of GDP in Sub-Saharan Africa, 12 percent in Latin America, for a modest 3 percent in Asia and for 10 percent in mixed economies world-wide. In Zambia before 1991, the economy was purely characterised by a strong Government presence in business

⁶ For example shortly after gaining independence in the early 60s the Tanzanian government took over the running of 350 enterprises from the private sector – See S.KIKERI, J. NELLIS AND M. SHIRLEY, 'Privatisation: Lessons of Experience,' World Bank publication, Washington D.C, (1992) P. 2

through a parastatal sector estimated at 80 percent of industrial and commercial activities in the country.⁸

Having given the above picture, the question that arises then is why then did countries resort to privatisation?

Over the years, the performance of state owned enterprises has been assessed the world over with evidence from a wide range of countries showing that far too many state owned enterprises were economically inefficient and continuously incurred heavy financial losses.

According to the World Bank's report on 'Privatisation: lessons of experience,' most of these enterprises were an unsustainable burden on the budget and the banking system, absorbing scarce public resources and their contribution to the treasury were negligible in relation to the huge investment they represented.⁹ In Mexico, for instance government transfers and subsidies to state owned enterprises amounted to more than 3 percent of GDP in 1982, 4 percent of gross national product (GNP) in Turkey in 1990 and 9 percent of GDP in Poland in 1989.¹⁰ In Ghana in the last half of the 1980s the annual average outflow from government to fourteen Core State owned enterprises constantly exceeded the meagre flows in the form of dividends and taxes from the

⁷ Ibid., p. 14

⁸ F.C LUKASHI, 'Privatisation process techniques,' 28th February, 1995

⁹ S. KIKERI, J, NELLIS AND M SHIRLEY, 'Privatisation: Lessons of Experience,' (supra n.6)P. 2

¹⁰ Ibid.

firms to the state.¹¹ In the case of developing countries, it was found that governments were spending huge sums of money trying to salvage these enterprises, thereby increasing their external debt. As Patricia Feeney in her paper, 'The human rights implications of Zambia's privatisation programme,' observes,

'In the 1990s privatisation of state-owned assets came to be seen as one of the answers to the intractable debt crisis. Since the early 1980s as a result of government efforts to sustain state-owned industries the external debt of developing countries has spiralled out of control, leading to years of macro-economic instability, painful adjustment, low or even negative growth.'¹²

As early as the beginning of the 1970s concerted efforts were made to find ways of making these enterprises perform. Reforms were designed virtually in all developing countries which in nearly all were short of ownership transfer to remedy the causes of poor state owned enterprise performance. These reforms aimed at exposing state owned enterprises to domestic and external competition and ending preferential treatment in order to create a level playing field; eliminating easy state owned enterprise access to credit from the budget and banking system and instituting a hard budget constraint; increasing the autonomy of state owned enterprises and freeing managers from government interference in day to day operational decision making and from non-commercial goals; and developing institutional mechanisms, such as

¹¹ Ibid.

¹² PATRICIA FEENEY, 'The Human Rights Implications of Zambia's Privatisation Programme,' University of Exeter, 15/17 Sept. 1998

contract plans and performance evaluation systems, to hold managers accountable for results.

Over a number of years, the performance of enterprises was assessed and it revealed that unlike in the earlier arrangement, the firms obtained some improvement. However, the improvement obtained at this point was notably unsustainable, attributing this to none change in ownership of these enterprises. This is illustrated by the **Japanese Railways case:**

'Between 1964 and 1984 Japanese National Railways (JNR) - Japan's largest state owned enterprise, recorded staggering losses. A World Bank study in co-operation with the Japan Economic Research Institute however shows that despite five separate attempts at full-scale reform, performance continuously deteriorated. The JNR's annual losses exceeded \$7 billion in the mid-1970s and \$10 billion in the mid-1980s. It is said that over this period the company received subsidies of more than \$57 billion and ran its long-term debt up to \$286 billion, or 11 percent of GNP.'¹³

The question of ownership in the Japanese case was pointed out as the major obstacle to realisation of sustainable improvement. This being the case, there has been a widely held view among economists, especially those in the World Bank and the International Monetary Fund, that state owned enterprises cannot compete in today's global market and that the only way to achieve sustainable development is through privatisation. Hence an emphasis not only on economic reform but more so on the actual change in

¹³ S. KIKERI, J. NELLIS AND M SHIRLEY, *Privatisation: Lessons of Experience*; Supra (n.6) p.19

ownership from public to private. It is for this reason that over the past decade privatisation of state owned enterprises has been advocated for.

To sum it all up, privatisation has come about as a result of countries being disappointed with the high costs and poor performance of state owned enterprises and the modest and unenduring nature of reforms that do not involve change in ownership. Countries under taking privatisation hope that new owners will increase the efficiency with which the firms use resources and will decrease the financial demands made by state owned enterprises on strained government budgets.

3.1 OBJECTIVES

With the above given background, it is clear that in many ways, privatisation objectives are broadly similar across countries in that they all centre around the benefits to be gained from rebalancing the roles of the private and public sectors to enhance the productive power of the economy. As is stated in the United Nations Conference on Trade and Development (UNCTAD) report on Comparative Experiences with Privatisation: Policy Insights and Lessons Learned, 'there is now a widespread consensus that achievement of more dynamic economic growth requires a greater role for the private sector and for market forces.'¹⁴

¹⁴ UNCTAD/GATT, 'Comparative Experiences with Privatisation: Policy, Insights and Lessons Learned,' Supra (n.1) P.1

The specific reasons behind privatisation nonetheless, at the national level are varied and interlinked. Thus, depending on the circumstances prevailing in each particular country the objectives can be political, economic, fiscal, social, or, most frequently, a combination of several of them. The interlinkage comes in, in that it is rather difficult to draw a line in between the different categories. Often it may be seen that achieving one objective is also the means to achieve another. For example, reducing public debt can play an important role in stabilising the economy and thus in promoting savings and investment.¹⁵ The social objectives of widening share ownership can also have strong political motivations, as the share ownership in itself would for instance lead to economic empowerment. Like an eminent Human rights Advocate observes 'a well fed person is able to objectively participate in the political arena than one who is not fed.'¹⁶ Likewise, the political objective of redefining the role of the State also has important economic ramifications. Putting it in Mr. Lukashi's words:

'The positive out come from privatisation is the very act of removing business ventures from the day to day activities of the Government. This allows the government to withdraw to areas in which it has or it is expected to have a comparative advantage, that is, the provision of social capital and basic human services including health and education and generally developing the policies to create the enabling environment for sustained growth.'¹⁷

¹⁵ Ibid.

¹⁶ JULIA HANSEMANN, A Human Rights Approach to Development, Rights and Humanity, UK (1998) p.28. Julia is the President of Rights and Humanity in the United Kingdom.

¹⁷ F.C LUKASHI, 'Th Role of Privatisation in Zambia,' paper presented at the Copperbelt University ZICA- Student chapter, Kitwe, July, 1999, p. 3

Different countries however will have different priorities in ordering their privatisation objectives, according to their specific socio-economic and political situation.¹⁸

Among the reasons behind privatisation are:

- To promote economic efficiency by fostering well-functioning markets and competition;
- To redefine the role of the state in order to allow it to concentrate on the essential task of governing;
- To reduce the fiscal burden of loss-making public enterprises, in order to help regain fiscal control and macroeconomic stability;
- To reduce public debt;
- To release limited state resources for the financing of other demands, for example in the area of education;
- To generate new investment, including foreign investment;
- To mobilise domestic resources for development, and deepen domestic financial Development; and
- To spread and democratise share ownership.

The justification for the first objective, that of promoting economic efficiency by fostering well-functioning markets and competition, is that, private sector ownership

¹⁸ While the privatisation programme has two main aims in the United Kingdom: to promote efficiency and to widen and deepen share ownership, Ghana's is to reduce the size of the state-owned sector and thereby relieve the government of the financial burden which state-owned enterprises impose on the state. See UNCTAD/GATT, 'Comparative Experiences with Privatisation: Policy, Insights and Lessons.' Supra (n.1)

enhances economic efficiency by exposing management and labour to market incentives and allowing resource allocation decisions to be determined by private sector responses to relative price signals. Under public ownership, the firm is under the control of a Minister or Government bureaucrat who maximises an objective function, which in most cases include a personal agenda. For example, the personal agenda could consist of a variety of elements: redistribution to favoured interest groups, high wage and employment levels in particular enterprises or sectors, patronage and so on. Under private ownership the firm will aim at achieving the efficiency which exists in the product market they operate in, or in the capital market or both. Firms will be disciplined to meet the consumer wishes by the threat of transfer of custom to other firms.¹⁹

Competition is needed in order to achieve gains. It is an important principle of privatisation that while ownership matters, competition matters even more. Competition which is conceptually distinct from ownership, greatly improves monitoring possibilities and hence incentives for productive efficiency.²⁰ In particular, competition facilitates performance comparisons, which can generally improve trade offs between incentives and risk when several agents facing correlated uncertainties are being monitored. A public enterprise to be privatised may be operating in a non-competitive market but even in such a situation, it is said that competition or the threat of competition can sometimes be introduced to improve performance.

¹⁹ F. C LUKASHI, 'The Role of Privatisation in Zambia,' *Supra* (n.17)

As regards the objective to redefine the role of the state or to rebalance the roles of the public and private sectors, it is seen that if industries are left to the private sector to run, then the state naturally would concentrate on its core functions, such as creating a sound legal and macroeconomic framework, protecting the environment, ensuring order and security and providing efficient public services such as infrastructure, education and social protection.

On the issue of debt, mobilising resources through sales, privatisation serves to reduce public debt and the associated recurrent fiscal burdens of debt service. In most developing countries the issue of debt has actually been one of the major objectives behind privatisation. Debt service has been consuming an excessive share of current government revenues, to the detriment of core government functions. By contributing to healthier public finances, debt reduction can also allow more capital to be made available at lower cost for private investment, thus promoting private sector-led growth. By reducing the fiscal burden of loss-making state enterprises, or reducing public debt service burden, privatisation can serve to release limited state funds for the financing of other activities.²¹

On attracting new investment, particularly foreign investment, together with new technology and management skills, as well as new partners, for enterprise growth, the argument is that privatisation frees the enterprise from budgetary constraints and

²⁰ Ibid.

²¹ UNCTAD/GATT, 'Comparative Experiences with Privatisation: Policy Insights and Lessons Learned,' *Supra* (n.1) p. 5

political interference from the state. It also allows the state to raise private capital and enter into alliance with strategic partners. There have been instances where the fear of government interference has been a major factor in driving potential investors away.²² In countries such as Jamaica, privatisation has been successful in the objective of attracting new investment, in that privatisation-related flows accounted for 94 per cent of total inward foreign investment in 1987.²³

Privatisation also serves to mobilise domestic resources for development that may not otherwise be tapped. As can be seen, a sale of land may create new entrepreneurs, which would result into productive use of idle land for successful cultivation of export crops.

As regards the spreading and democratising of share ownership, privatisation helps allocate a proportion of shares to small investors and to employees and creates a new group of stakeholders in the well being of the national economy. This is done through employee share ownership plans or other forms of share allocation to employees such as internal buyout or an employee ownership plan which transforms the company into a profitable enterprise and turns the owner-employees into self-sufficient individuals. As can be seen from Fabiano Lukashi's efforts to justify privatisation in Zambia:

'Zambian workers have become shareholders in a number of profitable and growing privatised enterprises through the establishment of employee share ownership plans by

²² Ibid., Pg. 6

such companies as Bonnita, Chilanga Cement, Zambia Sugar and in several companies sold to management and employee buy out teams.²⁴

3.2 MAJOR ACTORS IN PRIVATISATION

Privatisation involves a number of major actors. Different countries may have different actors in the playing field but generally, the following actors are always involved.

a) **The State**: This is an obvious actor. Privatisation reduces the role of the state in some areas, but increased or modified in some others. Redefining the role of the state, to enable it to make a more effective contribution to economic performance, was one of the objectives of privatisation identified above.

b) **Private sector enterprise**: This is another actor involved. The private sector is expected to be able to make use of the new opportunities brought about by privatisation to enhance productivity and growth. This includes several distinct elements such as entrepreneurship, management and labour, as well as private sector capital - each of which has its role and requirements. For privatisation to succeed, basically all of these elements must be able to respond effectively to market conditions and opportunities.²⁵

²³ Ibid.

²⁴ F.C LUKASHI, 'The Role of Privatisation in Zambia,' *Supra* (n.17) p. 6

c) **Domestic savers and investors**: These a third key actor identified in privatisation. Privatised enterprises will need to rely on private sector sources of capital and mechanisms for financing current operations, rather than on tax revenues. The reduced role of government in enterprise funding will require a corresponding increase in the role of institutional mechanisms and financial instruments, which can attract private sector savings on a voluntary basis. Emphasis here is given to the need for the government to put up measures that build investment confidence, for both foreign and domestic investors.²⁶

d) **Financial sector**: The Financial sector is another important actor in the process because the capital markets and financial intermediary institutions play a vital role in ensuring the success of privatisation. The Financial institutions in this regard perform a number of function, including inter alia mobilising large pools of domestic savings so that the capital requirements of enterprises can be met without inflationary credit creation, and enabling individual investors to alter their investment portfolios or withdraw funds without necessarily affecting the level of market capitalisation or causing disruption of credit lines to individual enterprises. Financial intermediary institutions also play a crucial role in reconciling the needs of savers and investors and mobilising domestic resources for productive investment.²⁷

²⁵ UNCTAD/GATT, 'Comparative Experiences with Privatisation: Policy, Insights and Lessons Learned,' Supra (n.1) p. 6

²⁶ Ibid., pg. 10

²⁷ Ibid., pg. 11

e) **The donor community**: These are a major actor in the privatisation programmes of developing or transitional countries. Their participation is mainly in the form of supplying financial and technical assistance; financial social protection or compensation measures or even in some cases buying equity stakes in privatised firms. By the term donor community, both bilateral and multilateral donors are included. Multilateral lending institutions such as the World Bank have in some countries helped to set up privatisation agencies and to implement privatisation programmes. They have also supplied technical assistance to privatisation agencies and also financed privatisation studies. In Zambia for instance, the World Bank helped out in the programme through financing of salaries of senior members of the Zambia Privatisation Agency, management and staff, privatisation studies, valuations and advertising.²⁸ The United States of America through USAID assisted through funding of equipment, furniture, vehicles, staff training, marketing and publicity and other logistical support to Zambia Privatisation Agency.²⁹ It also provided the Agency with three Business Analysis Consultants on a fully serviced, full time basis.³⁰

4.0 ZAMBIAN CONTEXT

Zambia was a fairly prosperous colonial economy with a well-established private sector in an open market oriented economy dominated mainly by expatriate business interest, multinational corporations and commercial farmers. The copper industry,

²⁸ ZAMBIA PRIVATISATION AGENCY MEMORANDUM OF OPERATIONS, June 1998, pg. 9

²⁹ Ibid.

³⁰ Ibid.

which was the main stay of the economy, was under the control of two large mining groups; Anglo American Corporation and Roan Selection Trust. State participation in the economy at the time was limited to a very few activities such as railways, electricity and water. At independence in 1964 Zambia inherited a buoyant and highly specialised mining economy. Throughout the sixties and early seventies, the country experienced rapid economic growth stimulated by government expenditure on infrastructure and services and investment in import substituting manufacturing enterprises.³¹

Following the Unilateral Declaration of independence (UDI) in neighbouring Southern Rhodesia (now Zimbabwe) in 1965, investment in local manufacturing expanded even further. This was so because a number of companies that previously supplied Zambia from Zimbabwe set up operations locally in a bid to protect their market in Zambia after the imposition of Trade sanctions on Rhodesia by the United Nations. As a result of a combination of these factors, growth in the first decade after independence was comparatively high. For example, it is said that between 1966 and 1970 Zambia's GDP growth averaged 11.4 per cent and for the entire period 1966-76 GDP growth averaged 8.78 per cent.³²

³¹ F.C LUKASHI, 'Role of privatisation in Zambia,' *Supra* (n.17), see also FUNDANGA M CALEB EL AL, 'Privatisation of public enterprises in Zambia: An evaluation of the policies, procedures and experiences,' paper presented at the Public Sector Management Conference, University of Manchester, Institute for Development Policy and Management, 1997.

³² *Ibid.*

Intervention from the state in the economy began in 1968 with the Mulungushi Reforms, where the then President Kenneth Kaunda announced a program of nationalisation of private owned companies. The justification given for this was that since the economy of the country was largely in the hands of foreigners, nationalisation was inevitable, as it was the only way to provide an opportunity for indigenous Zambians to participate in the economy. Government intervention in the economy, through the establishment of state owned enterprise was seen as the best, fastest and surest way of accelerating indigenous participation as well as economic growth.³³

The Government nationalised a wide range of commercial activities ranging from retail shops to meat packing plants and quarrying operations. These reforms were followed by another series of reforms a year later, which were referred to as the Matero reforms. Unlike the Mulungushi reforms that only affected companies, the Matero reforms covered all aspects of business ranging from agriculture, vehicle, assembly, hotels, tourism, milling, brewing, electricity and water, timber and wood products and bakeries. Important to note here also is that these reforms were the ones at which measures to nationalise the mining companies were announced.³⁴

Like elsewhere, Zambian state owned enterprises failed to perform for a variety of reasons including: the fluctuation of copper prices on the world market, the application

³³ MATEMBO MATONGO, 'The prospects of the Zambia privatisation process: A legal view,' Obligatory Essay, UNZA, 1995, pg.2

³⁴ F.C LUKASHI, 'Role of privatisation in Zambia,' Supra (n.17) p.6

of inappropriate technology; total dependence on processing of imported raw materials; inexperienced management; misappropriation of resources by officials appointed by governments to run them; and the operation in monopolistic environments with no competition. The implication of this was that the state owned enterprises were typically inefficient, which affected their financial viability, in turn requiring the Government to subsidise their operations.

Although the then Government of Kenneth Kaunda in the early eighties signed an agreement with the IMF and World Bank to reform the economy, it backed out of some aspects of the extremely harsh measures required under structural adjustment. In 1987, the World Bank and IMF suspended their lending because of the failure of the Government to pay its arrears.³⁵ The failure of the government to provide economic growth and wider participation gradually undermined the legitimacy of the leadership of Kenneth Kaunda's United National Independence Party (UNIP). There was a groundswell of support for the Movement for Multiparty Democracy (MMD), which won elections in 1991 on a platform of free market reforms. The MMD launched an ambitious privatisation programme aimed at privatising some 150 state owned enterprises, accounting for 80 per cent of formal economic activity, over five years. To this effect the Privatisation Act³⁶ was enacted in 1992, establishing the Zambia Privatisation Agency. Its purpose is to plan, manage, implement, and control the initiative. As of 31st May 1999, the Zambia Privatisation Agency had privatised 229 state owned enterprises.

³⁵ Ibid.

4.1 OBJECTIVES

According to the World Bank, the Zambian privatisation programme aimed to: ensure participation of the largest possible number of the Zambian citizens in privatisation process through direct or indirect ownership of shares in the state owned enterprises to be privatised; create an equity market which would permit trading in the shares of newly privatised state owned enterprises; and, introduce new savings instruments to encourage popular saving and diversify the types of savings instruments which the small individual investor can buy. A Privatisation Trust Fund was set up to function as a 'warehouse' for minority stakes reserved for later sale to citizens. Priority in the sale of minority shares was to be given to small individual Zambian investors through discounted initial public offerings, with the objective of achieving a wide distribution among the population. The World Bank maintained that such strategies had been devised to accelerate the transition from socialism to capitalism throughout Eastern Europe and the former Soviet Union' but they could also be adapted to countries 'where progress on privatisation has been hampered by political and social conflicts over ownership and the distribution of the benefits of reform.'³⁷

According to the Zambian government officials and Zambia Privatisation Agency the ultimate however, privatisation in Zambia has the following objectives:

³⁶ ACT No. 21, 1992

³⁷ PATRICIA FEENEY, 'The Human Rights Implications of Zambia's Privatisation Programme,' *Supra* (n.12)

- To scale down the Government's direct initiative in economic activities and Correspondingly its administrative load;
- To reduce Government budgetary costs arising from subsidies and
- To promote competition and improve the efficiency of enterprise operations;
- To encourage wide ownership of shares;
- To promote the growth of capital markets;
- To minimise the involvement of government bureaucracy in enterprise operations
- To stimulate both local and foreign investment;
- To promote new capital investment;
- To derive capital incomes for the Treasury.³⁸

From the above outlined objectives, we note that the ultimate goal of privatisation in Zambia is to improving the national economy as well as the welfare of Zambians. On the other hand, the Zambian government like most governments the world over, has confessed that privatisation, like many other economic reforms does have its own disadvantages, with its strongest objection being the effect on jobs. Privatisation has in most cases resulted into massive job loss, making many people redundant and consequently leading to an increase in poverty levels among the people.³⁹ Certain governments nonetheless have ensured that adequate measures safeguarding the lives of citizens are put in place before resorting to economic reform. The questions we

find ourselves facing are how has privatisation affecting the ordinary Zambian? And has the Zambian government put in any measures to safeguard the ordinary citizen as the privatisation programme take its course?

The next chapter looks at the legal and administrative framework put in place to implement privatisation in Zambia.

³⁸ Proceeds from the sale of state owned enterprises bring immediate gains for Government coffers. For example, the privatisation of Paribus in France brought in 4 billion Pounds. See PROFIT MAGAZINE, No. 3/2, July 1994

³⁹ Ibid.

CHAPTER TWO

THE ADMINISTRATIVE AND LEGAL FRAMEWORK OF PRIVATISATION IN ZAMBIA

1.0 INTRODUCTION

Having given the definition and historical background of privatisation in chapter one this chapter proceeds to analyse how the program has so far been implemented in Zambia. It basically outlines and briefly analyses the legal and administrative framework put in place to implement the programme. In this regard we shall look at all the relevant legislation to privatisation like the Zambia Privatisation Act⁴⁰ and such other supporting legislation in the process as the Employment Act,⁴¹ the Investment Act,⁴² the Companies Act⁴³ and the Securities Act.⁴⁴ The law relating to privatisation is very broad and extensive, it is therefore not possible to address all the legislation in this Chapter.⁴⁵

⁴⁰ ACT No. 21, 1992

⁴¹ CAP 512 of the Laws of Zambia

⁴² ACT No.39, 1993

⁴³ ACT No. 26, 1994

⁴⁴ ACT No.38, 1993

⁴⁵ The Privatisation Act is the chief implementing Act for the privatisation, giving inter alia the Government a legal framework in which to implement privatisation. The other Acts are being referred to as supporting Acts in this case because where as the privatisation was specifically put in place to implement the programmes the others Acts were either amended or enacted to help or facilitate the implementation of the Privatisation Act. The Government in 1992 initiated with the assistance of the donor community a review, amendment, repeal and replacement of all existing laws relating to business activity which were outdated and restrictive. Most of these laws were suitable for a command economy rather than a market economy.

For the purposes of this paper, only the Privatisation Act, the Investment Act, Employment Act and the Companies Act will be examined. This is because they are the main Acts giving the process a legal and administrative framework.

2.0 THE PRIVATISATION ACT

To set the privatisation process in motion, the Privatisation Act was enacted into law on the 4th July 1992. The importance of the Act is that, Government is given the legal authority it requires to privatise public enterprises by selling its ownership interest to the private sector.

Precisely the Act was enacted to:

'Provide for the privatisation and commercialisation of state owned enterprises; to provide for the establishment of the Zambian Privatisation Agency and to define the functions of the Agency; to provide for the sale of shares in state owned enterprises and to provide for matters connected with or incidental to the foregoing.'⁴⁶

2.1 THE ZAMBIA PRIVATISATION AGENCY

From its preamble, one of the main aims of the Privatisation Act is the establishment of the Zambia Privatisation Agency (ZPA). The Agency is a statutory body mandated

⁴⁶ ACT No. 21 1992, Preamble

to plan, manage, implement and control the privatisation of state owned enterprises by selling them to those with the expertise and capital to run them on a commercial basis.

Although the ZPA is a Government agency, it maintains that it is both transparent and is as independent or as free from political manipulation as possible.⁴⁷

The members of the ZPA take decisions on privatisation. These members include: -

- a) The Permanent Secretary in the Ministry responsible for Commerce Trade and Industry
- b) The Permanent Secretary in the Ministry responsible for Finance
- c) The Attorney General
- d) A representative of the Zambia Confederation of Chambers of Commerce and Industry
- e) A representative of the Zambia Federation of employers
- f) A representative of the Zambia Congress of Trade Union
- g) A representative of the Law Association of Zambia
- h) A representative of the Zambia Institute of Certified Accounts
- i) The Dean of the School of Business of the Copperbelt University
- j) A representative of the Churches in Zambia

⁴⁷ Quite often the Agency has come under attack that it is a government office put in place to implement the desires of the government but the Agency has defended itself that even though it is a quasi government institution by virtue of it being government funded, it is both independent and transparent or free from political manipulation as possible. It maintains that all its decisions are made by the members of the Zambia Privatisation Agency, who themselves are drawn from different sectors of society with

k) A representative of the Bankers Association of Zambia

l) A representative of the Farmers⁴⁸

The President, having first received nominations from the represented institutions and the approval by a select committee of the National Assembly and ratified by the National Assembly appoints these members.⁴⁹ For example, the Law Association of Zambia nominates to the President the names of whom they want to represent them; these are then subject to scrutiny by a select committee of the National Assembly and ratification by the Assembly. The entire ZPA membership is what is referred to as the ZPA Board.

A recent ZPA Status Report,⁵⁰ review that not all these positions are currently fulfilled. By January 2000, the Law Association of Zambia, Permanent Secretary Ministry of Commerce Trade and Industry, Zambia institute of Certified Accounts and Churches of Zambia were not represented. In fact Mr. Andrew Chipwende, ZPA Acting Technical Director confirmed that most of these positions have never been fulfilled since the Agency was established.⁵¹ He however was quick to observe that the blame for this lies on the various groupings entitled to representation who have up to date never nominated any name to the President.

only three representatives of the twelve designated positions coming from the Government. (Interview with Mr Andrew Chipwende, ZPA Acting Technical Director, 7th July, 1999)

⁴⁸ ACT No. 21 1992, section 5(1)

⁴⁹ Ibid.

⁵⁰ ZPA STATUS REPORT AS AT 31ST JANUARY 2000

⁵¹ Interview with him, Supra (n. 47)

Prima facie, the provision on representation and procedure of appointment are clearly strengths of the Act, as they seek to prevent a situation in which members of ZPA are mere political appointees, which could lead to the Agency making political decisions. This however is no guarantee at the moment looking at the vacancies that are there from civil society and business community representatives.

Furthermore, a critical look at the other provisions of the Act reviews that nearly all-major decisions of ZPA are actually influenced by the Government. For instance, the Agency still has to recommend to cabinet the most appropriate method of sale and it can not proceed in privatisation until it has received Cabinet approval.⁵² The responsibility of signing the final sales agreement to transfer sales to the selected bidder has been left to the Minister responsible for Finance.⁵³ This goes to show that even though members of the Agency are not political appointees in the real sense, they are as good as that in practice because whatever they do must be approved by either Cabinet or the Minister of Finance who are responsible to the Government.

Therefore even though the Privatisation Act seems to give the Agency vast powers, in practice the Agency has very little powers, if any at all. As Matembo Matongo also observes:

⁵² No. 21 1992, section 8(2)(f)

⁵³ From the provisions of section 36 it appears the Minister has no discretion on the signing of the final agreement. Meaning that once the sale agreement has been finalised the Minister is under a mandatory duty to append his signature. Nonetheless, the fact that the Act has not stipulated a time limit within which the signing must be done, it leaves it open to the Minister to deliberately deny the signing for such sales which for one reason or another he does not approve of.

‘...one weakness of the Act is that it gives the Agency very little power at the end of the day, even though prima facie, one may be made to believe that the Act gives the Agency vast powers and this has led to the process of privatisation being impeded or slowed down....’⁵⁴

2.2 PROCEDURE FOR PRIVATISATION

i. SELECTION OF STATE OWNED ENTERPRISES TO PRIVATISE

Under the Privatisation Act, the first step in the privatisation process is the preparation of the Divestiture Sequence. This is a list of which State owned enterprises are to be privatised and the order in which they are to be sold. The Divestiture Sequence plan is prepared in accordance with Section 8-(2) (e) (f) of the Act. The Cabinet upon the recommendation of the Agency approves it. The factors considered in sequencing divestiture are the State owned enterprises’ size in respect of sales volume and number of employees (small, medium or large), their type of business (trading, agricultural, manufacturing, mining etc), whether wholly or partially owned (i.e. presence of minority shareholders), the perceived ease or difficulty of divestiture (presence of or lack of complicating factors); and anticipated mode of privatisation.⁵⁵

ii. GOLDEN SHARE

⁵⁴ MATEMBO MATONGO, ‘The prospects of the Zambia privatisation process: A legal view,’ Supra (n.33) p. 15

⁵⁵ ZAMBIA PRIVATISATION AGENCY MEMORANDUM OF OPERATIONS, June, 1998

The Privatisation Act provides that the Minister for Finance on the advice of the National Assembly may retain a share in a state owned enterprise and convert such share into a golden share. This is, 'a share with special rights to enable the government in the national interest to intervene in the operations of a company, which intervention is by specific actions undertaken by the company.'⁵⁶

The golden share may consist of one share, which, nevertheless, has some special rights attaching to it. For instance if a decision is reached to fire all employees in a newly privatised enterprise, the Government as a golden shareholder in that enterprise can change or nullify the decision. Where the golden share is provided for, the articles of association should clearly state the rights and privileges of the government as special shareholders.⁵⁷

The golden share provision is very important because it allows for the Government to protect national interest after the privatisation of certain strategic enterprises. For instance, in Zambia, there are certain companies which are crucial to the Zambian economy like ZCCM which can not be left totally in the hands of private investors, least the government would be held at ransom with a sudden decision by a private investor to close up the mines risking the entire national economy.⁵⁸

⁵⁶ ACT, No. 21 1992, section 2

⁵⁷ CENTRE FOR PRIVATISATION, Helping countries privatise, problems met, Lessons Learnt, occasional paper, October, 1990

⁵⁸ In explaining this Mr. Alex Chikwesa, ZPA/ZCCM Advisor insisted that it was important for the Government to have such a share in ZCCM after privatisation because it is one of the key players in the Zambian economy, least should the Government find itself in a position like that of the Nigeria where the government has to do anything the oil companies demand because of threats to halt the running of the companies (Interview with him, Feb. 2000)

2.3 MODE OF PRIVATISATION

The selection of the mode of privatisation is in pursuance of Section 8-(2) (f) of the Act, which provides that the Agency shall recommend to the Cabinet the most appropriate method of sale of each State, owned enterprise to be privatised.

There are several options from which the Agency can choose the mode of sale of state owned enterprises. These modes of privatisation specified in the Act are: public offering of shares, private sale of shares through negotiated or competition bid, offer of additional shares in state owned enterprises to reduce Government share holding, sale of asset and business of the state owned enterprise, re-organisation of the state owned enterprise before the sale of the whole or any part of it, management or employee buyouts, lease and management contracts and any other method the Agency may consider appropriate.⁵⁹ So far, the most common way in which most State owned enterprises are sold is through the private sale of shares through negotiated or competitive bids.⁶⁰ This means that private sector companies or even individuals can make bids based on how much they believe a business is worth.

i. PRIVATE SALE OF SHARES THROUGH NEGOTIATED OR COMPETITIVE BIDS

⁵⁹ No. 21 1992, section 22(1)

⁶⁰ ZAP MEMORANDUM OF OPERATIONS, June, 1998 pg. 15

Pursuant to Section 8 (2) (h) of the Act, potential investors may be required to submit an application to ZPA to pre-qualify as bidders for each SOE they might wish to consider acquiring. They are provided with a statement of the prequalification procedures and criteria, an application and questionnaire appropriate to their legal status, a summary company profile on the State owned enterprises in which they have expressed interest and a confidentiality agreement.⁶¹

The intent of the application/questionnaire is to make an assessment of the investor's financial resources, management resources, and industrial and business experience, in order to eliminate obviously inappropriate contenders and to make the process reasonably manageable from an administrative perspective. And more broadly the idea is to prevent *Zambian industry* from falling under the control of investors with a dubious background or a poor track record.⁶²

A confidential information memorandum (CIM) on the enterprise is then prepared by one of the ZPA's teams of business analysts as part of a tender package. The package for each State owned enterprise consists of a set of tender instructions, a Confidential Information Memorandum (CIM) and appendices, which are sold for a fee.⁶³ This gives prospective buyers all the information they need in order to assess the worth of an enterprise through what are called due diligence studies. In addition, guidelines are supplied on conducted due diligence investigations, including visits to the sites of the

⁶¹ Ibid.

⁶² Interview with Mr. A Chimpwende, Acting Technical Director, ZPA, July 7th 1999.

⁶³ ZPA MEMORANDUM OF OPERATIONS, Pg. 15

State owned enterprises. Site visits are only allowed if arrangements are made in advance through ZPA.⁶⁴

Upon advertising the sale of any State owned enterprise, each bidder has four to twelve weeks to carry out this assessment and then make a bid. Bids are placed in sealed envelopes and deposited in padlocked metal tender boxes at the ZPA offices. All bids are then opened in public. Once the bids have been opened in public, an evaluation team within ZPA assesses each of them in turn. The evaluation team is made up of two or three ZPA staff and a consultant. In evaluating each bid, consideration is given not only to the price offered, but also to the commitment of potential buyers to develop the enterprise and to their ability to do so as shown by their track record.⁶⁵

The team then meets with the ZPA management before presenting its bid evaluation report and recommendations to the members of the ZPA Board. The members approve a short list of bidders and invites those selected to further negotiations. For each sale, an independent negotiating team whose appointment is approved by the members of the ZPA board assists ZPA management.⁶⁶ This always comprises of an

⁶⁴ Ibid., pg. 16

⁶⁵ Pursuant to the provisions of section 8 (i) of the Act which provides that, 'The function of the Agency shall be... to evaluate offers from potential buyers with regard to i) the price; ii) ability and commitment of buyers to develop the enterprise; and track record of buyers and their expertise in the type of enterprise on offer.'

⁶⁶ Ibid., section 32(1)

independent chairman, a lawyer, at least two technical consultants from ZPA staff and specialist consultants/advisers, as required.⁶⁷

The ZPA Secretariat prepares a paper on negotiation strategies in respect of each State owned enterprise as well as a checklist of items relative to negotiations in general.⁶⁸

These are circulated to each negotiating team member. The purpose of negotiations is to bargain with the selected prospective buyers with the ultimate aim of choosing the best bargain. Overall, the team is responsible for securing the best possible price and for ensuring that an agreement is reached on all issues of concern to the Government of Zambia. These include making sure that the new owners honour existing conditions of work and pledge to make investments in the business in accordance with Section 8 (i) of the Act.

The negotiating team carries out negotiations with the selected bidders and it is entirely up to them to choose the best bidder who it eventually draws up an agreement with. Once each individual agreement has been finalised by the negotiating team, it does not come back to the members of the ZPA Board for approval, although both the ZPA Board and the Attorney General may review the agreement reached. Rather, the Act specifies that the Minister of Finance shall sign the final sales Agreement to transfer shares to the selected bidder.⁶⁹

⁶⁷ ZPA MEMORANDUM OF OPERATIONS, June, 1998, pg.20

⁶⁸ This is pursuant to section 8(h) of the Privatisation Act gives ZPA the responsibility to set prequalification criteria for the selection of potential buyers or investors of a state owned enterprise to be sold.

⁶⁹ ACT No. 21 1991, sect. 36 (1)

The Act does not limit the period in which the Minister should sign the bid nor state exactly how the actual purchase is done. However, it provides that the transfer of shares shall be in accordance with the provisions of the Companies Act.⁷⁰

ii. PUBLIC OFFERING OF SHARES

The other mode often used has been the public offering of shares. Pursuant to the provisions of section 24, shares in a State owned enterprise can be sold to both citizens and foreigners.

With the establishment of the Lusaka Stock Exchange, efforts have been made to sell some of the Government held shares on the stock exchange for companies. Under section 29 (1) of the Privatisation Act, the Minister of Finance is given the responsibility to establish a Privatisation Trust Fund in which the Government holds shares in trust for citizens of Zambia for divestiture after a State owned enterprise has been privatised. According to section 29 (2) shares may be offered at a discount to persons who purchase a small number of shares; a share bonus shall be given at the end of a prescribed period to small shareholders who hold onto shares; individuals, management and employees of the state owned enterprises may pay for shares in instalments; or individuals may participate in the acquisition of shares which have

⁷⁰ Ibid., sect. 36 (2)

been transferred in a State owned enterprise to a Privatisation Trust Fund which shall be established under the Act.

There are three categories of state owned enterprises in which public offers of shares are made, namely:

- (1) Companies where negotiations are held with the minority shareholders who have pre-emptive rights to sell a portion of shares to them so that they hold a majority share.⁷¹ These agree with the Zambia Privatisation Agency to float up to thirty percent of the company's shares. This approach has been taken in the following companies which have already had minority stakes of between 6 and 30 per cent floated on the Lusaka Stock Exchange; Chilanga Cement plc, Zambian Breweries plc and Rothmans of Pall Mall (Zambia) plc.⁷²
- (2) Wholly owned State owned enterprises which are offered on public competitive tender to investors with a view to offer them a portion of shares so that they hold a majority share. A minimum of thirty percent of the total shares of the company has been reserved for public offer at a later date. As of June 1998 the companies falling under this category included, Northern Breweries Limited, ROP Limited, ZAMOX, Maamba Collieries and Pamodzi hotel.⁷³

⁷¹ Certain companies have legal agreement in place to the effect that in the event of the majority shareholder deciding to sell his shares, he/she must first offer them to the minority shareholders and it is only after these refuse to buy that the shares must be offered to the public. The question of pre-empted rights has its history in nationalisation, when the Government through ZIMCO entered into legal agreements with private, usually foreign firms that required that, in the even of the Government reselling its shares, it must offer its shares to the existing shareholders to buy these shares that were once their but where taken over by the Government during nationalisation. (Interview with Mr. Chikwesa, ZPA/ZCCM Special Advisor, Feb. 2000)

⁷² ZPA MEMORANDUM OF OPERATIONS, June, 1998, Pg. 24

⁷³ Ibid., pg. 25

- (3) Wholly owned state owned enterprises yet to be privatised that could also be offered to the Zambian public on the Stock Exchange are likely to be Zambia Telecommunications Ltd, Zambia Electricity Supply Corporation (ZESCO) and Zambia National Commercial Bank (ZANACO)⁷⁴

The timing of when to offer the shares to the public is determined by the Zambia Privatisation Trust Fund which holds shares in trust for the Zambian public even though difficulties have arisen were negotiated bids have taken place with minority share holders with pre-emptive rights. The difficulties that have arisen have come in the form of delays by minority shareholders in making up their minds, whether to buy or sell their interest. This has led to the slowing down of the privatisation process.⁷⁵

The Trust Fund together with the Lusaka Stock Exchange determine the criteria used to sell the minority shares, although in general terms, this is said to be based on what is conceived to be a fair market value.⁷⁶

2.4 TRANSPARENCY OF THE PRIVATISATION PROCESS

In an effort to ensure that there is transparency in the privatisation process and that those in privileged positions do not benefit unfairly from the sales, the Act has the following provisions:

⁷⁴ Ibid.

⁷⁵ MATEMBO MATONGO, the prospects of the Zambian Privatisation Process: A legal view,' Supra (n.33) p.21

Under Section 25, no member of the Agency, or consultant to the Agency and their immediate families and professional partners is allowed to purchase any shares of a State owned enterprise, unless through public offer of shares on the Stock exchange.

Political leaders and public officers are also required to publicly disclose their intention to bid for shares in a state owned enterprise.⁷⁷

It further provides that any potential investors must disclose his bid in a State owned enterprise, or his direct or indirect interest whether this is in the form of a share holding or held through a nominee.⁷⁸

The Act contain provisions to ensure that the general public is informed on the progress of privatisation. Under the Act, the ZPA must publish certain information by notice in the Gazette. This information should be reproduced every six months, at the end of June and at the end of December, in a progress report which the ZPA must also

⁷⁶ZPA MEMORANDUM OF OPERATIONS, June, 1998, Pg. 25

⁷⁷ The weaknesses of the Act on this provision were the failure to provide a definition of a politician. This however has been rectified by Privatisation (Political and public officer bidding) Regulation Statutory Instrument, No. 64 of 1994 which has defined a 'political leader,' to mean any of the following: a) The President, the Vice President, the Speaker, Leader of the official opposition political party in Parliament, Deputy speaker, Deputy Minister and Member of Parliament; b) Members of the Executive of all registered political parties. It also defines a public officer to mean a State house chief of staff, Secretary to the Cabinet, Special Assistant to the President, Deputy Secretary to the Cabinet and Permanent Secretaries.

⁷⁸ ACT No. 21 1992, section 27

submit to the Minister of Finance.⁷⁹ This report is presented to the National Assembly and then published for sale to the public. Published information must include:

- the names of state owned enterprises to be privatised
- the name of registered consultants, valuers, lawyers, public accountants and merchant Banks dealing with the privatisation process
- the names of bidders and how much they are bidding
- the successful bidders and the reason they have been selected
- the price of shares and any other special conditions of sale of shares
- any other matters thought to be appropriate.⁸⁰

The Act also makes it mandatory for the accounts of the Agency to be audited by independent auditors annually.⁸¹

3.0 THE INVESTMENT ACT

As observed in the first chapter, the role of the investor is crucial to any privatisation programme. It is the investor who is going to buy the state owned enterprises during privatisation. And it is the investor who puts in the money to invest in the former state-run enterprises, which have been starved of cash.

⁷⁹ Ibid., section 44

⁸⁰ Ibid., section 38

⁸¹ Ibid., section 42

The Investment Act defines investment as: -

'A contribution of capital, in cash or in kind, by an investor to a new business enterprise, or the expansion or rehabilitation of an existing business enterprise or to the purchase of an existing business enterprise from the state.'⁸²

It is clear from the definition that the purchase of a business enterprise from the state, as is the case in privatisation, is an investment and therefore there is, need to have a sound legal framework relating to investment to encourage potential investors to invest in the state owned enterprises.

The Investment Act of 1993 replaced the Investment Act of 1991. The Act exemplifies Zambia's determination to promote and facilitate private sector development.

Section 30 of the Privatisation Act provides that foreign investors shall be entitled to incentives under the Investment Act. They shall however only do that if they acquire shares in state owned enterprise where: -

- a) Expertise is needed to upgrade efficiency of that state owned enterprise
- b) Participation is necessary to promote the export market
- c) The nature of business requires global linkages and international expertise or
- d) Capital investment or foreign technology is required to expand the capacity of

the business operations.⁸³

The incentives that are outlined in the Investment Act have been classified into general and special incentives.⁸⁴ Most of the incentives come in the form of tax rebates, which include, exemptions from customs duties and sales tax on certain machinery and products.

The Act also provides for investment guarantees, it provides that:

‘No property of any description shall be compulsorily acquired and no interest in or right over property of any description of an investor shall be compulsory acquired except for public purposes under an Act of Parliament relating to the compulsory acquisition of property which provides for payment of compensation in respect thereof.’⁸⁵

And then goes further to say that:-

‘Any compensation payable under, this section shall be made promptly at the market value and shall be fully transferable at the applicable exchange rate in the currency in which the investment was originally made, without deductions for taxes and other duties except where those are done.’⁸⁶

⁸² ACT No. 39 1993, section 2

⁸³ It appears from all the conditions outlined that the Government desires to ensure real investment in Zambia. The kind of investment that will not only enhance technology, pave way for Zambian products to be exported but also establishes links in the international market.

⁸⁴ ACT No. 39, 1993, Part IV & V

⁸⁵ Ibid., section 35 (1)

⁸⁶ Ibid., section 35(2)

4.0 THE EMPLOYMENT ACT

One question that arises in the privatisation process is, what happens to the employees of a state owned enterprise after it has been privatised?

A transfer of shares, even if all company shares change hands does not constitute a change of employer. For the employer is not the shareholder but the company, shareholders may change but the company continues. Its constitution, its business operation and its conditions of service are all not directly affected by a change in share holding.⁸⁷

On the other hand, when a company is sold to another company there is a change of employers. The contracts of service for the employees of the state owned enterprises that have been sold are negotiated with the buyers who are the new employers. As the ZPA memorandum of operations strives to explain:

The role of ZPA in relation to employment is to facilitate a smooth transfer of employees from the parastatal companies to the privatised companies. The change from a parastatal to a private company does not necessarily result in redundancies and neither do the terms of employment and conditions of service necessarily change. The existing contracts of employment remain valid until they are renegotiated or a better package is effected.⁸⁸

⁸⁷ Interview with Mr. Felix Chanda, ZPA

⁸⁸ ZPA MEMORANDUM OF OPERATIONS, June, 1998, pg. 23

By law an employee has the freedom to exercise his rights to offer his services to or to withdraw his services from one employer as he may wish. At common law the relationship of employer and employee is a contract in which parties enter into on terms laid down by themselves within the limitations laid down by the law of contract. This was illustrated in the famous case of NOKES V DOCASTER AMALGAMATED COLLIERIES.⁸⁹ In this case, a company on which an order was made under the Companies Act, transferring it, its liabilities and assets to the respondent company employed the appellant, a minor. The appellant was unaware of this order. He worked for sometime and then absented himself and he was charged and found guilty by the lower court of an offence under the Employers and Workers Act for breach of contract of employment. It was held that apart from overriding questions of public welfare, it could not be assumed that power could be given to a court or to anyone else to transfer a man without his knowledge and possibly against his will from the services of one person to another.

The provision of the Employment Act regarding the relationship between employer and employee where there is a transfer of employment provides that:

'No rights arising under any written contract of employment shall be transferred from one employer to another unless the employee bound by such contract consents to the transfer.'⁹⁰

⁸⁹ (1940) Appeal Cases, pg. 1014

⁹⁰ CAP 512, section 35

The provisions of the Act notwithstanding however, at a tripartite consultative labour meeting, the ZPA proposed the view that, in view of the need to maintain social, political and economic stability and to ensure that national interests prevails in the privatisation process, employees of state owned enterprises being privatised should be exempted from the provisions of Section 35(1) (A) of the Employment Act. Contracts of employment should be made transferable to another employer without the consent of the employee so that the employees are transferred without their consent and if they *do not want to be transferred then they should not be paid redundancy benefits as most companies find it hard to fund the resulting terminal benefits.* They will therefore have a choice, either to accept transfer to the purchaser of the company together with their contract entitlements or to resign without terminal benefits.⁹¹

Matters relating to Employment will be dealt with again when analysing the actual rights that have been affected by privatisation in Zambia.

5.0 THE COMPANIES ACT

For Government's liberalisation policy to have its full effect in the private sector, a thorough revision of the Companies Act of 1921 was needed to bring it in line with

⁹¹ This decision good as it may seen in preserving the national interest, it is still contrary to the law and it deprives the worker not only the right of consent which vital in any contractual relationship but also puts the worker who decides to resign in an awkward position as he is likely not to receive the same kind of benefits as he would have if his employment was to be terminated by virtue of change of employer. For the decision that was made, see TRIPARTITE CONSULTATIVE LABOUR COUNCIL MEETING BRIEF REPORT, 4th February, 1994

modern company law practices and to harmonise it with other laws in a market economy.

The first change that has been made by the new Companies Act (1994) concerns the incorporation of companies. The simplified the procedures for incorporation of companies, as such removed the red tape or bureaucracy that was under the old Act.⁹²

Perhaps the most significant change of the Companies Act concerns the regulation of directors of a company. The new Act has made statutory provisions with regard to duties of Directors of the company which are intended to safeguard against abuse of office as well as for the protection of persons dealing with the company, for instance the act now provides for the removal of a director as a statutory right in addition to providing the circumstances under which the office of director may be vacated. The old Companies Act left such matters to the Articles of Association and this left a lot of loopholes for abuse of office while companies were rendered impotent to act because in many cases the Articles did not cover such situations.⁹³

Previously, directors as managers of the affairs of the company had wide or broad powers that left doors open for abuse of their powers. The new Companies Act has redressed this danger and has provided for limitation on the powers of directors.⁹⁴ For example under the Act, if a director has an interest in a contract he enters into with the

⁹² ACT. No 26, 1994, section 6

⁹³ CHARITY MWANSA, 'Powers and duties of Directors and Managers,' Companies Act seminar paper, Pamodzi Hotel, Lusaka

company, he is required to make full disclosure to the meeting of directors and failure to do so makes him liable to a fine.⁹⁵

Further the new Companies Act provides that all companies must keep proper accounting records and must make up accounts for each financial year, showing the financial position of the company, the directors must also draw up a report on the activities of the company and the accounts and reports must be provided to each shareholder or member before the annual general meeting.⁹⁶

The new Act also makes provision for the public issue of shares and matters thereto.⁹⁷ This is one of the modes of privatisation provided under the Privatisation Act. It also provides that company shares that are listed on the Stock Exchange in Zambia shall be exempted from the provisions of the property transfer tax act of 1984.⁹⁸

From the above noted provisions, it is clearly seen that the new Companies Act goes a long way in insuring that there is accountability to the shareholders on the part of directors. This indeed should provide an incentive to the people to take part in the privatisation process as they are assured of being kept informed of the activities of the company and if things are going wrong, they are able to hold the accountable.

⁹⁴ Act No. 26 1994, section 216

⁹⁵ Ibid., section 218

⁹⁶ Ibid., part VIII

⁹⁷ Ibid., part VI

⁹⁸ Ibid., section 85

CHAPTER THREE

THE CHAIN OF RESPONSIBILITIES

1.0 INTRODUCTION

Although the general justification given for privatisation has always been that it brings about economic benefits to the country, there is recognition from world experiences that privatisation like any other economic reforms has a tendency of undermining the enjoyment of human rights. The rights mostly affected being the economic and social rights. Economists however, have argued that such effects are indeed inevitable but short lived and that within no time of privatisation, the gains of the process override the negative effects.

This chapter indeed argues that human rights standards apply at all times during the privatisation process. As Patricia Feeney observes:

'The understandable attention that donors, the media and international NGOs have devoted to violations of civil and political rights in Zambia has obscured the extent to which fundamental economic and social rights have been undermined during the country's painful transformation to a market based economy... there has been a manifest failure to meet international obligations to protect and promote key rights, or at least a diminution of

people's enjoyment of the minimum core content of some of the rights contained in national and international human rights instruments.⁹⁹

The chapter further maintains that nearly all the actors involved in privatisation have the obligation to uphold these rights and there is no justification whatsoever to depart from the obligation at any given time and for whatever reason. That even where the observance or upholding of such rights is impossible, adequate measures must be put in place to protect the vulnerable groups. While still recognising the fact that human rights are indivisible, interdependent and interlinked, the chapter argues that privatisation has had a greater impact on social-economic rights than it has had on civil and political rights.

In short this chapter looks at the human rights obligations of the Government of Zambia, the World Bank, the International Monetary Fund and the private investor as the major actors.

2.0 HUMAN RIGHTS - DEFINITION

The term 'human rights refer to those rights that have been recognised by the global community and protected by national and international legal instruments. They reflect the moral conscience of the world and the highest common aspiration that everyone

⁹⁹ PATRICIA FENEENEY, The Human Rights Implications of Zambia's Privatisation Programme,' Supra (n.12)

should live free from want and fear and have the opportunity to develop in dignity.¹⁰⁰

This basically entails a proclamation by the world that every human being has:

- the right to life and liberty
- the right to security of person (physical integrity)
- the right to participate in the political process
- the freedom of religion, opinion, speech and expression
- the right to a standard of living adequate for health and well being of the individual and his or her family
- the right to work and to be entitled to just and favourable conditions of work
- the right to the highest attainable standard of physical and mental health
- the right to food and housing
- the right to education and access to information

The above mentioned rights and all other rights complementing them are all inherent in the human person. This means that every woman, man and child is entitled to enjoy them simply by virtue of being human. What this further entails is that regardless of colour, sex, religion or nationality, every person is entitled to these rights.¹⁰¹ Such being the case it is very important for one to understand that human rights are not granted but must be respected, protected and promoted.

¹⁰⁰ JULIA HAUSERMANN, A human rights approach to development,' supra (n.16) P. 55

¹⁰¹ Ibid., pg. 28

As already said earlier on while it is clear that human rights are interlinked, meaning that denial of one right invariably impedes enjoyment of others, economic reforms such as the privatisation process more impact on the social-economic rights than on the civil and political rights. It is thus very important that we understand what these rights exactly mean.

2.1 THE SOCIAL-ECONOMIC RIGHTS- DEFINITION

Economic, Social and Cultural Rights have been defined as a bunch of individual and collective rights intended to ensure a good, a wholesome and fulfilling life, not only for individuals but also for communities.¹⁰² The economic, social and cultural rights are grouped in seven major categories, and these are: right to self determination; freedom from discrimination; right to work; right to social security; right to health; right to education; and right to a culture.¹⁰³

3.0 THE ZAMBIAN GOVERNMENT

3.1 UNDER THE ZAMBIAN CONSTITUTION

The Zambian government is obliged to respect the human rights of all people within its

¹⁰² G. MUDENDA, Economic, social and cultural rights, Southern Africa Human rights review, AFRONET, Lusaka, Zambia 1998, Pg.4

¹⁰³ Ibid.

jurisdiction, to protect individuals from abuse by the third parties, to promote respect for human rights in its laws, policies and actions and to take the necessary measures to ensure realisation of human rights in practice.

The entire part III of the Zambian Constitution is a Bill of Rights guaranteeing the respect and promotion of civil and political rights, including inter alia, the right to life,¹⁰⁴ right to liberty,¹⁰⁵ right to freedom from slavery or servitude,¹⁰⁶ right to freedom from torture or cruel, inhuman or degrading treatment or punishment,¹⁰⁷ freedom from discrimination,¹⁰⁸ right to protection of the law,¹⁰⁹ right to expression, association, assembly and movement¹¹⁰ and the right to vote.

The Constitution has proceeded further to provide for the enforceability of these rights in Article 28 by providing that:

'...if any person alleges that any provisions of Article 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then.... that person may apply for redress to the High Court which shall; a) hear and determine any such application; b)determine any question arising in the case of any person..'

¹⁰⁴ CAP 1 of the Laws of Zambia, article 12

¹⁰⁵ Ibid., article 13

¹⁰⁶ Ibid., article 14

¹⁰⁷ Ibid., article 15

¹⁰⁸ Ibid., article 23, Providing that no person shall be treated in a discriminatory manner by virtue of race, tribe, sex, place of origin, marital status, political opinion, colour or creed.

¹⁰⁹ Ibid., article 18

¹¹⁰ Ibid., articles 20, 21 & 22

Based on the above constitutional provision, a number of claims have been made in the High Court regarding the violation of various civil and political rights. However, the Zambian Bill of Rights does not provide for any economic, social and cultural rights. Instead these rights have only been adopted by the constitution as directive principles of state policy. To this effect the Constitution provides in Article 112 that:

'Endeavour to create conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment....provide clean and safe water, adequate medical and health facilities and decent shelter for all persons....provide equal and adequate educational opportunities in all fields at all levels...strive to provide a clean and healthy environment for all...recognise the right of every person to fair labour practice and safe and healthy working conditions.'

Directive principles of state policy are mere guidelines to government legislation. They are not justiciable.¹¹¹

The question left to answer is what does this mean to the Zambian Government? Does this then mean that the government is not under any obligation to respect and promote economic-social rights? Certainly not, Zambia is a signatory to a number of international human rights instrument which creates obligation for its parties.

¹¹¹ This simply means that a violation of any of the social-economic rights mentioned is not repressible in a court of law. Unlike in the other category (the civil and political rights) where anyone can for instance take the state or an individual for interfering with her/his movement, no one can take the state to court for none provision of employment, housing or food. See, A. CHANDA, Protection of Human Rights in Southern Africa: an overview,' Southern African Human Rights Review, Issue 3, July 1999, P.g 4

3.2 UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The Zambia Government is a signatory to numerous international human rights instruments which among others include, Universal Declaration on Human Rights, International Covenant on Civil and Political Rights-ICCPR (1966), International Covenant on Economic, Social and Cultural rights- ICESCR(1966), the Convention on the Rights of the Child (1989), the African Charter on Human and People's Rights and so on - to the effect that it has to promote and protect the human rights covered under the instruments. Nearly all these instruments have provisions for the respect and promotions of economic-social rights. But with the regards to these rights, the Covenant on Economic, Social and Cultural Rights is the principle instruments and such Zambia's obligation will be weighed on the provisions of it.

The International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200 A (XX) of 16th December 1966. According to Article 27, the Covenant's entry into force was on 3rd January 1973. It is premised on the notion that 'the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights,' and urges member states to take certain practical steps to ensure that these rights provided under it are made available and accessible to their citizens. This includes the adoption of legislative measures. In particular Article 2 of the Covenant says:

'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

Therefore, as a signatory to this Covenant the *Zambian Government* is obliged to take steps to the maximum of its resources, with the view to achieving progressively the full realisation of the following rights:

3.3 THE RIGHT TO SELF-DETERMINATION

This right confers upon individuals and communities the right to freely determine their political status and to freely pursue their economic, social and cultural development. 'All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'¹¹²

As regard the issue of privatisation in *Zambia*, it is seen that the government had the obligation to ascertain whether it was the wish of the people to resort to it. This

¹¹² THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR), article 1

question however will be answered when looking at the particular rights that have been affected during privatisation in the next chapter.

3.4 THE RIGHT TO EDUCATION

Cardinal to the understanding and analysing of issues lies education. Article 13 of the International Covenant on Economic, Social and Political Rights obliges the Zambian Government to provide free and compulsory primary education, make available, accessible and progressively free secondary and technical education, provide on the basis of capacity higher education and encourage adult education to those who missed out.¹¹³

3.5 THE RIGHT TO HEALTH

This right basically speaks of the right of access to the highest attainable standards of physical and mental health. Under the International Covenant on Economic, Social and Cultural Rights this includes also the right to medical and special care and assistance in childhood and motherhood. Specifically Article 12 of the Covenant provides that:

¹¹³ Similar provisions can be found under Article 25 of the Universal Declaration of Human Rights, Article 17 of the African Charter on Human and People's rights and under Article 28 of the Convention on the Rights of the Child,

'The states parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the State Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for: a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the health development of the child; b) the improvement of all aspects of environmental and industrial hygiene; c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

The question that arises here is whether the Zambian Government has continued to honour its obligation provide the right to health as it implements the privatisation programme. Generally what effects has the privatisation process had on this fundamental right?

3.6 THE RIGHT TO WORK

The right to work with its accompanying rights to favourable conditions of work, which includes fair wages, equal remuneration for equal work, safe and healthy working conditions, equal opportunity for promotion, the right to rest, leisure, appropriate working hours and periodic holidays with pay and the right to form trade unions, to go on strike and for trade unions to form federations or combinations and function freely without police or legal restrictions, is clearly recognised under the International Covenant on Economic, Social and Cultural rights.¹¹⁴ Accordingly as a State Party to this Covenant, the Zambia Government is implored to ensure the

provision of technical and vocational guidance and training programmes, policies and techniques in order to achieve steady economic, social and cultural development and full and productive employment.¹¹⁵

The Zambian Government is obliged to ensure availability of employment. As regards to this obligation, the question to be answered is whether the Government has indeed honoured this obligation as it takes part in the privatisation programme. This will however be answered in the next chapter.

3.7 THE RIGHT TO SOCIAL SECURITY

The right to social security induces the right to social insurance. In this cluster of rights we find those rights which protect the family freely entered, those that promote maternal care, and those that protect children both as members of the family and as members of the community. Also included are the rights pertaining to an adequate standard of living, including access to adequate food, clothing and housing and continuous improvement of living conditions. Freedom from hunger is also emphasised as an important aspect of the right to social security.¹¹⁶ As such the International Covenant on Economic, Social and Cultural Rights urges member states

¹¹⁴ ICESCR, articles 6, 7 & 8.

¹¹⁵ Ibid., article 6 (2)

¹¹⁶ Ibid., articles 9, 10 & 11

(the Zambian Government inclusive) to adopt programmes to improve methods of production, conservation and distribution of food.

Has the privatisation programme helped the Zambian Government realise the realisation of the above-mentioned right in any way? Or can it be said that the coming into play of privatisation has led to the Government abandon efforts to realise this right? All these questions will be answered in the next chapter as we analyse the implications of the sale of Zambia Consolidated Copper Mine-Luanshya division.

4.0 THE WORLD BANK

The World Bank is a specialised agency of the United Nations devoted to economic and social development in its member countries. The Bank's Articles of Agreement set out its broad scope of activity in economic and social issues stating that its prime purpose is to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.¹¹⁷

The Articles also establish guidelines that limit the range of the Bank's activities. In particular, the Articles state that, in all its decisions, 'only economic considerations shall be relevant,' specifically stating that:

¹¹⁷ IBDR Articles of Agreement, article 1 (1)

‘The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.’¹¹⁸

Clearly a strict interpretation of the above provision would be that the Bank is prevented from confronting any political issue and in a way this includes human rights. Indeed much as it may be argued that economic-social rights fall within the scope of economic issues, many aspects of human rights may be said to fall outside the Bank’s mandate. One of such aspect being that human rights do not exist in a vacuum, they in so many ways take a political will of the people for them to be recognised.

Notwithstanding the provisions of the Bank’s Articles of Association, the World Bank has on several occasions stood to state their commitment to human rights. In the fact sheets on Development, Human Rights and Judicial Reform, it was stated that although the Articles of Agreement of the World bank stipulate that ‘only economic considerations shall be relevant,’ to its investment decisions, promotion of social and economic rights has been an intrinsic part of the Bank’s Mandate. That in many ways the promotion of economic growth, social welfare, good governance, equity of opportunity, participation, community involvement, and protection of the most

¹¹⁸ Ibid., article IV, section 10

vulnerable members of society have constituted the bulwark of the World Bank's undertakings.¹¹⁹

However this was not the first time. The World Bank made its first major pronouncement about its approach to human rights in the run-up to the Vienna World Conference on Human rights in 1993. It was stated that:

'The fundamental objective of the World Bank is the reduction of poverty in the developing world through sustainable growth...Through its lending operations, its technical assistance and its advice to its developing member governments, the bank continues to contribute to raising the standards of living and improving the levels of literacy, primary health care and nutrition in many of the world's poorer countries. In doing so, the Bank helps these countries transform the economic and social rights proclaimed in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights from ideals to rights that can actually be enjoyed by every man, woman and child. Indeed the economic and social rights set out in universal and regional instruments on human rights are closely linked to the reduction of poverty.'¹²⁰

With the above declaration, it is noted indeed that even though the World Bank is prohibited from interfering in the political affairs of its members, it nonetheless acknowledges that it assists in the promotion and protection of economic and social rights through its economic work. As such it may be seen that the Bank has imposed on itself a moral obligation to observe human rights generally and indeed with a

¹¹⁹ World Bank, 'Development, Human Rights and Judicial Reforms,' Fact sheets, December 1999

correct interpretation of its duty to promote development in its Articles of Agreement, it has as it claims, the obligation to respect and promote human rights more especially economic and social rights. This position is clearly stated in the Bank's message commemorating the 50th anniversary of the Universal Declaration of Human Rights, that:

'The World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development; By placing the dignity of every human being especially the poorest- at the very foundation of its approach to development, the Bank helps people in every part of the world to build lives of purpose and hope. And while the Bank has always taken measures to ensure that human rights are fully respected in connection with the projects it supports, it has been less forthcoming about articulating its role in promoting human rights within the countries in which it operates. This fiftieth anniversary of the Universal Declaration of Human Rights gives us the opportunity to assess our role and to identify areas where we can do even more to reflect the principles enshrined in the Declaration into all of our work.'¹²¹

As can be seen from the above statement, the World Bank does have an obligation to respect and promote human rights, especially economic and social rights even as it takes part in the privatisation process in Zambia.

¹²⁰ PATRICIA FEENEY, 'The Human Rights Implication of Zambia's Privatisation Programme,' *Supra* (n.12) p. 9

¹²¹ Statement made on behalf of the World Bank group which includes the International Bank for Reconstruction and Development; the International Development Association (IDA); the International

5.0 THE INTERNATIONAL MONETARY FUND (IMF)

The traditional role of the International Monetary Fund (IMF), is in crisis management.

Specifically its Articles of Agreement state that its purposes are inter alia:

- To promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.
- To facilitate the expansion and balance growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy
- To give confidence to members to making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payment without resorting to measures destructive of national or international prosperity.¹²²

Unlike the World Bank, the purposes of the IMF clearly indicate some obligation to human rights. As is seen from the provisions cited above, the IMF is mandated to promote and maintain high levels of employment and real income and development of the member countries.

Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for Settlement of Investment Disputes (ICSID), Washington D.C, 10th December, 1998

¹²² IMF Articles of Agreement, Article I (i), (ii) & (v)

However, in reality the IMF has come under attack several times and accused of designing a number of economy policies such as the Structural Adjustment Programme (SAP), ESAF, HIPC and other programs that are not consistent with the achievement of poverty reduction and consequently the welfare of the people. As Patricia Feeney notes in reference to a report from Oxfam, 'IMF programs have been associated with worsening investment performance and poor growth in developing countries.'¹²³

Indeed in acknowledgement of that the IMF together with the World Bank in September, 1999 launched new initiative- the Poverty Reduction and Growth Facility (PRGF) whose aim is to link debt relief to poverty reduction. It calls for among other things, the formulation and implementation of programs that satisfy the three criteria of broad-based country ownership, transparency and accountability and the adoption of a Poverty Reduction Strategy Paper (PRSP), a key element in the enhanced initiative for debt reduction.¹²⁴ The program targets for the country are related to the international community's long international development goals, which are:

- Reduction in extreme poverty:
- Universal primary education

¹²³ PATRICIA FEENEY, 'The Human Rights Implications of Zambia's Privatisation Programme, supra (n.12) 8

¹²⁴ KENNETH MYERS, 'The International Monetary Fund and the Poverty Reduction Growth Facility,' paper presented to the Economic Association of Zambia (EAZ) monthly meeting, Pamodzi Hotel, December 1999

- Gender equality
- Reduction in infant and child mortality
- Reduction in Maternal mortality
- Reproductive health and
- Environmental conservation¹²⁵

In essence the recent approach taken by the IMF indicate the Fund's desire to uphold their obligation as provided in its Articles of Agreement to advance the welfare of the people, thereby upholding human rights.

Like the World Bank, the IMF has an obligation to respect and promote human rights emanating from its obligations to promote development and invariably real development which in this case entails a recognition of economic and social rights.

6.0 PRIVATE INVESTOR

It is often said that when investing money in foreign countries, most private investors only has one thing in mind, to make more and take back.¹²⁶ Indeed true as it may be that at the back of most investors is the thought of making a profit out of their investment, investors are under obligation to the terms of their investment as well as the law of the land in which they are investing. In terms of human rights, the Private investor in Zambia has the following obligations:

It was noted from the discussion on the procedure of privatisation that evaluating the bid received from potential buyers of a state owned enterprise consideration is not only had to the price offered but also to the commitment of potential buyers to develop the enterprise and their ability to do so as shown by their track record.¹²⁷ A business plan is often drawn by the investor and this forms part of the transaction agreement. It is common among investors in Zambia that their business plans include mostly their commitment to support local business development, provision of employment, recognition of workers union and an amount of money to be paid in consideration for the assets being bought or the enterprise being purchased.¹²⁸ The law of contract demand for a commitment to its terms and as such any commitment made in respect of human rights is one that certainly places a contractual obligation to those rights on the part of the private investor.

Secondly, every investor is under obligation to respect the law of the land. There are quite a number of laws in Zambia that protects the rights of the people involved in the private investors' dealings, an obvious example of persons who find themselves in such positions is an employee.

¹²⁵ Ibid.

¹²⁶ Mr Mumba Kapumpa, Company Law seminar: The Zambia Stock Exchange, UNZA, 6th April, 2000

¹²⁷ 'The function of the Agency shall be ...to evaluate offers from potential buyers with regard to i) the price; ii) ability and commitment of buyers to develop the enterprise; and track record of buyers and their expertise in the type of enterprise on offer,' – Privatisation Act, section 8 (i)

¹²⁸ Binani industries business plan for the purchase of RAMCOZ, had all these. See Government Gazette, 25th September, 1998

In an effort to combat child labour, the Employment Act places an obligation on private investors not to engage anyone below the age of 15.¹²⁹ It also demands that any employment agreement made for a period of or exceeding 6 months must be stipulated in writing with defined terms.¹³⁰ Such terms defining the particulars of the engaging parties, description of work to be done, working hours, the duration of the contract and such other conditions as the wages to be paid. Regardless of the terms agreed between the investor and any individual statute law in Zambia places upon them certain minimum labour standards by which employment terms must be based. The Statute in question is the Minimum Wages and Conditions of Employment Act.¹³¹ Under this piece of legislation the Minister of labour is empowered to make regulations and order with respect to minimum conditions of employment for any group of workers who are not adequately covered by any effective mechanism of regulating wages and other terms and conditions of employment. Broadly stated, this Act can be said to apply in those areas outside the scope of collective bargaining or where trade unions do not exist.¹³² But it also technically applies where the bargaining unit has failed to agree on a particular issue.¹³³ This is in view of the fact that the Minimum Wages and Conditions of Employment Act and the regulations made under it are the basic

¹²⁹ CAP 512, section 12

¹³⁰ Ibid., Part V

¹³¹ CAP 276 of the Laws of Zambia

¹³² Minimum Wages and Conditions of Employment (General) order of 1997, clearly provides that employees of the government of Zambia, those engaged in domestic service, district councils and employees in occupations where wages and conditions of employment are regulated through the process of collective bargaining are exempted from the provisions of the Minimum Wages and Conditions of Employment Act. See Statutory Instrument No. 119 of 1997.

¹³³ DARLINGTON BANDA, 'A Guide to Employment Law in Zambia,' Friedrich Ebert Stiftung, Lusaka, 1999, pg. 26

minimum upon which the employer may improve upon through collective bargaining (where a trade union exist) or unilaterally.

Section 8 of this Act provides that Agreement in contravention of the Act or order made under it shall be void to the extent of such contravention.

Further obligations as regards to the conditions that an employee is entitled to may be found in the employment Act. The Employment Act together with the Industrial Labour Act¹³⁴ and such other laws as the Minimum Wages and Conditions of Employment entitle employees to a holiday with pay,¹³⁵ paid sick leave,¹³⁶ annual leave,¹³⁷ work only up to 48 hours a week,¹³⁸ transport allowance,¹³⁹ housing,¹⁴⁰ the right to join a trade union¹⁴¹ and to redundancy or retirement benefits.¹⁴² While the Employment act allows both the employee and employer to terminate the contract of employment by notice,¹⁴³ section 5 of the Industrial and Labour Relations Act, forbids

¹³⁴ CAP 269 of the Laws of Zambia

¹³⁵ CAP 512, section 15

¹³⁶ Ibid., section 54

¹³⁷ The Act provides that every employee is entitled to leave of absence on full pay at the rate of two days per month upon the employee's completion of six months continuous service with the employer. And no maximum period of service is placed over which the leave days may be accumulated. See Act No. 15 of 1997, being an amendment to the Employment act.

¹³⁸ According to the Minimum Wages and Conditions of Employment (General) order of 1997 (S.I/119/97) the weekly hours of work for any employee shall not exceed forty-eight hours. An employee who works in excess of those hours in a week is entitled to be paid at one and half times the employee's hourly rate of pay. An employee who work on a public holiday or on a Sunday where a Sunday does not form part of the normal working week shall be paid at double the employee's hourly rate of pay. See Also DARLINGTON BANDA, 'A Guide to Employment Law in Zambia,' supra (n.133)

¹³⁹ CAP 512, section 14 (1)

¹⁴⁰ Ibid., section 41

¹⁴¹ CAP 269, section 5

¹⁴² CAP 512, section 15 (c)

¹⁴³ Ibid., section 20

the employer from dismissing an employee for reason of exercising his trade union rights.

The above mentioned Acts certainly protects a good number of a workers rights although not all. But it is clear from them that even the private investor does have the obligation to respect human rights.

Having established the various obligations that the different Actors in the privatisation process have, next chapter will try to determine whether these actors have honoured their obligation during the privatisation process.

CHAPTER FOUR

HUMAN RIGHTS IMPLICATIONS – AN ANALYSIS OF THE ZCCM- LUANSHYA DIVISION

1.0 INTRODUCTION

It is no doubt that the human rights of ordinary Zambians have in numerous and complex ways been severely damaged as the result of the privatisation programme.

This chapter seeks to identify specifically which rights have been affected during privatisation and by which actor. Taking a particular case study of the privatisation of ZCCM-Luanshya division (RAMCOZ), it starts by analysing how the sale was conducted before proceeding to outline the rights implicated. The reason why ZCCM was chosen is because of its importance in the Zambian economy. It was by far the largest of Zambia's parastatals, provided at least 80% of the country's foreign currency and was the largest single employer.¹⁴⁴ Luanshya division was singled out in particular because it was one of the first few packages of ZCCM to be sold and seeing that it has been sold for almost three years now, an assessment of implications of its sale is possible. Apart from there has been numerous reports in the media on the operations of

¹⁴⁴ Most of Zambia's foreign exchange came from ZCCM which in turn sold to the Bank of Zambia and the commercial banks, the decline in ZCCM's revenue from copper resulted in shortages of foreign exchange and a depreciation in the Kwacha.(Privatisation in Zambia: what it means for the majority, Rights and Accountability in Development, Oxford, U.K, fact sheet 3b)

Roan Antelope after privatisation which has categorically been labelled a scandal and a lesson to learn from in future privatisation exercises.¹⁴⁵

2.0 PRIVATISATION OF ZCCM

The public debate on the privatisation of Zambia Consolidated Copper Mines (ZCCM), began as far back as 1993.¹⁴⁶ It was generally acknowledged at that time that the ZCCM needed reinvestment and that the amount of money required to resuscitate the mines was so enormous that it could not be financed by domestic capital.¹⁴⁷ It was noted further that capital and expertise from outside was important if the economic development of the country was to be achieved and such making the sale of ZCCM inevitable.¹⁴⁸ The objectives, which the government sought to achieve through the privatisation of ZCCM, are:

- To transfer control of, and operating responsibility for, ZCCM's operations to private sector mining companies as quickly as practicable;
- Mobilise substantial amounts of committed new capital for ZCCM's operations;
- Ensure that ZCCM realises value for its assets and retains a significant minority interest in its principal operations;

¹⁴⁵ Bram Posthumus refers to it as an eloquent testimony to privatisation gone haywire while Theo Bull refers to it as the 'problem child of the Copperbelt. (See THEO BULL, PROFIT MAGAZINE, April, 1999, at p.21 and AFRICAN BUSINESS MAGAZINE, 'ZCCM: A tale of heartbreak and tears)

¹⁴⁶ THEO BULL, 'Weighing the huge cost to Zambia of turning down the offers of the Kafue Consortium,' PROFIT MAGAZINE, April, 1999, pg. 17

¹⁴⁷ SAM KAPEMBWA, 'Only privatisation can save ZCCM: Bull,' Privatisation News, July, 1999, pg. 10

¹⁴⁸ Ibid.

- Transfer or extinguish ZCCM's liabilities, including its third party debt;
- Diversify ownership of Copperbelt assets;
- Increase Zambian participation;
- Conduct the privatisation as quickly and transparently as is consistent with good order, respect for the other objectives and the observation of ZCCM's existing contractual obligations.¹⁴⁹

In 1995 Kienbaum, a UK based consultancy firm, was engaged to assess the best mode to privatise the ZCCM. Kienbaum recommended that the mines be sold in different bundles, meaning that it should not be sold as a whole but in different packages. The Zambian Government however rejected this report and it is alleged that out of it the then Deputy Minister of Mines Dr Mathias Mpande even lost his job.¹⁵⁰ Kienbaum was replaced by N.M Rothschild, an international merchant bank as privatisation advisors and Clifford Chance as legal advisors.¹⁵¹

In 1996 the Government approved the ZCCM privatisation report by Rothschild even though much of it echoed and elaborated on the Kienbaum, suggesting the unbundling of ZCCM into different packages but also recommended a two stage structure of sale.¹⁵² In stage one, the minority interests in the companies owning certain of ZCCM's mining and power distribution operations were to be sold to trade buyers

¹⁴⁹ ZCCM PRIVATISATION STATUS REPORT as at 27th December, 1999

¹⁵⁰ THEO BULL, 'Weigh the huge cost to Zambia of turning down the offers of the Kafue Consortium,' supra (n.146), p.17

¹⁵¹ F.H. Kaunda, 'The Privatisation Process and Status of ZCCM at 19th September, 1998,' Commonwealth Business Forum 29/30 September, 1998, Ottawa, Canada, Pg. 3

while as in stage two, the GRZ was expected to dispose of some or all of its 60% shareholding in ZCCM itself with some part of this to be earmarked for Zambian investors.¹⁵³ At least nine different packages were identified and approved by the Government, with ZCCM, Luanshya division falling in what is referred to as Package B (Bco).¹⁵⁴

The process of advertising (locally and internationally) followed this and the original bids were opened by 28th February 1997. Negotiations for these were led by Rothschild until at the end of March 1997, Mr. Francis Kaunda was appointed by the President, rather than by the ZPA board, to head the ZCCM Privatisation Negotiating Team as stipulated under section 32 of the Privatisation Act.¹⁵⁵ Unlike in other cases of privatisation where the Minister signs the sale agreement after it has been concluded, in the case of ZCCM, a special Cabinet Subcommittee (also known as the Committee of Ministers) decides whether each sale should go ahead in line with the terms which are being agreed by the negotiating team. This subcommittee is chaired by the Minister of Mines and Mineral Development, the Minister of Commerce, Trade and Industry and the Minister of Energy by virtue of the ZCCM's Power Division.¹⁵⁶ Not much is known about the process of picking the independent valuers, consultants

¹⁵² Theo Bull, op. cit., p. 146

¹⁵³ ZCCM PRIVATISATION STATUS REPORT, supra (n.149), p. 5

¹⁵⁴ Ibid., pg. 6

¹⁵⁵ Concern for this was raised, for example in his contribution to the debate to adopt the special report of the committee on public investments, Colonel Nawa, said the appointment of Mr. Kaunda as chairman of the GRZ/ZCCM Privatisation Negotiation Team by the President was a blatant disregard of section 32 of the Privatisation Act which stipulates that all members of the team shall be appointed by the Zambia Privatisation Agency Board. (Post newspaper, 3rd December, 1997)

¹⁵⁶ RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT, Privatisation in Zambia: what it means for the majority, (supra n.5)

and lawyers working on the privatisation of ZCCM. Unlike in the other sales handled by ZPA where such information is contained and made available to the public in the ZPA status reports, the GRZ/ZCCM privatisation status report does not contain such information. Since 1997 a number of sale agreements for the different ZCCM packages have been concluded but for the sake of this paper only that of ZCCM-Luanshya division, Roan Antelope mine will be looked at.

2.1 ZCCM-LUANSHYA DIVISION(THE ROAN ANTELOPE MINE)

Prior to its sale, ZCCM-Luanshya division was incorporated as Roan Antelope Mining Corporation of Zambia (RAMCOZ), wholly owned (100%) subsidiary of ZCCM.

The closing date for receiving bids for its sale was 28th February, 1997 and by then bids were received from Binani Industries Limited, a company incorporated in India, First Quantum Minerals Limited, a company incorporated in Canada and Sterlite Industries limited, a company incorporated in India. On 19th June, 1997, all the three bidders submitted their revised offers for the mine and this was followed by preliminary negotiations and clarifications by the GRZ/ZCCM Privatisation Negotiating Team with each of the bidders.¹⁵⁷ Eventually an agreement was entered and signed with Binani Industries on 15th October 1997 with the new owners taking charge of the running of the mine by 1st November, 1997.

¹⁵⁷ GOVERNMENT GAZETTE No. 4732, 25th September, 1998

The Government's justification regarding the choice made is that the Binani Industries' total negotiated cash offer of US\$35 million for 85% of shareholding in the new company coupled with their attractive business plan and a future copper price participation for ZCCM was evaluated and found to be both acceptable and superior to the offers made by the other bidders.¹⁵⁸ Binani had offered a copper price participation mechanism whereby ZCCM will be receiving 20% of the incremental value when the copper price is above US\$2,750/t.¹⁵⁹

The business plan, which formed part of the sale transaction, through the Development Agreement, included but was not limited to the following important aspects:

- To immediately invest a total of US\$20 million as new equity capital in the company
- To invest a minimum of US\$69 million as capital investment during the first five years from the date of transaction close a conditional investment commitment of not less than US\$103 million, subject to feasibility studies and other conditions, to be spent during the first 10 years from the date of transaction close.¹⁶⁰ This may include the development of some downstream projects including, but not limited to, an acid plant and a fertilizer plant.
- To provide employment to all the existing labour force and avoid immediate redundancies. Provide high caliber management and training opportunities to employees.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

- A commitment to support local business development.
- Recognition of the Mineworkers Union of Zambia (MUZ) and a commitment to provide social services at a standard no worse than that at the time of take over.

The price of shares and other special conditions of the sale included; US\$35 million cash at close paid for 85% shares of Roan Antelope Mining Corporation of Zambia in which the assets of package 'B' were vested, amounted to US\$3.51 per share; ZCCM retention of 15%, all free carried, shareholding in the company and representation on the Board of Directors; and Government retention of a special 'Golden share,' giving it certain special rights to safeguard the national interest.¹⁶¹

The sale of RAMCOZ has kept its position as a leading news story right from the time the best bidder was selected. When it became apparent that Binani industries was buying the mines, First Quantum sued the ZPA, ZCCM, the Binani group as the new owner, and the government as a fourth defendant. It alleged that its bid was superior and that the decision to award the contract to the Binani group was not considered by the ZPA Members or the sale handled by the ZPA.¹⁶² The company wanted a declaration to the effect that no other body except the ZPA is entitled to offer for sale any state owned enterprise under the Privatisation Act.¹⁶³ First Quantum however

¹⁶⁰ The Sale Agreement for RAMCOZ was signed on 15th October, 1997. See *The Monitor*, 13-19 August 1999, 'RAMCOZ operations choke.'

¹⁶¹ *Government Gazette*, supra (n.157)

¹⁶² First quantum minerals total negotiated cash offer was US\$34 million for 82% of the shareholding in the new company, equity investment of US\$15 million, Committed investment of US\$70.4 million and contingent investment of US\$ 26.3 million. *Ibid*.

¹⁶³ At the time the suit was filed, the Chief Executive of ZPA, Valentine Chitalu, was a Director of ZCCM, Mr. Willa Mungomba, a member of the ZCCM Privatisation Negotiating Team, was also a

withdrew the case and shortly after that its bid for ZCCM Mufulira mine was declared the winner.¹⁶⁴

Apart from that, allegations in the early months after the sale were made that some Government Ministers had personally benefited from the sale of Luanshya division.¹⁶⁵ Other than that there has been all sorts of reports from Luanshya of miners being laid off, the new owners closing up its smelter plant,¹⁶⁶ riots in Luanshya, assets of the new owners being chased by bailiffs because of debt, with all this being attributed to the fact that RAMCOZ was privatised.

3.0 THE HUMAN RIGHTS IMPLICATIONS

A minor survey was conducted at the end of March, 2000 to assess the implications of the privatisation of RAMCOZ on the human rights of the ordinary citizen and the following are the findings:

3.1 THE RIGHT TO SELF DETERMINATION

Director of ZCCM. The Privatisation Act specifies that the ZPA and therefore not the company board and directors of a parastatal are to handle all sales. In the case of ZCCM, this distinction is blurred. Similarly, Francis Kaunda, the chairman of the ZCCM negotiating team who was appointed over the heads of the ZPA Members, is a former chairman and chief executive of ZCCM. It may make sense for someone with a thorough knowledge of ZCCM to head up the team, but the manner of Mr. Kaunda's appointment sent a clear message that the ZPA was no longer in charge of the process.

¹⁶⁴ It appears the government negotiated with First Quantum to withdraw the case in return for the Mufulira Mine. As at 27th December, 1999 negotiations for Mufulira mine were still in process. (ZCCM Privatisation status report as at Monday 27th December, 1999)

¹⁶⁵ PATRICIA FEENEY, 'The Human Rights Implications of Zambia's Privatisation Programme,' *supra* (n.12)

¹⁶⁶ RAMCOZ closed its milling, concentrator and smelter plants on 30th May, 1999. See Monitor, 13-19th 1999, RAMCOZ operations choke.

Since the right to self determination confers upon individuals and communities the right to freely determine their political and economic development, a question that was posed to Luanshya residents to find out if prior to the privatisation of the mine, any exercise was conducted to assess the local people's general view and understanding of the privatisation of RAMCOZ. Except for the miners that stated that they were given hand out explaining what privatisation was a few was and what effects it would have on their jobs, a good number of residents only heard of the sale of RAMCOZ through the media.

From the sentiments of government officials and some donor community representatives, it is certain that the privatisation of the mines and ZCCM in particular was forced by the donor community. The push was there and the government had demonstrated its helplessness and aid was tied to progress in the privatisation exercise. In January 1999, the major donors withheld some \$530 million of balance of payments support until ZCCM had been privatised.¹⁶⁷ But when the government announced within the same month that they had entered into an Agreement with Anglo American Corporation, the World Bank arranged \$175 million in balance of payment support, debts were rescheduled and other donors came forward.¹⁶⁸ Six months earlier however when the Kafue Consortium¹⁶⁹ pulled out, the British government had announced a

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ This was a Consortium consisting of Avmin, Noranda Mining and Exploration Inc, Phelps Dodge and the Commonwealth Development Corporation who had pledged to buy the Konkola, Nchanga and Nampundwe Operations. Their bid was opened in February 1997 and negotiations with them run through to their final bid in June 1998. They however pulled out in August 1998 alleging that the mines were being over valued whilst the government on the other hand claimed the Consortium was offering very

discontinuation of aid because they feared their money was going into ZCCM, which according to them was costing the Zambian government anything between \$1 million and \$2 million per day at the time.¹⁷⁰ At the Paris consultative meeting in May 1999 the representatives of the donor community again stressed the urgency of completing the privatisation of ZCCM and called upon the Zambian Government to facilitate the sale in whatever way it could.¹⁷¹ In turn the Zambian delegation assured the meeting that they will speed up the sale of the mines and that the mines would be sold by the next meeting.¹⁷²

From the above it is clear indeed that the privatisation of ZCCM vis a vis that of Roan Antelope was externally driven without any efforts to determine the feelings of recipients, who themselves are entitled to determine the trend of their future. Thus a violation of the right to self-determination.

3.2 THE RIGHT TO WORK AND TO JUST AND FAVOURABLE CONDITIONS OF WORK

little and termed their bid as a 'song.' – see Theo Bull, weighing the huge cost of Zambia of turning down the offers of the Kafue Consortium, supra (n.146)

¹⁷⁰ Bram Posthumus, ZCCM: A tale of heartbreak and tears,' African Business Magazine, February, 2000

¹⁷¹ WORLD BANK, Zambia's future prosperity linked to continuing reforms and development of a long-term vision, , press Release, May 1999

¹⁷² The Zambian delegation to this meeting included the then Hon. Minister of Finance Edith Nawakwi, Legal Affairs Minister, Vincent Malambo, Hon. B. Mushala, MP, Professor B. Mweene, Secretary to the Treasury; Dr. J. M. Mwanza, Bank of Zambia Governor; Mrs. E. Jhala, Permanent Secretary, Legal Affairs; Mr. R. H Mataka, Permanent Secretary, MDD Cabinet Office; Mr. B. Nonde, Permanent Secretary, Ministry of Finance and Economic Development; Mrs M. Nkole, Permanent Secretary, Ministry of Community Development; and other senior Government officials. It was chaired by Ms. Phyllis Pomerantz, then Country Director for Zambia of the World Bank.

Even if it were argued that the high levels of unemployment are inevitable given the poor state of the economy, it can be argued that all parties in the negotiations about the sale of RAMCOZ, failed to provide the workforce with acute predictions about the levels of redundancies that the sale would entail. As it were, the desire to retain the forceful of these companies and the consequent creation of more jobs is one of the conditions under which most of the private investors managed to win the bids. As Rights and Accountability in Development, observes:

‘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.’¹⁷³

The Binani group of companies in their business plan which was part of the sale transaction assured the government that it would work to, ‘provide employment to all the existing labour force and avoid immediate redundancies. Provide high caliber management and training opportunities to employees.’

However, this has not been the case. Since taking over RAMCOZ from the government at least a total of 400 workers were retrenched in December, 1999 and

¹⁷³ RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT, Privatisation in Zambia: what it means for the majority.’ supra (n.5)

582 in March, 2000 and another 700 earmarked for retrenchment in April, 2000.¹⁷⁴

When asked to comment on the criteria used in selecting the workers to retrenched RAMCOZ Acting Head of Manpower department¹⁷⁵ noted that when a business is sold projections about the number of people employed in a business may change for the better or for the worse and that all the retrenchments made at RAMCOZ were effected in accordance with the prevailing situation. He explained further that in situations where for instance jobs are combined or abolished or where departments are closed, the company felt it not necessary to keep the unproductive employee. Reacting to this however, miners talked to as well as the union officials refuted claims that there was any visible need to retrench workers adding that the retrenchments have actually resulted into a shortage of labour. Mr. Siame, a union official observed that even the criteria used in determining the workers to retrench is not as transparent as the Head Human Resources put it stating that one of the major criteria the new owners was using in laying off workers was ones' involvement in the union. According to him the Union at the mine is very organised and radical such that management is using retrenchments as a weapon to weaken it.¹⁷⁶

Apart from massive retrenchments at RAMCOZ there is also displacement of labour.

With the change in ownership some Zambian professionals were removed and

¹⁷⁴ Interview with Mr. Gilbert Siame, Vice Chairman, Mine Union of Zambia main branch, Luanshya, 27th March, 2000

¹⁷⁵ Also referred to as Head Human Resource. Interview with him of 27th March, 2000

¹⁷⁶ At the time of the research out of 12 executive union members at least 3 had been retrenched while 2 others fired on frivolous allegations. Among those retrenched is the chairman Mr. Pwele who is said to have been very controversial. (Interview with Mr. Siame, supra (n. 174))

replaced from their positions with men from India who were as less qualified.¹⁷⁷

When asked to comment on this RAMCOZ Acting Head of Manpower Department, explained that the new owners had merely abolished some managerial positions previously owned by Zambians and introduced new ones. Four of the introduced positions however have all been filled with expatriates, all Indians.

As regards the general conditions of service, it is clear that workers had better conditions of service under ZCCM than they do now. In October, 1998 over 6000 workers at RAMCOZ went on strike, demanding payment of housing allowance arrears, soft loans and terminal benefits for retired miners. Their families joined the workers at the end of the weeklong strike. The strike turned violence, resulting into battles with the police that led to two people being shot and killed by the police.¹⁷⁸

Ever since Binani took over the mine, workers salaries have only been reviewed once doing away with the long-standing tradition of ZCCM to undertake a revision at the end of every financial year. In place of this the Binani has inserted a clause in the collective agreement that workers salaries will only be reviewed after two year.¹⁷⁹

When asked to comment over this the Human Resources Manager (Head of Human Resource department) justified by explaining that the company needed more time to settle down before committing itself to certain matters and he further disclosed that it was undergoing serious financial difficulties. This is indeed reflected in the Monitor Newspaper:

¹⁷⁷ THEO BULL, 'The Mines, where are we now: the huge cost to Zambia of turning down the offers of the Kafue Consortium,' *supra* (n.146)

¹⁷⁸ Legal Resources Foundation, Police abuse of authority continues, LRF Newsletter, May, 1999

‘Employment at the Roan Antelope Mining Corporation (RAMCOZ) lies in limbo as operations have grounded to a complete standstill. And indicators under the prevailing circumstances are that the miners do not have the capacity to operate at full potential with its debtor portfolio standing at US\$87 billion in complete contrast to creditors liability position of ZMK44 million.’¹⁸⁰

Most of the allowances that workers were entitled to under ZCCM have been removed by the new owners. For instance without even prior notification to the workers over-time allowances were removed and workers that had already worked were told that from then onwards they would be only be given time off instead of money.¹⁸¹ Also while under ZCCM every worker was entitled to two bags of mealie meal a month, the new owners have stopped providing them with any at all.¹⁸²

With regard to the safety and healthiness of the work environment, miners at the company fear that their lives are more at risk now than under ZCCM. Referring to the recent retrenchment that had taken place, one miner explained that ‘working underground involves a lot of people, doing different kinds of work, with the retrenchment of certain workers we find ourselves abandoning certain tasks and diverting to others, this is very dangerous because there is usually need for coordination between the tasks and abandoning any of them places everyone at risk.’

¹⁷⁹Mr.. Siame, MUZ, supra (n.174)

¹⁸⁰ Monitor Newspaper, 13-19 August 1999, ‘RAMCOZ operations choke,’

¹⁸¹ This came out rather prominently from the answers given by miners in the questionnaires distributed to them. It was also confirmed both by the Union as well as management with the same justification of the company undergoing financial difficulties being given as a reason for this.

He further noted that while ZCCM provided workers with safety uniforms three times a year, the new owners only does that once. As a result of this some miners even go underground without protective clothes and this is very risky to their lives considering the dangers involved in working underground.

As regard the workers right to representation by a union, it was acknowledged both by the workers and management alike that the relationship between the union and management is bad. As Theo Bull observes;

‘the RAMCOZ management has made many avoidable errors, they mishandled their relationship with the Mineworkers union and made no use of the experience on offer to them from ZCCM on labour matters.’

There are claims and counter claims. According to management the problem lies with the union who do not want to address any of their grievances to them directly except through the media.¹⁸³ The union on the other hand maintains that management is to be blamed for the sour relationship that exist between them because of its unfulfilled promises coupled with unwarranted dismissals or retrenchments of workers.¹⁸⁴

Since the right to work also includes the provision of technical and vocational guidance and training programmes, inquiry was made on the Binani industries’ staff training policy. Mr. Mtuta, RAMCOZ Sectional Personnel Officer responsible for

¹⁸² Ibid.

¹⁸³ Interview with the Head Human Resources Manager, 27th March, 2000

training and job evaluation, reviewed that while the company inherited from ZCCM a Staff training institute, no training policy has been established yet. He further noted that ever since RAMCOZ was sold no employee has ever been sponsored for training to any other institutions by the new owner.

From the above discussion it is indeed clear that the right to work in all its known ambits has been severally violated with the privatisation of Roan Antelope mine.

3.3 THE RIGHT TO HEALTH

One of the well-known social services that are provided by each division of ZCCM in every Copperbelt town is health care. Mine hospitals have with time earned a good reputation for offering very good health services.

Under ZCCM, Roan Antelope Corporation owned two hospitals, Roan Antelope and Luanshya respectively; the new owners have handed over one of them to the Government. Under ZCCM the companies also had several clinics operating in all townships, the new owners have decided to close some of them. The new owners have come up with a policy to hand over certain responsibilities to relevant

¹⁸⁴ Interview with Mr. GILBERT SIAME, *supra* (n.174)

authorities.¹⁸⁵ They explained that this is the only way they are going to concentrate on their core business, which is basically mining.¹⁸⁶

The miners who are still in employment still have a health scheme allowing them and their spouses and children below the age of 21 to seek medical services at half fee. Considering the conditions of services under which these mines are working it evident that it is the other half that is killing. Dr. Manasseh Phiri, with a life-long history in the Copperbelt medical world was quoted by the African Business Magazine has having said that:

‘all the money the miners are getting goes on food and therefore the medical and school fees go unpaid. For health people will only go to a hospital in an emergency. In all other case they don’t. Nutrition is very poor and people’s defences are down. They are much more vulnerable to infections now than they have ever been vulnerability in this case includes to such infections as HIV/AIDS. There is not a single family in the Copperbelt that has not been affected.’¹⁸⁷

The mine hospitals, which under ZCCM were well, looked after are not the same any more.¹⁸⁸ While they were a lot cleaner than government run hospitals and clinics, there is very little difference between the two now. The hospitals that were always stocked with the necessary drugs while under ZCCM, are now providing their patients

¹⁸⁵ The relevant authority in the case of hospitals being the Ministry of health

¹⁸⁶ Interview with Mr. EMMANUEL PHIRI, RAMCOZ Acting Head Public Relations and Administration, 27th March, 2000

¹⁸⁷ BRAM POSTHUMUS, ‘ZCCM: A tale of heartbreak and tears,’ Africa Business Magazine, February, 2000

with prescriptions requesting them to buy their own drugs in town.¹⁸⁹ Commenting on this Mr. Phiri¹⁹⁰ again attributed all this to the financial crisis in which the company was. Owing to this the company has not only reduced its allocation to hospitals but has also decided to close down some of the clinics in the mine townships. The redundancies, which have occurred, have put the former miners even in a worse position than this. While the miners still in employment are required to pay only half the charged medical fees, retrenched workers have to pay full amounts. In explaining that these fees are far beyond their reach, especially that they no longer have a regular income, Mrs Kalefya, wife of a retrenched miner had this to say:

‘I really can not explain to you how things are here. Our husbands have been turned into loafers, our children can not go to school and we are just dying in our homes when we are sick because the clinics that were nearby have been closed and those that have remained are too expensive for us. Hospitals are now for the rich Indian working at RAMCOZ.’¹⁹¹

It is clear that the right to health, just as that of work of the ordinary person has also suffered violation.

3.4 THE RIGHT TO EDUCATION

¹⁸⁸ Interview with LILIAN MWAKA, a nurse at Roan Antelope Mine, March 27th 2000.

¹⁸⁹ Ibid. This again comes back to the buying power of the people who we mentioned earlier that not getting adequate wages and as such can not even afford buying most of the prescribed drugs.

¹⁹⁰ Interview with Mr. Emmanuel Phiri, *supra* (n.186)

¹⁹¹ Interview with Mr and Mrs Kalefya, Roan Antelope township, 26th March, 2000

Education, like health, is another social service that mining companies were known for providing. These schools, again like the hospitals, earned a reputation for their high quality of education. Most highly educated Zambians today trace their roots into these schools and notably most Zambians who speak very good English have a background in Mine Trust schools. Usually each division of ZCCM owned a trust school, which started from reception to primary school. Children graduating from these schools normally went to Mpelembe secondary school, which was also ZCCM run. Up until the third republic Mpelembe was the only secondary school in Zambia that provided 'A' levels.¹⁹² It however has since the beginning of the privatisation of ZCCM been given to the Catholic Church.¹⁹³

At the time of privatisation Roan Antelope mine owned one Trust school. At the time of privatisation, Binani retained the Trust school and has then continued running it. Under ZCCM miners took their children to the school at a very minimal fee while non-miners paid large amounts of money. The new owners have also continued with the same system.¹⁹⁴

The above notwithstanding however, it should be born in mind that provision of education does not only end with building or establishing one. It has everything to do with access to the school. The right to education here is correlated with people's

¹⁹² Interview with Mr. M Tandeo, former Head Master Mpelembe, also former Registrar UNAZA, March, 2000

¹⁹³ Mine Mirror, 3rd September, 1998

¹⁹⁴ Interview with Mr. PETER MTUTA, Sectional Personnel Officer Technical Training/Job evaluation, 27th March, 2000

financial capacity to afford the education. While as the miners can still take their children to school at a minimal amount, it is that amount that they are failing they are failing to meet. As Dr. Manasse Phiri pointed out, it is the 'half that is killing.'¹⁹⁵ The position for the retrenched workers is even worse because while most of the workers said they could still take their children to government schools that were a lot cheaper than the mine schools the majority of these can not for both.¹⁹⁶

It is thus clear that indeed the right to education has also been violated.

3.5 THE RIGHT TO SOCIAL SECURITY

The right to social security, as it also includes social insurance, food, housing and recreation facilities is another right that has not been left out.

Social insurance as it includes a secured pension upon retirement has been affected in the sense that while as under the collective agreement with ZCCM, workers were entitled to a pension package of the number of years worked, multiplied by the twenty eight (28) days for each year and then by a workers current salary, the collective agreement with the new owners entitles a worker to a package of the number of year worked, multiplied by two (2) days for each year and then the workers pay. The

¹⁹⁵BRAM POSTHUMUS, 'ZCCM: A tale of heartbreak and tears,' supra (n.187). Only two out of 20 miners who answered a questionnaire given to them indicating which schools their children go to mentioned the Trust school. The rest said the trust school was too expensive for them.

collective agreement signed with ZCCM was in accordance with the Employment Act which provides that worker is entitled to a two and a half days per month while as that of the new owners is something of their own making.¹⁹⁷

The right to food was slightly touched in the discussion of the other rights already done. The provision of food, like was observed for that of education, for the most part depends on the adequacy of wages. An adequate salary enables a worker not only to take his/her children to school but also buy food for his family. The decision by RAMCOZ to review workers salaries after a period of two years fails to meet with the ever-increasing prices of commodities leading miners into situations where they are even failing to buy food. This coupled with massive retrenchments at RAMCOZ has resulted into a rise in poverty levels in Luanshya. Clearly money is hard to come by in Luanshya and a sure sign of this is the locking up of shops and the impression is confirmed by what the locals say. A local resident, Mrs Supuni put it very bluntly: 'we are dying here!' By this she meant that before the mines where sold she could buy a few things and resale to the miners and earn herself a living but these miners no longer have any money and hence they do not buy anything from her.

A prominent local Indian businessman who refused to be named says he has had to change businesses three times since the privatisation of the mines. He noted that

¹⁹⁶ MR. CHALI, a local resident stated that for while miners' children pay K25, 000 per child per term, non-miners children pay K1,200, 000 per child per term. (Due to shortage of time, these figures could not be confirmed with the school)

¹⁹⁷ See, supra (n.137)

everything he has tried is failing to materialise because the people no longer have any.

Quoting his exact words the Businessman observed that:

‘You see this thing is a chain reaction. Before the mines were privatised the miners were doing well, all the others in town were engaged in all sorts of small businesses and the miners were their best clients. After selling stuff to the miners these people could also come to me and give me business. Now that the mines have been privatised most of the miners have lost their jobs and even the ones that are working do not get a lot of money, the local people have stopped doing business and I have no one to buy the goods as well.’

He went on to say:

‘this town is dead and there is a lot to say except I am afraid that you will name me in your research paper and I will be deported like my friend Majid Ticklay.’¹⁹⁸

Similarly, Luanshya Town Clerk, Mr Mwanakulanga in a statement to Radio Phoenix community news said that the council in Luanshya is in serious financial problems. It is failing to pay its workers because most residents have become too poor to pay the council for any of the services it is providing, attributing the poverty to the sale of the RAMCOZ.¹⁹⁹

A bus driver interviewed also reviewed that the largest amount of money that buses can charge on a local route was three hundred Kwacha (K300) for the furthest place because the people can not afford anything more than that. He charged that an

¹⁹⁸ The name of the Indian man is withheld because assurance was made to him that he will not be named. The other man mentioned is a former Lusaka business man who was deported by the government last 1999 for allegedly calling upon his fellow Indians to help in removing the current government in power for increasing poverty levels in the country.

increment from three hundred Kwacha (K300) to five hundred Kwacha (K500) had been made and the people stopped boarding buses in preference to walking because they could not afford meeting the charges.²⁰⁰

As regards to the right to shelter, prior to the privatisation of Roan Antelope all miners living in mining houses were offered their houses to buy. When transferring services from ZCCM to Binani group of companies, the workers had their benefits calculated and the prices of the houses deducted from it.²⁰¹ The rest of the money was kept in trust for them by the new owners to be paid either at retirement or upon any other termination of employment. It appears that very few miners had a problem as regards to housing. In fact the issue of buying houses was viewed as the only positive outcome of privatisation. It was difficult however to ascertain whether the new owners pay the workers a housing allowance, seeing that the company has not provided them with accommodation per se, because half the workers acknowledged that they are given the allowance while the other half claimed they are not. Both the Acting Head human resource department and the Acting Head public relations, in separate interviews confirmed that the company provides the workers who are not living in a company house with a housing allowance.

¹⁹⁹ 3rd April, 2000, at 14:00 hrs.

²⁰⁰ This is the amount charged from town to Minkonfwa as at 27th March, a distance similarly that that of town – Chainama in Lusaka which is K700.00.

²⁰¹ Although the workers have received letters of offer and acknowledgement of payment for them, no title deeds have been issued to any of them. Commenting on why this has been the case Mr Phiri, the Acting Head public relations explained that the houses are all on a mine farm, that ZCCM owned the entire farm area i.e. the mine plant and the rest of the area, including where the houses are, and that now that the houses have been sold to individuals, ZCCM is working out something to demarcate this. He noted that a sketch plan for individual was being worked out and that title deed will be issued to individuals as soon as this was completed.

Before privatisation RAMCOZ was responsible for the general maintenance of the mining townships in terms of providing street lights, collection of garbage, cutting grass during the rainy season and sweeping the streets. The new owners of the mines have completely withdrawn from providing such services. In justifying the company's withdrawal Mr. Phiri,²⁰² explained that the company has decided to leave out such responsibilities to relevant institutions such as the council. At the time this research was conducted, council workers were on strike demanding the salaries of three months.²⁰³

On the provision of recreational facilities, a visit to some of the former ZCCM sporting clubs indicated that most of these clubs are not running. But it came to light that the new owners have put up an advert in the papers leasing out these clubs to private individuals.²⁰⁴ The new owners however alleged that they have continued sponsoring the former ZCCM sponsored football club, Roan United.²⁰⁵ But a visit to the clubs camping site indicated that the camp is in a deplorable state and the few footballers spoken to allege that they no longer get any allowances from RAMCOZ, as they were when company was under ZCCM. They however acknowledged that RAMCOZ did at times provide the club with transport after lengthy negotiations.

²⁰² ACTING HEAD PUBLIC RELATIONS DEPARTMENT, *supra* (n.186)

²⁰³ Luanshya municipal council is no different from all other councils where money is concerned. Generally all councils in Zambia are poorly funded by the government and their revenue collection is dependant on the income of the local residents who themselves have become so impoverished. In the light of this it is rather illogical that RAMCOZ management should transfer any of its responsibilities to such institutions as the council. Unless they want to deprive the people of the services altogether.

²⁰⁴ ZAMBIA DAILY MAIL, March 7th, 10th and 11th, 2000

It is clear from the above discussion that the right to social security has not been spared.

3.6 OTHER RIGHTS

As earlier mentioned in chapter three, human rights are inter-dependent and in many ways inter-linked. The effects of privatisation of RAMCOZ on the economic and social rights of the people had bearing on the civil and political rights in Luanshya. The economic hardships brought about by the sale of the mines has resulted into a number of political tensions. As Dr. Kenneth Mwenda observes;

‘The poor state of the economy could have significant effects on the future political stability of the country...Privatisation of parastatal companies, the cutting of cost structures (e.g down-sizing the workforce in major companies), the abolition of subsidies on consumer products, the ceiling of wages and the reduction of state expenditure on social welfare are some of the efforts that have been undertaken by the Zambian government....Severe unemployment has, however, resulted from the privatisation programme. This has led to major political spill-off...’²⁰⁶

What Dr. Mwenda observes is true of Luanshya. As a result of economic hardships Luanshya residents become anti-government or opposed to the government. For

²⁰⁵ Interview with Mr. E. Phiri, Acting Head public relations and administrative services, 27th March, 2000

²⁰⁶ MWENDA K.K, ‘Contemporary issues in Corporate Finance and Investment Law,’ Penn Press, Washington, D.C, 2000

instance of all the top ruling MMD leadership, Luanshya Central Member of Parliament, Ben Mwila is the only one who has publicly condemned President Chiluba's ban on presidential aspirants to campaign for the coveted top position and even gone to the extent of calling for the President's expulsion from the party.²⁰⁷ An allegedly government funded demonstration against Mr. Mwila in Luanshya was a flop.²⁰⁸

Luanshya has turned to be a political centre in several other ways. The newly elected Mayor Mr. Simon Kachimba and 12 other councillors were suspended from the ruling MMD in November 1999. And since the suspension 30 other ordinary party members have also been suspended.²⁰⁹ The suspension of the Mayor and the councillors has resulted into the council not having a meeting since 4th November 1999.²¹⁰

The Councillors are local government leaders meant to represent people at grassroots level, the suspension of Mayor together the Councillors is denial of representation and therefore a serious violation of people's right to participate in politics through representatives of their choice.

²⁰⁷ Zambia Daily Mail, 25th March 2000, 'Suspend Chiluba: says Mwila,'

²⁰⁸ 'B.Y Mwila should resign on moral grounds: why,' 31st March to 7th April, ZAMLIN

²⁰⁹ Interview with one of the suspended Councilors, 27th March 2000.

²¹⁰ It is alleged that the reason why Mr. Kachimba was suspended is that the Councilors went against the President's wish to have Mr. Chilufya voted in as the Mayor when they voted for Mr. Kachimba. What had happened is that on one of the President's visits to Luanshya to mediate in the problems between RAMCOZ management and workers, he called for a meeting with Councilors. It is alleged further that at this meeting the President called upon the Councilors to vote for Mr. Chilufya but the Councilors voted for Mr. Kachimba. It was actually on the day when Mr. Kachimba was supposed to be inaugurated that MMD Secretary General Michael Sata sent word of his suspension and because of this the inauguration ceremony was set aside. Mr. Kachimba has since sued Mr. Sata for allegedly stopping a democratically elected Mayor from being inaugurated. (Interview with a suspended Councilor, 27th March 2000)

4.0 THE ACTORS RESPONSIBLE

Binani industries, the new owners of Roan Antelope Mine (RAMCOZ) take lead in violating the rights outlined above. They have shown complete disregard for most of the workers rights and their decision to lay off most of the workers has led to further denial of rights such as the right to health, education, food etc, of people dependent on the retrenched workers.

While this continues to happen however, the Government of Zambia remains silent despite having entered into a contractual agreement with Binani industrial to respect some of the rights being violated. On the part of the government, the failure to enforce the laws designed to protect the workers, to enforce the agreement entered into with Binani and the failure to engage carry out an official research to determine the extent of human rights violation in Luanshya, makes the Government a part of the violation as Binani itself.

On the right to self-determination, the IMF and World Bank together with other international donors are mainly to blame. But as actors very instrumental in the privatisation process in Zambia, they too like the Government of Zambia would be blamed for not funding any research to determine the effects on privatisation on the livelihood of the ordinary citizen. In such a research can easily be conducted through

the Social impact department of the Zambia Privatisation Agency whose work has so far only been to conduct seminars and workshops at companies about to be privatised to enlighten the workers on what privatisation is and why it is so important that they should co-operate with the buyers.²¹¹

²¹¹ 'The Social impact department,' ZPA Memorandum of Operations, June 1998, pg. 3

CHAPTER FIVE

CONCLUSION/ RECOMMENDATIONS

CONCLUSION

This research has attempted to trace the roots of the privatisation programme that is currently being exercised in Zambia. It also attempted to outline clearly what its fundamental objectives are, its main actors and perceived beneficiaries. By giving an example of the privatisation of ZCCM Roan Antelope Mine, it demonstrated that objectives of privatisation are not realised in every case. It also demonstrated it is indeed very important that before economic reforms such as privatisation are implemented measures should be put in place to protect the rights of vulnerable people.

Indeed the issue of redundancy at ZCCM Roan Antelope Mine is much more complicated than simple displacement from one's place of employment. ZCCM had created a corporate culture which extended past a workplace involvement. As an employer it provided for all of an employee's needs: shelter, medical assistance, hospitals, education for his children, free electricity, water and transport, a number of subsidised items including burial arrangement. Once severed from this support an ex-employee has little to fall back on except redundancy payment. ZCCM was

committed to the development of local small scale businesses through supplies of various items. The new owners have abandoned that. ZCCM, as the biggest company in town took up the cleanliness responsibility of the town, as a service to the community, the new owners have completely abandoned that to concentrate on the mines. In all this, ZCCM reviews itself as a company that strived to uphold the dignity of a person and as such respected and upheld human rights. The opposite is certainly the case with Binani.

RECOMMENDATIONS

The Times of Zambia Newspaper, 4th May 2000 led with a story headlined 'embattled RAMCOZ deep in trouble.' The story behind the headline read in part;

'The crisis at the embattled Roan Mine Antelope Mining Corporation (RAMCOZ) deepened yesterday as workers were sent back to their homes. The operations at the Luanshya Mine ground to a halt three days ago after the Copperbelt Energy Corporation (CEC) restricted power to the mining areas to recover \$17.7 million. The workers said yesterday that they had not been working since Monday and were worried management may be forced to lay them off if the situation was not brought under control.'

The fate of RAMCOZ is yet to be determined but what is contained in the newspaper article reviews the worst out come of the findings in this research paper. A complete close down of RAMCOZ means a loss of 6000 jobs and direct threat to the lives of 150, 000. There is need for a careful analysis of the way privatisation of ZCCM Roan

Antelope Mine was carried out and the effects it has had on the livelihood of the people of ordinary citizen. The goal is a sufficiently important one for unless the benefits of privatisation are properly weighed, the need for a reversal of policies is urgent as it appears.

1. While it seems clear from this research that restructuring of Zambia's economy was necessary and the privatisation of ZCCM essential in order to attract investment and stimulate growth, the Zambian Government, donor community and the international financial institutions seriously underestimated the cost that ordinary people have to pay for such a transformation to occur. The case of RAMCOZ rebuts the presumption made that the negative social and economic impact on ordinary citizens is short lived. What has come out of the sale of RAMCOZ, is a complete damage of the life of ordinary citizen. There is urgent need for the Government as well as its development partners such as the World Bank and IMF to carry out a research to determine the consequence.
2. It further appears from this research that the main objective of the donor community has only been the rapid privatisation of ZCCM which has overridden every other consideration: the social consequences of the sales-such as the withdrawal in mining communities of crucial basic services or the transfer of responsibility for their provision to hopelessly under-funded local councils were recklessly disregarded. The enacting, amending or repealing the laws that were outlined in chapter two, the Government should have drawn provisions to

prohibit withdrawal of basic necessities other than just maximising the security of the investors. This can still be done.

3. Many ambiguities surround the privatisation of ZCCM, the reason for forming the ZCCM/ZPA team remains unexplained and certainly contrary to the Privatisation Act. The appointment of Francis Kaunda as head of the Team, a man the ruling MMD fired in 1991 from the post as Chief Executive of ZCCM in itself makes the independence of the Team questionable. Apart from the fact that this man may have experience in the operations of ZCCM, the chances of him being politically manipulated are high seeing that he was out of employment at the time and as such is more likely to listen to the appointing authorities than he would adhere to professionalism. If knowledge of ZCCM, was the prerequisite of appointment, Mr. Valentine Chitalu who was Chief Executive at ZPA, would have still done the work seeing that he also was once a Director at ZCCM. Having said this, it is hence recommended here that the arguments put across by First Quantum in the case against ZCCM/ZAP and the Government should be taken up by someone. Then maybe with an order from court, sales that have been concluded like RAMCOZ will be nullified, in order for the mines to be sold to real world owners who have no debts nor favours to government officials to pay back.

In the mean time all privatisation matters should be left to ZPA to handle and the necessary vacancies on the ZPA Board should be immediately filled.

4. Similarly, a comparison of the ZPA progress and status reports with those of the ZCCM/ZAP review that the latter is not detailed or rather it contains very little information. The result of this is that the majority of Zambians have been kept in the dark about the negotiations and the sale agreements. For example an informal request made at ZCCM/ZPA for a copy of the sale agreement Binani for the purposes of this research was denied that such documents are classified unless authorised by Binani industries or the chairman of the Team. Indeed the lack of information readily available to the people means that civil society has been unable to participate in determining what level of social obligations might reasonably be demanded of the new companies. Without access to the classified development agreements, the public will have no means of ensuring that the new investors comply with their contractual agreements. It is hence recommended that the public be accorded the information.

5. Although this has been tackled in a subtle way in the other recommendations, it is again emphasised that the Government should monitor the progress or operations of newly privatised companies and where it becomes so apparent that the new investors are violating certain laws, the laws should be enforced against them.

6. Indeed it is worth adding as a footnote that inevitably the winners in the privatisation process as it appears in the case of RAMCOZ, have been the

(foreign) investors. The whole programme must be weighed before the damage is complete and if the situation is as bad in all the other case, or the majority of cases, then there is need to reverse the policies. The one thing that strikes most, is how does a policy meant to benefit the people hurt them? If the hurt overwhelms the benefits then it is indeed point less to privatise.

In the mean time on a virtually deserted street corridor in the middle of town in Luanshya, an old man sits in a shop porch. He clutches a battered guitar. A little boy is wrapped in a blanket, in spite of the stifling heat, and sleeps. The man strums his guitar and sings in a quivering voice about one of the few escape routes people in Luanshya have still available to: the heavens above. 'I will be free when I die,' he sings. Such is the welcome that a visitor receives.

Human rights matter most when they are most at risk. This is when Lawyers and Lawmakers have a special responsibility. It is therefore finally recommended that more Lawyers and Lawmakers must go beyond this research by ensuring the implementation of this paper's recommendations.

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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

DIRECTED RESEARCH QUESTIONNAIRE

TOPIC: THE HUMAN RIGHTS IMPLICATIONS OF THE
PRIVATISATION OF ZCCM- LUANSHYA DIVISION

Dear Respondent,

I am a student from the University of Zambia Law school carrying out a research on the above topic as part of my Bachelor of Laws Degree.

You have been randomly selected from the total population of your company.

Please kindly answer the questions in this questionnaire as honestly and truthfully as possible. The information you will give shall be treated with strict confidence. For this reason you are not required to write down your name.

Thanking you in advance,



Brenda Mofya
Student



Michael Holden
Supervisor

INSTRUCTIONS

1. Fill in where necessary
2. Tick your preferences e.g 1. Yes[✓] or

A. BASIC INFORMATION

1. SEX..... MALE
2. AGE..... 27 years
3. JOB TITLE..... ADMINISTRATIVE ACCOUNTANT
4. WHAT DO YOU UNDERSTAND BY THE TERM PRIVATISATION?
This is when the state turns a state owned
enterprise to be run by a private company. In short
it is when a private company takes over the state owned company
5. WHEN WAS ZCCM LUANSHYA-DIVISION PRIVATISED?
15TH OCTOBER 1997
6. WHO ARE THE NEW OWNERS?
BIDANI GROUP OF COMPANIES
7. WERE YOU INFORMED BEFORE IT WAS PRIVATISED THAT IT WOULD BE
PRIVATISED?
1. Yes 2. No
8. IF YES, HOW LONG BEFORE WERE YOU INFORMED?
9. IF NO, HOW LONG AFTER PRIVATISATION WERE YOU INFORMED?
 Days after
 Weeks after
 Months after
 Years after
10. WHO INFORMED YOU ABOUT THE PRIVATISATION?
 ZCCM
 Union leaders
 Government officials
 Others..... PRESS(Specify)
11. AT PRIVATISATION DID THE NEW OWNERS RETAIN ALL THE WORKERS?
1. Yes 2.No

12. IF YES, HAVE THE NEW OWNERS MAINTAINED ALL THE WORKERS THEY INHERITED?

1. Yes

2. No

13. IF NOT, HOW MANY WORKERS DID THE NEW OWNERS LAY OFF?

Over 70%

Between 70% and 50%

Between 50% and 30%

Below 30%

14. HAVE THE NEW OWNERS REPLACED ANY QUALIFIED ZAMBIAN STAFF WITH FOREIGNERS?

1. Yes

2. No

1. WHAT IS YOUR MONTHLY SALARY?

Below K150, 000

Between K150,000 and K350, 000

Between K350,000 and K550, 000

Above K550, 000

2. ARE YOU GETTING MORE NOW THAN YOU USED TO UNDER ZCCM?

1. Yes

2. No

3. HAVE THE NEW OWNERS PROVIDED YOU WITH A HOUSE?

1. Yes

2. No

4. IF NOT, ARE YOU GIVEN A HOUSING ALLOWANCE?

1. Yes

2. No

5. WHICH OTHER ALLOWANCES ARE YOU ENTITLED TO?

cost of living allowance

6. DO YOU HAVE A FAMILY?

1. Yes

2. No

7. HOW MANY CHILDREN DO YOU HAVE?

N/A

8. DID YOU HAVE A FAMILY MEDICAL SCHEME UNDER ZCCM?

1. Yes 2. No

9. DO YOU HAVE A FAMILY MEDICAL SCHEME UNDER THE NEW OWNERS? YES

10. WHAT IS THE CRITERIA USED FOR RETIREMENT?

Age, medical guarantee

11. HOW MUCH IS GIVEN TO RETIREES?

1. Junior staff 2 months pay for each year served
2. Senior staff 2 months pay for each year served

12. DO YOU THINK THIS PACKAGE IS ADEQUATE FOR A RETIREE?

1. Yes 2. No

13. HOW LONG DOES IT TAKE MANAGEMENT TO PAY THE RETIREES AND DECEASED EMPLOYEES SPOUSES?

- Less than a year
 Two years after
 Two to three years after
 More than three year after

14. HOW ARE YOUR EMPLOYMENT CONDITIONS WITH THE NEW OWNERS COMPARED TO ZCCM?

- Worse
 Better

15. DO YOU HAVE A WORKERS UNION?

1. Yes 2. No

16. HOW IS THE RELATIONSHIP BETWEEN THE UNION AND THE NEW OWNERS?

- Very Good
- Good
- Bad
- Very Bad

B. SOCIAL NEEDS

1. DID ZCCM SPONSOR SPORTING AND RECREATIONAL ACTIVITIES?

1. Yes 2. No

2. DO THE NEW OWNERS SPONSOR SPORTING AND RECREATIONAL ACTIVITIES?

1. Yes 2. No

3. HAVE THE NEW OWNERS TAKEN OVER THE RUNNING OF FORMER ZCCM HEALTH INSTITUTIONS?

1. Yes 2. No

4. HAVE THE NEW OWNERS TAKEN OVER THE RUNNING OF FORMER ZCCM EDUCATION INSTITUTIONS?

1. Yes 2. No

5. IF YES, WHAT PRIVILEGES DO MINERS' CHILDREN HAVE IN THESE INSTITUTIONS?

..... THEY PAY SUB-ECONOMIC FEES

.....

.....