WHAT IS THE IMPACT OF LOCAL LEGISLATION ON THE ADOPTION OF SHARE SCHEMES FOR INVESTMENT IN FOREIGN EQUITY? PARTICULAR REFERENCE TO THE BP GROUP SHARE SCHEME IN ZAMBIA.

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DEDICATION

This paper is dedicated to my dear late beloved **MOTHER**. Mum, you were the best thing that the good Lord could bless me with. It is not often that this is said, but mum I truly miss your motherly tenderness, a thing that my brothers, sister and I have continued to miss and genuinely lack since the day that the Almighty God took you away from us. Of course it was God's wish, after all what can we do where His will is concerned. I only ask Him to continue blessing our family so that your departure may not be the end to everything but the source of inspiration, direction, responsibility and love. I wish you were here around to see this happen. This paper is also dedicated to my sister and brothers, DANIEL, DAVIES, BENJAMIN, CHRISSY and ZENAIDA. You guys are the best bunch of friends that the Lord our God has blessed me with. Finally, this paper will be incomplete if mention is not made to my Grand mum, ZENAIDA BANDA. I thank you for all the good things you have been doing to us. Indeed you have continued to be our second mother since the departure of our mum.

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ABSTRACT

Share allotment to would be subscribers, or in short shareholders, is one of the majo sources of capital for most companies limited by shares as well as companies limited b guarantee. It is, however, not just a one sided gain as it also benefits the shareholder themselves since it is a source of empowerment in terms of acquisition of rights due to subscriber, which include, inter alia, participation in the distribution of capital, votin right and dividends. This is the position that an employee who subscribes to a shar option scheme, a scheme whereby the employer gives the employee the right to subscrib to the companies shares, acquires. However, the share option scheme, though seemingly good development as far as empowerment of Zambian employees are concerned, it is source of concern because some of the companies that have been listed on the stoc market (Lusaka Stock Exchange) by adopting share option schemes for their employee are largely multinational corporations that may sometimes not even be subject to the law of the land as they were incorporated elsewhere other than in Zambia. Therefore, th impact of local laws on the operation of share schemes that these large companies hav adopted becomes a complicated one. This is more especially so when some of th beneficiaries those that are intended in these share schemes are Zambian employees Hence the urgent need to undertake a substantial study concerning the impact of loca legislation on the adoption of the share schemes that are designed by the foreign investor in Zambia through savings of employees for investment in their foreign equity or capital Particular reference shall be made to the operation of the BP Group Share Scheme in Zambia.

ABSTRACT

Share allotment to would be subscribers, or in short shareholders, is one of the major sources of capital for most companies limited by shares as well as companies limited by guarantee. It is, however, not just a one sided gain as it also benefits the shareholders themselves since it is a source of empowerment in terms of acquisition of rights due to a subscriber, which include, inter alia, participation in the distribution of capital, voting right and dividends. This is the position that an employee who subscribes to a share option scheme, a scheme whereby the employer gives the employee the right to subscribe to the companies shares, acquires. However, the share option scheme, though seemingly a good development as far as empowerment of Zambian employees are concerned, it is a source of concern because some of the companies that have been listed on the stock market (Lusaka Stock Exchange) by adopting share option schemes for their employees, are largely multinational corporations that may sometimes not even be subject to the laws of the land as they were incorporated elsewhere other than in Zambia. Therefore, the impact of local laws on the operation of share schemes that these large companies have adopted becomes a complicated one. This is more especially so when some of the beneficiaries those that are intended in these share schemes are Zambian employees. Hence the urgent need to undertake a substantial study concerning the impact of local legislation on the adoption of the share schemes that are designed by the foreign investors in Zambia through savings of employees for investment in their foreign equity or capital. Particular reference shall be made to the operation of the BP Group Share Scheme in Zambia.

INTRODUCTION

The issue of share allotment by companies as well as acquisition of company shares, though seemingly not so old in Zambia, has always created a centre stage in the corporate world in many developed economies, particularly Europe and the United States.

With the privatisation of state owned companies and emerging capital markets acquisition of company shares especially through share option schemes designed by employers and intended for employees, remains a great challenge to the legal fraternity. For example, Chilanga Cement Plc was privatised in 1994 and upon listing its shares on the stock market, Lafarge, a French owned company through the Commonwealth Development Corporation, purchased majority of the shares in Chilanga.[1]

Still other entities, both local and multinational corporations such as (Mopani Copper Mines Plc, Copperbelt Energy Corporation and BP Zambia Plc) decided to allot their shares to local Zambian employees, thus, giving the employees an option to purchase them. This is the advent of share schemes by foreign employers in Zambia that are specifically designated for local employees.

The question of whether Zambia, as a nation and in particular, the shareholders in the various listed companies, are ready to accommodate the idea of a stock exchange with the local legislation influencing operation is a complicated and pertinent. It cannot be taken lightly, especially that some of the companies that have recently been listed on the stock market (Lusaka Stock Exchange) are large multinational corporations that, upon being so listed, are subject to local legislation. The impact of local laws on the operation of share schemes that these large companies have adopted becomes a complicated one more

[1] Mwenda, K.K. 2000. The Dynamics of Market Integration: Africa Stock Exchanges in the New Millennium. USA: Brown Walker Press(p.67)

especially when some of the beneficiaries that are intended in these share schemes are Zambian employees.

Among the listed companies, BP Zambia Plc has made available to its employees the option to acquire its shares. It is intended that these employees will exercise this option to acquire shares through designated nominees acting under a trust arrangement or "schemes" as they are called.

Hence there is need to evaluate the efficacy or legality of such schemes as well as the legal framework on the adoption of share schemes through savings of employees for investments in foreign equity, as some of these companies B.P. Group inclusive, have their equity or financial capital that is controlled from head office which is situated abroad. Put simply, their financial capital is foreign equity. Therefore, when employees subscribe to B.P. Zambia Plc's share capital by paying up for the allotted shares, these shares are intended not only to finance the operations of the local branch but also ultimately finance the equity capital of the parent company, which is the B.P. Group International.

It is against this background that the paper is set to critically analyse the impact of Zambian legislation on the adoption of share schemes through savings of employees for investment in foreign equity, with particular reference to the B.P. Group Share Scheme in Zambia.

The paper is divided into five chapters. Chapter One will outline the definition of a share and a stock market as well as establish the historical development of a stock market in Zambia.

Chapter Two will analyse the operation of a share scheme in general and the status of a subsidiary company in Zambia with particular reference to the B.P. Group Share Scheme especially when some of the beneficiaries that are intended in these share schemes are Zambian employees.

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Chapter Two will analyse the operation of a share scheme in general and the status of a subsidiary company in Zambia with particular reference to the B.P. Group Share Scheme in Zambia. Chapter Three will examine the justification for asking shareholders to pay-up for their shares. In other words, it will examine the theories that explain the justification for shareholder obligations to pay – up shares, and how a trust is created. Chapter Four examines the relevant Zambian legislation on the subject, that is to say, the legality as well as the impact of local laws on the share scheme in general. It will also discuss the legality of trust in Zambia and if not legal, the reason as to why this is so. Lastly, Chapter Five will give recommendations and conclusion. It is hoped that the end of this paper will have attained its main objective of analysing the legality as well as the impact of local laws on the adoption of share schemes through savings of employees for investment in foreign equity. It is also hoped that the recommendations that will be given at the end of this paper will help in the development of a legal system that upholds the interests of the nation in general and Zambian employees in particular and safeguard against the rigours of foreign equity financing by local share subscribers.

CHAPTER ONE

1.1. THE DEFINITION OF A SHARE AND A STOCK MARKET OR STOCK EXCHANGE

According to..........a share is defined as:

"The interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se..."[1]

It is evident from the above definition that whereas a share, as an interest entitles a shareholder to a number of rights such as the right to way of dividends, a share attracts liability on the unpaid share capital of the company in the event that the company goes into liquidation.[2] These rights and obligations represent some of the contractual relationships between the shareholders inter se and between the shareholders and the company. As Ashbury J., put it in the Hickman case:

"An outsider to whom rights purport to be given by the articles in the capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles, treating them as contracts between himself and the company, to enforce those rights."[3]

[1] Steel Brother and Company [1901] 1 CH 279

[2] Mwenda K.K. 2000. Contemporary Issues in Corporate Finance and Investment Law. Washington: Penn Press

[3] [1915] 1 CH 881 at 897

On the other hand, a stock market is simply a market place for people to buy and sell shares. It is defined as:

"*A market for the purchase and sale of shares thereby providing constant liquidity for companies listed on the stock exchange.*"[4]

The Zambian Securities Act[5] defines a securities market as a place where information pertaining to such transactions is supplied. However, the same Act defines a securities exchange (or stock market) as only

An exchange established and separated by a company listed to do so under the Act. Elsewhere, a stock market has been defined as:

"*An organised market for dealings in negotiable securities issued by and for the financing of governments, municipalities, public bodies, and business corporations formed under the law of the countries in which they are incorporated.*"[6]

Such a market exists in every important financial centre. A stock exchange has been defined as:

"*An organised market for trading in stocks and bonds, which is only open to members (brokers) who conduct trade for customers on commission.*"[7]

Another way of looking at the stock exchange is that it is an exchange in securities, which plays an important role in an economy by facilitating the investment of funds

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[4] Yikoma, S.M. Stock Exchange: What in entails. Source Magazine. Times Printpack. Lusaka. 2002

[5] Act of 1993, schedule 1, Para 7

[6] Mwenda, K.K. 2000. The Dynamics of Market Integration: African Stock Exchanges in the New Millennium. Washington DC: Brown Walker Press

[7] Collins Family Encyclopedia. 1981London and Glasgow: Collins(p. 123)

and the subsequent liquidation of such investments. Generally, the necessity to develop stock markets arose primarily to meet two demands. According to Briston, the first reason was due to the fact that the increased issue of securities of a long term or permanent nature require a market for the purchase and sale of these securities, so that their holders could liquidate their investments in the short term.[8] Secondly, the expansion of industry during the nineteenth century necessitated the discovery of new sources of finance. One of the main sources was the stock exchange. In view of the foregoing some have commented that, in summary, the stock exchange plays two vital and inter-linked roles within a country's economy; these are to enable government and industry to raise capital with comparative ease and to provide a secondary market where investors can sell and where prospective investors can buy.[9]

1.2. General Reasons For Listing A Company

The following account of some of the major reasons why it is desirable to list a company on any stock exchange will be of a very general nature and quite brief. Initially, it is important to note that the choice by a company of its capital structure is influenced not only by its financial policy to maximise shareholder's wealth but also by imperfect market conditions. It is these same imperfect conditions that inevitably lead to most companies to want to list their shares on the stock exchange and they are influenced by the following reasons;

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[8]Briston, R.J.1985. The Stock Exchange and Investment Analysis. London: George Allen and Unwin Ltd(p. 35)

[9] Stanley, N.F. 1986. The Stock Market: A Guide for the Private Investors. Cambridge: Woodhead Faulkner (p. 16)

General Reasons

Generally, the issue of shares on a stock market is one of the most ideal methods of converting an individual's savings into capital investment for industry. By pooling risks and rewards among a number of investors, stock markets allow companies to raise capital on better terms than would be available from single investors.[10]

A. Raising Capital

The major reason why a company would wish to spread its capital base and list on a stock exchange is because a company both can raise new equity capital at the time of floatation and subsequent to the floatation, by issuing shares for cash or as consideration in the acquisitions.[11]

B. Reduction of Reliance on Debt Financing

Long-term financial stability can be achieved from the use of equity capital while reducing on debt financing.[12] Also, equity capital provides the best alternative when the financing avenues such as debentures are no longer accessible.

C. Marketability

Stock markets provide mechanism for the valuation and trade of securities. This is advantageous to companies and their shareholders to unlock some of their cash by selling off part of their investment in the business. This is desirable because the existing shareholders are able to value any residual shareholdings in the company, and secondly, shares which can easily be traded and for which a market valuation can be obtained are

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[10] London Stock Exchange: Going Public. Internal Stock Exchange. London. 1992. (p.1)

[11] London Stock Exchange: Going Public. Internal Stock Exchange. London. . 1992 (p.1)

[12] Nonde Chisanga Isaac. 2002. The Lusaka Stock Exchange: Benefits and Constraints of Listing a Company on the Lusaka Stock Exchange. A dissertation Submitted to the Faculty of Law of the University of Zambia, partial fulfillment of the requirements of Bachelor Laws Degree (p.7)

often more acceptable for loans.[13] The latter part explains how marketable a company would be to a venture capitalist or a debt-financing house, if the company had shares which could easily be traded and for which a market valuation could be obtained.

D. Prestige

Going public enhances a company's profile and the shareholding basis is broadened. Generally, a statutory framework for regulating public distribution of securities provides some investor confidence, making investors feel that they are protected from market abuses, such as inside dealings and price manipulation. Thus, this form of investor protection could operate as an incentive to attracting more debt finance to companies that have listed securities.

2.1. HISTORICAL BACKGROUND TO THE ESTABLISHMENT OF THE LUSAKA STOCK EXCHANGE

The Lusaka Stock Exchange (LuSE) was established with preparatory technical assistance from the International Finance Corporation (IFC) and the World Bank in 1993.The Securities Act Number 36 of 1993 was given Presidential Assent on 8th August, 1993. The Act came into force on 17th December, 1993. This paved way for the LuSE to begin operations on 21st February, 1996. The official opening of the LuSE took place on 27th April, 1995 when the then President of the Republic of Zambia, Mr F.TJ. Chiluba officially opened the stock exchange.

[13] Ibid (p.7)

It is important to note that in Zambia, the political economy has greatly influenced the development of the law on public distribution of securities. The nation has witnessed different political and economic developments that have impacted greatly on corporate and securities laws. The first phase is the political history of Zambia that is right from independence in 1964 to early 1973 and this phase essentially accommodated the capitalist institutions and structures of the colonial masters. However, between 1969 and early 1970, the UNIP Government abandoned this strategy and instead adopted a socialist strategy in which Zambia experienced the nationalisation of many privately owned mines and business entities. In 1968 and 1969, respectively, the Mulungushi and Matero Economic Reforms were introduced as part of this re- organisation strategy.

The third phase in the political and economic history of Zambia was witnessed in 1991 when there was an introduction of a capitalist development strategy by the MMD Government, which saw the privatisation of state owned enterprises.

The MMD Government pursued its ambitious restructuring programme as a way to impress its international financiers, that is the Word Bank and the International Monetary Fund (IMF), which it was making efforts to ensure that the country paid off its external debts.[14] In the programme to attract foreign investment to Zambia, the government enacted laws that would accommodate its ideological inclinations. For instance, this resulted in the enactment of the Privatisation Act of 1998. From here onwards, it was clear that the Zambian government had embarked on an ambitious programme to privatise state controlled companies and to divest the state of its

[14] Penza, Ronald, 18th June, 1992 in Musambachime, M.C. Privatisation of State Owned Enterprises in Zambia: 1992- 1996- A Model of Africa? Unpublished Seminar Paper presented to the Library Department of the University of Namibia. 1997

shareholdings in these companies or parastatals.[15] This formed the basis of the establishment of LuSE. Thus, there is evidence to show that securities traded in the luSE started and continued with the privatisation of state- owned enterprises.

[15] The Technical Committee on Privatisation in Zambia. Privatisation Programmes in Zambia's Strategy and Designs. Ministry of Commerce. Lusaka. 1992. (p.4)

CHAPTERTWO

2.1. THE OPERATION OF THE SHARE SCHEME IN GENERAL- BP GROUP SHARE SCHEME IN PARTICULAR AS WELL AS THE STATUS OF A SUBSIDIARY COMPANY IN ZAMBIA

In Zambia, the bulk of the law governing payment of shares is found in the Companies Act Number 26 of 1994. Many companies in Zambia have adopted the standard articles of association in Schedule 1 of the Companies Act Number 26 of 1994 – These articles – include articles government the governing the payment of shares. However, these standard articles do not state that the issued shares must be paid up when the allotment is made.

Regular 15 of the standard articles simply permits company directors to accept partial or full payment from an allottee before a call is made on the unpaid amount. This simply indicates that when shares are allotted the directors can decide to pay up shares immediately or in future. However, Regulation 9 of Schedule 1 to the Companies Act, Act Number 26 of 1994 states that when a call is made on the un-paid up share capital the allottee must pay up.

Under Regulation 17, the company directors will be required to be given what could be considered as the final notice, calling on the allottee to pay up the shares and to add interest to that. The same regulation stipulates that the penalty for failure to take heed of the notice which penalty is forfeiture of the shares to the company. The company could then re-issue the shares to another person.

In the same standard articles under the Act, it is also provided that during the period when the call for payment has not been made, the allotting company has a first and paramount lien in every share that has not been fully paid up. This lien extends to dividends payable in respect of the issued, but not paid up share capital.

The major weakness, however of these regulations is that there is no obligation to adopt the standard articles of association which are contained in Schedule 1 of the Act. They can be modified or replaced altogether by other contractual rules.

Part IV of the Companies Act, Act Number 26 of 1994, Chapter 388 of the laws of Zambia, is entitled shares and share capital. It defines a company as a company with share capital.

Section 57 of the Act stipulates that shares or other interests of a member in a company shall be personal estate and movable property, transferable by written transfer in a manner provided by the articles of the company or by this Act. A share is therefore regarded as personal estate of the subscriber or shareholder and is designated as his or her movable property.

As already noted, the articles of a company may provide for the issue of shares and these are redeemed or are liable to be redeemed at the option of the company and the shareholder or either the company or the shareholder.

The present discussion in issue concerns the BP Group Share Scheme. In other words, BP Zambia Plc, through a nominee, Cavmont Stock Brokers Ltd, which is a member of Lusaka Stock Exchange, has listed a number of shares on the stock market. Some of these shares have been made available to would be eligible employees. It is this status of affairs that is set to form the basis of this legal presentation.

2.2. BACKGROUND: OPERATION OF THE BP GROUP SHARE SCHEME

The basic idea behind the BP Group Share Scheme was to provide eligible BP Zambia employees an opportunity to acquire shares in the BP Group Company, through a designated local nominee. This is a very welcome development as it helps o empower the local people with the necessary source of income.

Section 2 of the Articles of Association of BP Zambia Plc, the Company's Ordinance (Public Company), 29th October 1996, defines the employee's share scheme as any scheme for encouraging or facilitating the holding of shares in the company by or for the benefit of the bonafide or former employees of the Company. This is the category of eligible employees who are entitled to the share scheme.

The amount of issued share capital that the employees are liable to pay- up as far as allotment of shares is concerned is the 500 million ordinary shares, which forms almost half of the authorised share capital of the company. [16]

[16]Section 3 of the Articles of Association of BP Zambia Plc, Company's Ordinance (Public Company), 29th October 1996

The offer would normally specify in writing the subscription price (in pound sterling) and the Kwacha equivalent thereof. It would also specify the minimum and maximum employee contribution. For example, from the data collected through primary source from the BP (Zambia) Plc head office one, Mr. Gilliot Mudenda, an employee purchased, on 4th June 2002 a total number of two shares at the minimum price of £5.6135 per share and was requested to be contributing a minimum of US $0.25 for each share every quarter of the year.[20] However, the quoting of shares in foreign currency, that is pound sterling and dollar has a negative effect on the Zambian economy because any devaluation of the local currency would adversely affect the net contribution of each employee in that the net Kwacha element of each employee's contribution would increase, thereby reducing that employee's take home pay.

In synopsis, eligible employees are allowed to buy shares in BP Group Company through their local trustees, Cavmont Stock Broker Ltd. Full time employees who at the offer data or any earlier data as determined by BP Zambia Board of Directors have completed at least 12 months of normal retirement and have not received a notice of termination of employment.

SAYE Scheme

Under the SAYE Scheme the acquisition of the shares would only be effected after a 3 year savings period by eligible BP Zambia employees.[21] Shares will be acquired by the trust on behalf of each employee in the trust would in turn receive dividend payments and bonus issues on behalf of the employees.

[20] The BP Share Plans Trustees Limited. Reference No. C0050001148/BPP

[21] BP Share Plans Trustees Ltd. Reference No. C005000U

Each employee would be required to save between 5 and 250 pounds sterling.[22]

The next chapter will determine how a trust arrangement is created and then analyse it together with the share scheme, which has been outlined above.

[22] Ibid

CHAPTER THREE

3.1. HOW THE TRUST IS CREATED

Many attempts have been made to define a trust, but none of them has been wholly successful. Therefore, it is better and easier to describe than to define a trust.

According to **Jill E. Martin**, a trust is a relationship recognised by equity which arises where property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other person called **certuis que** trust or **beneficiaries.**[23] The interests of the beneficiaries' will normally be laid down in the instrument creating the trust, but may be implied or imposed by law.[24] The beneficiaries interest is proprietary in the sense that is can be bought and sold, given away or disposed *of by will. However, it will cease to exist if the legal estate in the property comes into* the hands of a bonafide purchaser for value without notice of the beneficial interest.

In the case of **Pilcher v Rawlins**[25], Rawlins was the fee simple owner of land. He conveyed it by way of mortgage to the trustees of Pilcher's settlement as security for loan. Later the surviving trustee of the settlement improperly reconveyed the land to Rawlins although the loan was not fully repaid. Rawlins later conveyed the legal estate to other mortgages, Rawlins making title without disclosing the conveyance of to the trustees of the Pilcher settlement and re-conveyance to him. He thus appeared to be an unencumbered owner of fee simple. The beneficiaries under the settlement claimed that the mortgages took subject to their equitable interest. The mortgages claimed to be

23 Hanbury and Mandsley Modern Equity. 1989. 13th Edition. London

24 Ibid (1.46)

25 [1872], LR. 7Ch. App.259

purchasers of the legal estate for value without notice. There was no way in which they could have discovered that the land had been conveyed to the trustees of the settlement and had become subject to the trusts, because Rawlins' title appeared to be perfect when he disclosed only the deeds by which the land was first conveyed to him. As we have seen, the court decided that the test for constructive notice was whether the mortgagees had made all reasonable inquiries, and concluded that they had. They therefore took free of the trust.

If a transaction is not one under which a trust will arise by operation of law, it will give rise to a trust only if the parties intend that it should do so[26]. The onus of proving this intention rests upon those who seek to establish the trust, but in one case the burden is shifted by the existence of a presumption arises when a person purchases property in the name of another, when, for example, on a sale of land, the purchase money is paid by someone other than the person to whom the legal estate is conveyed[27]. In such a case the court will presume that the legal estate is intended to be held on trust for the person who paid the money. However, like most presumptions, it may, of course, be rebutted by evidence showing that the transaction was intended as a gift.

Moreover, it will not arise at all if the person to whom the legal estate is conveyed is the wife (but not the husband) or the child of him who pays the purchase money, or is one to whom he stands in **loco parentis**[28].

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[26] Warmington Crispin L. (ed)., 1950. Stephen's Commentaries on the Law of England. 21st Edition. Volume 1. London: Butterworths and Co. (Publishers) Ltd (p.440)

[27] Ibid (p.441)

[28] Ibid (p.441)

Secondly, a trust can be created by operation of law. Thus, law, independently of the intention of parties, may impose it. It is for instance general rule of equity that a trustee may make no profit out of his trust, and any benefit or advantage that accrues to the trustee will be considered as part of trust property[29].

3.2. WHAT CAN BE HELD UPON TRUST

The subject matter of the trust must be some form of property[30]. A trust cannot be treated unless there is trust property of such a character that it is proper subject of a trust. Certain interests, which a man has, are not property and cannot therefore be made the subject of a trust. For example, interest in freedom from harmful bodily contact is a legally protected interest but is not property and cannot be disposed of as such.

The conception of what property, of what makes a person's estate, of what interests he can transfer to another interviews or by testamentary disposition, whether absolutely or in trust, is undoubtedly an elastic conception, and has expanded through the years. In a promoting society, a man's property includes his interest in tangible objects, his chattels and his land. In a more refined society the notion of property is extended to include interests in intangible things. Thus is includes claims against others, chooses in action, interests in intangible things like the food will of a business and trade secrets, which are

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[29] Warmington Crispin L., (ed) 1950. **Stephen's Commentaries on the Law of England**. 21stEditonVolume 1. London: Butterworths and Co. (Publishers) Ltd (p.440)

[30] Martin Jill EW., **Hanbury and Mandsley Modern Equity**. 13th Edition. London: Sweet and Maxwell (p. 114)

treated as business interests. These interests are protected against persons who acquire them by fraud or breach of a confidential or fiduciary relation.

It has also been held that membership in a board of trade or a seat on a stock exchange may be held in trust, even in a jurisdiction in which creditors cannot reach it[31]. Thus, a seat on a stock exchange or other security exchange, or on a commodity exchange or board of trade, may be held in trust, unless there is something in the rules of exchange, which prevents such a separation of the legal and beneficial interests[32].

The interest of the owner of a seat is a property interest, and as such can be transferred by him, either absolutely or in trust, and is the subject to the claims of his creditor; but the character of his interest is subject to the rules of the exchange[33]. In **Matter of Hearns**[34], a seat on the New York stock exchange was bought with the partnership money for one of the partners. It was agreed that on his death the seat should be sold and the proceeds paid to surviving partner. The court held that the agreement was valid.

3.3. CREATION OF TRUST UNDER THE BP GROUP SHARE SCHEME

Under the BP Group Company, the trust is created in two respects. These are with regard to the three years savings period, and with regard to share ownership. The first instance falls under the Save as You Earn (SAYE) Scheme. Under the rules of the SAYE Scheme each employee can at any time close his or her savings account with the following consequences. Firstly, the closure of the account within twelve (12) months of savings

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[31] Scott, Austin Wakeman. 1967. **Law of Trusts**. 3rd Edition. Boston: Little, Brown and Company (p.680)

[32] Scott, Austin Wakeman. 1967. **Law of Trusts**. 3rd Edition. Boston: Little, Brown and Company (p.680)

[33] Ibid (p.705

[34] 214 N. Y. 426, 108. N.E. 816 (1915)

for share acquisition entails that there will be no interest paid to the employee[35]. Secondly, the closure of the savings account after twelve (12) months but before three (3) year savings period ends means that only 3% interest will be paid to the employee[36]. Lastly, the consequence of the closure of the savings account after three (3) year savings period results in 5.2% interest being paid to the employee.

With regard to the share ownership, which is one of the two ways in which the trust is created, the trust is so created either after the employee has exercised his or her option to acquire shares at the end of the three year savings period or under the participating share scheme[37]. The question that may arise is whether these trusts is created by operation of the law or by the intention of the parties, which are two ways in which a trust may be created. If it does not fall within these two ways of creating a trust, then it is prima facie not a trust.

3.4. HOW THE BP GROUP SHARE SCHEME IS MANAGED IN ZAMBIA

In light of the above, it is evident that there are at least two possible options for the management of the BP Group Share Scheme in Zambia. These are where the trustee is based in the UK, and where the trustee is based in Zambia.

In the case of the trustee being based in the United Kingdom each employee opens an account with Lloyds Bank Plc through a United Kingdom based nominee[38]. This

[35] **The BP Share Plans Trustees Limited**. References No. C00500011 48/BPP

[36] Ibid

[37] **The BP Share Plans Trustees Limited**. References No. C00500011

[38] BP Zambia 2002 – Annual Report (p.20)

arrangement, is subject to the UK trust law since the nominee is UK based along with the account, even through the account holder is Zambian. The legal position may be different if the nominee is a local entity and/or the funds are to be held in a local bank. The only real impact with regard to Zambian law will be in relation to taxation of earnings. This is because it would be subject to tax on the basis of source of income[39].

Secondly, where the trustee is based in Zambia, and in the event that the BP Southern Africa Trust Deed is used as the model for Zambia, that is the trustee is located in Zambia so that both savings and shares are held through the local trustee, then the local laws may impact on the scheme. Nevertheless, a trust is illegal in Zambia.

In fact, the section 10 of the Articles of Association of BP Zambia Plc, The Companies Ordinance (Public Company), 29th October, 1996 does not recognise a trust. It provides that:

> "*Except as required by law, no notice of any trust, expressed; implied or constructive, shall be entered on the company's register or be receivable by its registrar. The company shall not be bound by or required to recognise, even when having notice thereof, any equitably, contingent, future or partial interest in any share or any right whatsoever in respect of any share other than an absolute right to the entirely thereof in the registered holder*"

In light of this, the question that may be asked is whether the trust arrangement under which the BP Group Share Scheme and in particular the BP Southern Africa Deed shall

[39] Income Tax Act, Cap 323 of the Laws of Zambia, Section 14 (a)

operate is illegal or not. It can safely be concluded that it is illegal because, firstly, trusts are unlawful I Zambia, and secondly, the act is ultra vires the articles of association of the BP Zambia Plc.

However, in reality the second option, that is the management of the BP Group Share Scheme where the trustee is based in Zambia. Cavmont stockbrokers limited, which is a member of the Lusaka, stock exchange and is a local trustee to the one that holds both shares and savings in trust for employees.

3.5. ANALYSIS OF THE BP GROUP SHARE SCHEME VIS AVIS TRUST ARRANGEMENT

From the outset, it is important to note that a trust is illegal in Zambia. This is because the Trust Restriction Act is a rather outdated piece of registration. This particular Act was designed to "restrict the creation of settlements, trusts and future interests. The Act effectively prohibits the limitation of any property in trust for another but sets out **vire** exceptions to this general prohibition including the following:

a) a trust at the will of the beneficiary. It is assumed that the scheme falls under this

b) death

The paper will now in the next chapter discuss the legal implications of operating the BP Group Share Scheme in Zambia, with particular reference to relevant local legislation.

CHAPTER FOUR

4.1. ANALYSIS OF ZAMBIA'S LEGAL FRAMEWORK PERTAINING TO SHARES SCHEMES THROUGH SAVINGS EMPLOYEES, PARTICULARLY THE BP GROUP SHARE SCHEME IN ZAMBIA - LEGALITY OF THE PRACITCE

In assessing the legal implications of operating the BP Group Share Scheme in Zambia, the following legislation will be reviewed and analysed in reference to the scheme:

(a) Companies Act, Chapter 388 of the Laws of Zambia

(b) Securities Act, Chapter 354 of the Laws of Zambia

(c) Employment Act, Chapter 354 of the Laws of Zambia

(d) Income Tax Act, Chapter 323 of the Laws of Zambia

(e) Value Added Tax Act, Chapter 331 of the Laws of Zambia

(f) Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

(g) Property Transfer Act, Chapter 340 of the Laws of Zambia

(h) Pension Scheme Regulation Act, Act Number 28 of 1996

(i) Exchange Control Act Chapter of the Laws of Zambia

(j) Trust Restrictions Act, Chapter 63 of the Laws of Zambia (the Act has since been repealed).

COMPANIES ACT, CHAPTER 388 OF THE LAWS OF ZAMBIA

The Companies Act has little or no significant impact on the Scheme due to the fact that the shares being acquired by the employees are in foreign company, which is the BP Group International and not BP Zambia Plc. The BP Group Share Scheme was designed and is being operated by the BP Group International, which is the parent company. The jurisdiction and law that governs the acquisition and transfer of shares is therefore the United Kingdom Company Law.

Therefore the Zambian Company Act has little or no impact at all on the operation of the Share Scheme in Zambia.

SECURITIES ACT, CHAPTER 354 OF THE LAWS OF ZAMBIA

Section 32 of the Securities Act requires that all public companies whose shares are publicly traded (inter alia, companies that have more than 50 shareholders) to file a registration statement with the Securities and Exchange Commission in the prescribed form. The effect of this is that BP Zambia Plc is required under the Securities Act, to file a registration statement at the time of offer of shares to employees if that offer will lead to an increase in shareholders over the threshold of 50 members. If there are already more than 50 shareholders in BP Zambia is in default of Section 32 and liable to a fine of K20, 000, 000 (Twenty Million Kwacha) as provided under section 33 of the Act.

EMPLOYMENT ACT, CHAPTER 268 OF THE LAWS OF ZAMBIA

Under existing employment law, an employer has no obligation to establish any type of share scheme for the benefit of its employees. This is because there is no legal provision in the Act to that extent. There are therefore no employment law considerations to be taken into account. It will be of vital, however, that each employee that elects to participate in the scheme is made to agree to its terms and conditions in writing and these terms and conditions must be explained fully to each employee prior to obtaining his/ her consent.

INCOME TAX ACT, CHAPTER 323 OF THE LAWS OF ZAMBIA

The general rule is that tax is payable on all income. As is the norm in many other jurisdiction, income as a term, is not exhaustively defined under Zambian law. However, the Income Tax Act defines income as including dividends, interest, charges and discounts, emoluments and many others.[26]

With regard to both the Participating Share Scheme and the SAYE Scheme, which were stated above, tax issues require consideration:

- receipt of interest on savings
- the receipt of dividend payments on shares
- the receipt of shares for which no consideration is payable
- capital appreciation on the transfer (or disposal) of shares.

Interest on savings

The interest offered following fulfilment of the requisite savings period is subject to tax in Zambia as interest income. This is taxed at the personal tax rate when combined with all other income received by the person concerned and is based on the principle that all persons resident in Zambia are subject to tax on their income, regardless of the source (the "residence principle").[27]

The issue of whether the savings deduction is made on the employee's gross or net earning may have an impact on the tax applicable and should be considered. As advised below, however, it is possible to obtain exemption from tax for an employee's Savings Scheme.

[26] Section 17 of the Income Tax Act

[27] Section 4 of the Income Tax Act

Dividend payments on shares

Similar to interest income, the payment of dividends will also be subject to tax on the residence principle for the reasons advanced above with regard to interest income.

Free allotment of Shares

The Participation Share Scheme is structured so as to provide a fixed number of additional shares to each participating employee at no cost. If such a grant of shares is deemed to constitute 'income' then income tax will have to be paid by each employee on the value of such additional shares.

The Income Tax Act includes in its definition of 'income' the term "emoluments." Emoluments are defined in the Act as

> *Any salary, wage, overtime or leave pay, commission, fee,*
> *bonus, gratuity, benefit, advantage (whether or not the advantage*
> *is capable of being turned into money or money's worth),*
> *allowance, including inducement allowance, pension or annuity,*
> *paid, given or granted in respect of any employment of office,*
> *whether engaged in or held.*[28]

It is clear from the above that the grant of additional shares could be deemed to constitute an emolument and therefore be considered as taxable income. As explained below, however, an exemption to the taxation of both the Participating Share Scheme and SAYE Scheme can be obtained from the tax authorities.

[28] Section 2 of the Income Tax Act, Cap 323

Capital gains

Zambia taxation laws do not recognise capital gains tax. This means that where a person buys and sells an item of property and makes a profit on the sale and the transaction is a personal rather than a business one, no tax will be paid on the profit received.

Although it is opined that the interest and dividend payable would attract income tax, Section 15 (1) of the INCOME Tax Act exempts from tax *"persons, funds, charities and income declared to be exempt in the Second Schedule to the extent specified therein."*

Rule 5 (1) of the Second Schedule exempts from tax *"any employees' savings scheme or fund, if approved by the Commissioner- General."*

It is therefore recommended that this exemption must be sought from Zambia Revenue Authority (ZRA) as it would increase employees' take home income from the dividends earned. Should ZRA refuse to grant the exemption, it may then be necessary to determine whether the income and dividends as received by the trustee will be treated differently if received directly by the employee.

VALUE ADDED TAX ACT, CAP 331

The trustee may be required to charge VAT on the service provided. The trustee is effectively acting as a fund manager on behalf of either BP Zambia or the BP Zambia employees.

It is important that there is clarity on this issue because if the employees are the client of the trust then the VAT charged will not be recoverable. If BP Zambia is the client then the VAT would be recoverable as input VAT.

LANDS AND DEEDS REGISTRY ACT, CAP 185

Section 10 of the Lands and Deeds Registry Act provides that any deed or instrument declaring a trust 'which is desirable to register' and any document, other than relating to land, either required by any law to be registered and in respect of which no special registry office is indicated or which it is desirable and proper to register shall be registered in Miscellaneous Register.

PROPERTY TRANSFER ACT, CAP 340

Property transfer tax is payable on the transfer of property, i.e. land (including any buildings and unexhausted improvements) and company shares.

The definition of 'property' is restricted to;

(a) land in Zambia, and

(b) *any share issued by a company incorporated in Zambia.*

The Schemes shall not deal with any shares to a company incorporated in Zambia and for this reason they are not caught by the provisions of the Property Transfer Tax Act.

PENSION SCHEME REGULATION ACT, ACT NUMBER 28 OF 1996

The Scheme poses an interpretational challenge with regard to the application of the Pension Scheme Regulation Act. Under this Act, if a scheme is deemed to be governed by it, that scheme will not be allowed to 'invest its assets abroad'.

According to Section 2, the Act applies to any institution or company that establishes or manages a pension scheme. The definition of "pension scheme" is rather vague and does not categorically exclude the envisaged BP Scheme. This notwithstanding, it is my considered opinion that the structure and intention of the BP Scheme excludes it from the application of this Act for at least the following reasons:

Firstly, it is short- term savings plan for employees. Therefore, though it is well-intended programme, meant to empower employees generally with income through dividends as shareholders, it is not a long term programme and can thus not fall in the category of a 'pension scheme'.

Secondly, the intention of the plan is for employees to acquire shares in their employer's holding company at a discount. A pension scheme is meant to cater for old age.

Thirdly, the Scheme can be said to amount to a form of a profit share since dividends are paid from the profits so earned by the company. This is not the case with a pension scheme.

Fourthly, each employee can disengage from the scheme any time, while employee's savings to, say national Pension Scheme Authority is mandatory.

Lastly, the Scheme is not set up as an investment per se but as a way of way encouraging employee savings.

EXCHANGE CONTROL ACT CAP 354

Exchange Control is an important consideration in assessing the viability of the Scheme because each employee's Kwacha savings is likely to be converted into foreign currency for investment in foreign equity.

The Exchange Control Act would in the past, have governed such a transaction. The cessation of application of this Act on 29th January, 1994 makes the concern of exchange control now more an academic than a practical exercise.

It is important to emphasise, however, than any devaluation of the local currency adversely affects net contribution of each employee in that the Kwacha element of each employee's contribution will increase, thereby reducing that employee's take- home pay. Further, should the exchange control be re- introduced (which is not at this stage envisaged), unavailability of, i.e. lack of access to, foreign exchange could adversely impact on the share ownership prospects of the participating employees unless BP Zambia was agreeable as employer to making available the required foreign exchange to maintain the consistency of payment into the fund. The basis for determining the rate of currency conversion would also have to be agreed at the outset.

TRUST RESTRICTIONS ACT, CHAPTER 63 OF THE LAWS OF ZAMBIA

The Trust Restrictions Act, Cap 63, is a rather outdated piece of legislation that was designed to;

Restrict the creation of settlements, trusts and future interests.[29]

The Act had effectively prohibited the limitation of any property in trust for another but had set out nine exceptions to this general prohibition that included a trust terminable at the will of the beneficiary, death, cessation of employment and authorisation of directors. Firstly, under the exception relating to trust terminable at the will of the beneficiary, it is important to note that it is opined that the BP Group Share Scheme would fall. As was

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[29] Zambia Law Journal, Volume 31, 1977

stated in the Legal Opinion on the BP Group Share Scheme by Corpus Globe Legal Practitioners:

> *A careful review of BP Southern Africa Deed, which was used as the blue print for the BP Zambia Trust Deed was undertaken in the light of the Trust Restrictions Act.*[30]

[30] Corpus Globe Advocates, Lusaka. 2002

CHAPTER FIVE

5.1. GENERAL CONCLUSION AND RECOMMENDATIONS

SUMMARY NOTES

In Chapter One, the essay looked at the definition of a share and a stock market or stock exchange. A share was the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se. It is evident from the above definition that whereas a share, as an interest entitles a shareholder to a number of rights such as the right to way of dividends, a share attracts liability on the unpaid share capital of the company in the event that the company goes into liquidation. These rights and obligations represent some of the contractual relationships between the shareholders inter se and between the shareholders and the company. The paper also outlined general reasons for listing a company on the stock market. Firstly, the issue of shares on a stock market is one of the most ideal methods of converting an individual's savings into capital investment for industry. By pooling risks and rewards among a number of investors, stock markets allow companies to raise capital on better terms than would be available from single investors. The second reason relates to raising capital itself. Thus, the major reason why a company would wish to spread its capital base and list on a stock exchange is because a company both can raise new equity capital at the time of floatation and subsequent to the floatation, by issuing shares for cash or as consideration in the acquisitions. Thirdly, it leads to reduction of reliance on debt financing. In other words, long-term financial stability can be achieved from the use of equity capital while reducing on debt financing. Also, equity capital provides the best alternative when the financing avenues such as debentures are no longer accessible.

Stock markets also provide mechanism for the valuation and trade of securities. This is advantageous to companies and their shareholders to unlock some of their cash by selling off part of their investment in the business. Lastly, going public enhances a company's profile and the shareholding basis is broadened. A statutory framework for regulating public distribution of securities provides some investor confidence, making investors feel that they are protected from market abuses, such as inside dealings and price manipulation. Thus, this form of investor protection could operate as an incentive to attracting more debt finance to companies that have listed securities.

The paper also looked at the historical background to the establishment of the Lusaka Stock Exchange. The Lusaka Stock Exchange (LuSE) was established with preparatory technical assistance from the International Finance Corporation (IFC) and the World Bank in 1993.The Securities Act Number 36 of 1993 was given Presidential Assent on 8th August, 1993. The Act came into force on 17th December, 1993. This paved way for the LuSE to begin operations on 21st February, 1996. It is important to note that in Zambia, the political economy has greatly influenced the development of the law on public distribution of securities. The nation has witnessed different political and economic developments that have impacted greatly on corporate and securities laws.

In Chapter Two, the essay looked at the operation of the share scheme in general- BP Group share scheme in particular as well as the status of a subsidiary company in Zambia In Zambia, the bulk of the law governing payment of shares is found in the Companies Act Number 26 of 1994. Many companies in Zambia have adopted the standard articles of association in Schedule 1 of the Companies Act Number 26 of 1994 – These articles – include articles government the governing the payment of shares. However, these standard articles do not state that the issued shares must be paid up when the allotment is made.

The basic idea behind the BP Group Share Scheme was to provide eligible BP Zambia employees an opportunity to acquire shares in the BP Group Company, through a designated local nominee. This is a very welcome development as it helps o empower the local people with the necessary source of income. Section 2 of the Articles of Association of BP Zambia Plc, the Company's Ordinance (Public Company), 29th October 1996, defines the employee's share scheme as any scheme for encouraging or facilitating the holding of shares in the company by or for the benefit of the bonafide or former employees of the Company. This is the category of eligible employees who are entitled to the share scheme.

The amount of issued share capital that the employees are liable to pay- up as far as allotment of shares is concerned is the 500 million ordinary shares, which forms almost half of the authorised share capital of the company. The participating share scheme, according to the BP Zambia Plc's articles of association, is known as the BP Group International Participating Share Scheme. By this scheme, ordinary shares in the BP Zambia Plc are usually purchased on behalf of eligible employees by Cavmont Merchant Bank (Z) Ltd through Cavmont Stock Brokers Ltd, which is a registered nominee under the Lusaka Stock Exchange. Ordinary shares are defined as the ordinary voting shares of

Kwacha Two (K2) each in the capital of the Company. These are the ones that are liable for allotment by employees of the Company.

Chapter Three generally outlined how the trust is created. A trust was defined as the relationship recognised by equity which arises where property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other person called **certuis que** trust or **beneficiaries**. The interests of the beneficiaries' will normally be laid down in the instrument creating the trust, but may be implied or imposed by law. The beneficiaries interest is proprietary in the sense that is can be bought and sold, given away or disposed of by will. However, it will cease to exist if the legal estate in the property comes into the hands of a bonafide purchaser for value without notice of the beneficial interest.

There are two major ways in which a trust can be created. Firstly, it can be created if the parties intend it to be so. The onus of proving this intention rests upon those who seek to establish the trust, but in one case the burden is shifted by the existence of a presumption arises when a person purchases property in the name of another, when, for example, on a sale of land, the purchase money is paid by someone other than the person to whom the legal estate is conveyed. In such a case, the court will presume that the legal estate is intended to be held on trust for the person who paid the money. However, like most presumptions, it may, of course, be rebutted by evidence showing that the transaction was intended as a gift.

Secondly, a trust can be created by operation of law. Thus, law, independently of the intention of parties, may impose it. It is for instance general rule of equity that a trustee may make no profit out of his trust, and any benefit or advantage that accrues to the trustee will be considered as part of trust property.

The subject matter of the trust must be some form of property. A trust cannot be treated unless there is trust property of such a character that it is proper subject of a trust. Certain interests, which a man or woman has, are not property and cannot therefore be made the subject of a trust. For example, interest in freedom from harmful bodily contact is a legally protected interest but is not property and cannot be disposed of as such. In a promoting society, a man's property includes his interest in tangible objects, his chattels and his land. In a more refined society the notion of property is extended to include interests in intangible things. Thus it includes claims against others, chooses in action, interests in intangible things like the food will of a business and trade secrets, which are treated as business interests. These interests are protected against persons who acquire them by fraud or breach of a confidential or fiduciary relation.

It has also been held that membership in a board of trade or a seat on a stock exchange may be held in trust, even in a jurisdiction in which creditors cannot reach it. Thus, a seat on a stock exchange or other security exchange, or on a commodity exchange or board of trade, may be held in trust, unless there is something in the rules of exchange, which prevents such a separation of the legal and beneficial interests.

The interest of the owner of a seat is a property interest, and as such can be transferred by him, either absolutely or in trust, and is the subject to the claims of his creditor; but the character of his interest is subject to the rules of the exchange.

Under the BP Group Company, the trust is created in two respects. These are with regard to the three years savings period, and with regard to share ownership. The first instance falls under the Save as You Earn (SAYE) Scheme. Under the rules of the SAYE Scheme each employee can at any time close his or her savings account with the following consequences. According to the BP Share Plans Trust Limited, the closure of the account within twelve (12) months of savings for share acquisition entails that there will be no interest paid to the employee. Secondly, the closure of the savings account after twelve (12) months but before three (3) year savings period ends means that only 3% interest will be paid to the employee. Lastly, the consequence of the closure of the savings account after three (3) year savings period results in 5.2% interest being paid to the employee. It was safely be concluded that it is illegal because, firstly, trusts are unlawful I Zambia, and secondly, the act is ultra vires the articles of association of the BP Zambia Plc.

With regard to the share ownership, which is one of the two ways in which the trust is created, the trust is so created either after the employee has exercised his or her option to acquire shares at the end of the three year savings period or under the participating share scheme. The question that may arise is whether these trusts are created by operation of the law or by the intention of the parties, which are two ways in which a trust may be created. If it does not fall within these two ways of creating a trust, then it is prima facie not a trust. The chapter also looked at how the Bp Group share scheme is managed in Zambia. It was evident that there are at least two possible options for the management of the BP Group Share Scheme in Zambia. These are where the trustee is based in the UK, and where the trustee is based in Zambia. In the case of the trustee being based in the United Kingdom each employee opens an account with Lloyds Bank Plc through a United Kingdom based nominee. This arrangement, is subject to the UK trust law since the nominee is UK based along with the account, even through the account holder is Zambian. The legal position may be different if the nominee is a local entity and/or the funds are to be held in a local bank. The only real impact with regard to Zambian law will be in relation to taxation of earnings. This is because it would be subject to tax on the basis of source of income. Secondly, where the trustee is based in Zambia, and in the event that the BP Southern Africa Trust Deed is used, as the model for Zambia, that is the trustee is located in Zambia so that both savings and shares are held through the local trustee, then the local laws may impact on the scheme.

Chapter Three also gave an analysis of the Bp Group share scheme vis avis trust arrangement. It was noted that a trust is illegal in Zambia. This is because the Trust Restriction Act is a rather outdated piece of registration. This particular Act was designed to "restrict the creation of settlements, trusts and future interests.

Chapter Four analysed of Zambia's legal framework pertaining to share schemes through savings employees, particularly the BP Group share scheme in Zambia as well as the legality of the practice. In assessing the legal implications of operating the BP Group Share Scheme in Zambia, the following legislation will be reviewed and analysed in reference to the scheme. These are the Companies Act, Chapter 388 of the Laws of Zambia, Securities Act, Chapter 354 of the Laws of Zambia, Employment Act, Chapter 354 of the Laws of Zambia, Income Tax Act, Chapter 323 of the Laws of Zambia, Value Added Tax Act, Chapter 331 of the Laws of Zambia, Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, Property Transfer Act, Chapter 340 of the Laws of Zambia, Pension Scheme Regulation Act, Act Number 28 of 1996, Exchange Control Act Chapter 354 of the Laws of Zambia, Trust Restrictions Act, Chapter 63 of the Laws of Zambia (the Act has since been repealed).

The Companies Act has little or no significant impact on the Scheme due to the fact that the shares being acquired by the employees are in foreign company, which is the BP Group International and not BP Zambia Plc. As for the Securities Act, it requires that all public companies whose shares are publicly traded (inter alia, companies that have more than 50 shareholders) to file a registration statement with the Securities and Exchange Commission in the prescribed form. The effect of this is that BP Zambia Plc is required under the Securities Act, to file a registration statement at the time of offer of shares to employees if that offer will lead to an increase in shareholders over the threshold of 50 members.

In terms of the Income Tax Act, the interest offered following fulfilment of the requisite savings period is subject to tax in Zambia as interest income. This is taxed at the personal tax rate when combined with all other income received by the person concerned and is based on the principle that all persons resident in Zambia are subject to tax on their income, regardless of the source (the “residence principle”). The issue of whether the savings deduction is made on the employee's gross or net earning may have an impact on the tax applicable and should be considered. As advised below, however, it is possible to obtain exemption from tax for an employee's Savings Scheme.

Similar to interest income, the payment of dividends will also be subject to tax on the residence principle for the reasons advanced above with regard to interest income.
The Participation Share Scheme is structured so as to provide a fixed number of additional shares to each participating employee at no cost. If such a grant of shares is deemed to constitute 'income' then income tax will have to be paid by each employee on the value of such additional shares.

Lastly, the paper looked at whether Capital gains would be subject to tax. Zambia taxation laws do not recognise capital gains tax. This means that where a person buys and sells an item of property and makes a profit on the sale and the transaction is a personal rather than a business one, no tax will be paid on the profit received.
Although it was opined that interest and dividends would be subject to tax, they can be exempt from tax. Therefore, it is recommended that this exemption must be sought from Zambia Revenue Authority (ZRA) as it would increase employees' take home income from the dividends earned. Should ZRA refuse to grant the exemption, it may then be necessary to determine whether the income and dividends as received by the trustee will be treated differently if received directly by the employee.

In terms of the impact of the value added tax act, cap 331, the trustee may be required to charge VAT on the service provided. The trustee is effectively acting as a fund manager on behalf of either BP Zambia or the BP Zambia employees. It is important that there is clarity on this issue because if the employees are the client of the trust then the VAT charged will not be recoverable. If BP Zambia is the client then the VAT would be recoverable as input VAT.

According to Section 10 of the Lands and Deeds Registry Act, any deed or instrument declaring a trust 'which is desirable to register' and any document, other than relating to land, either required by any law to be registered and in respect of which no special registry office is indicated or which it is desirable and proper to register shall be registered in Miscellaneous Register.

As regard the Property Transfer Act, Cap 340, Property transfer tax is payable on the transfer of property, i.e. land (including any buildings and unexhausted improvements) and company shares. Property was defined according to the Act as being restricted to land in Zambia, and any share issued by a company incorporated in Zambia. The Schemes shall not deal with any shares to a company incorporated in Zambia and for this reason the provisions of the Property Transfer Tax Act do not catch them.

The Scheme poses an interpretational challenge with regard to the application of the Pension Scheme Regulation Act, Act Number 28 of 1996. Under this Act, if a scheme is deemed to be governed by it, that scheme will not be allowed to 'invest its assets abroad'. According to Section 2, the Act applies to any institution or company that establishes or manages a pension scheme. The definition of "pension scheme" is rather vague and does not categorically exclude the envisaged BP Scheme. This notwithstanding, it is my considered opinion that the structure and intention of the BP Scheme excludes it from the application of this Act for at least the following reasons. Firstly, it is short- term savings plan for employees. Therefore, though it is well-intended programme, meant to empower employees generally with income through dividends as shareholders, it is not a long-term programme and can thus not fall in the category of a 'pension scheme'. Secondly, the intention of the plan is for employees to acquire shares in their employer's holding company at a discount. A pension scheme is meant to cater for old age. Thirdly, the Scheme can be said to amount to a form of a profit share since dividends are paid from the profits so earned by the company. This is not the case with a pension scheme. Fourthly, each employee can disengage from the scheme any time, while employee's savings to, say national Pension Scheme Authority is mandatory. Lastly, the Scheme is not set up as an investment per se but as a way of way encouraging employee savings.

Exchange Control Act is an important consideration in assessing the viability of the Scheme because each employee's Kwacha savings will be converted into foreign currency for investment in foreign equity. The Exchange Control Act would in the past, have governed such a transaction. The cessation of application of this Act on 29th January, 1994 makes the concern of exchange control now more an academic than a practical exercise. It is important to emphasise, however, than any devaluation of the local currency adversely affects net contribution of each employee in that the Kwacha element of each employee's contribution will increase, thereby reducing that employee's take- home pay. Further, should the exchange control be re- introduced (which is not at this stage envisaged), unavailability of, i.e. lack of access to, foreign exchange could adversely impact on the share ownership prospects of the participating employees unless

BP Zambia was agreeable as employer to making available the required foreign exchange to maintain the consistency of payment into the fund. The basis for determining the rate of currency conversion would also have to be agreed at the outset.

The Trust Restrictions Act, Cap 63, is a rather outdated piece of legislation that was designed to restrict the creation of settlements, trusts and future interests. The Act had effectively prohibited the limitation of any property in trust for another but had set out nine exceptions to this general prohibition that included a trust terminable at the will of the beneficiary, death, cessation of employment and authorisation of directors. Firstly, under the exception relating to trust terminable at the will of the beneficiary, it is important to note that it is opined that the BP Group Share Scheme would fall. A careful review of BP Southern Africa Deed, which was used as the blue print for the BP Zambia Trust Deed, showed that it was undertaken in the light of the Trust Restrictions Act.

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Property Transfer Act, Chapter 340 of the Laws of Zambia

Pension Scheme Regulation Act, Act Number 28 of 1996

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Trust Restrictions Act, Chapter 63 of the Laws of Zambia (the Act has since been repealed).

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