

THE UNIVERSITY OF ZAMBIA:

SCHOOL OF LAW:



I RECOMMEND THAT THE OBLIGATORY ESSAY PREPARED UNDER
MY SUPERVISION BY YVONNE CHEMBE,


E N T I T L E D :

THE SECURITY OF TENURE OF EMPLOYMENT OF CHIEF
EXECUTIVES IN PARASTATAL COMPANIES:

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..... 26th June, 1987

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THE SECURITY OF TENURE OF EMPLOYMENT
OF CHIEF EXECUTIVES IN PARASTATAL COMPANIES.

BY:

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OBLIGATORY ~~DISSY~~ **ESSAY**

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIRE-
MENTS FOR THE AWARD OF THE DEGREE OF BACHELOR
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DEDICATED TO MY FATHER, VINCENT B. CHEMBE
WITHOUT WHOSE ATTENTION, LOVE AND GUIDANCE
I WOULD HAVE NEVER COME THIS FAR.

TABLE OF CONTENTS:

ACKNOWLEDGEMENTS.

INTRODUCTION.

1

CHAPTER 1

TYPES OF CONTRACTS OF SERVICE AVAILABLE.

3

CHAPTER 2

THE CONTRACT OF SERVICE FOR CHIEF.
EXECUTIVES IN PARASTATAL COMPANIES.

10

CHAPTER 3

COMPERATIVE ANALYSIS OF SECURITY OF TENURE OF CHIEF
EXECUTIVES IN PARASTATAL COMPANIES AND OTHER CHIEF EXECUTIVES. 22

CHAPTER 4.

CONCLUSION.

32

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INTRODUCTION:

The contract of Service under Chief executives in Parastatal Companies in Zambia Serve has been heavily debated upon. Much of this debate is centred around the question of who has or ought to have the power to appoint and dismiss Chief executives in these Companies. It is sad to note that 25 years after Independence. It is not clear as to what the correct position is on the matter. The Parastatal bodies in issue are those that are incorporated under the provisions of the Companies Act, Chapter 686 of the laws of Zambia. In legal form they are not different from privately owned Companies except that the State holds the whole of majority of the shares in the said Companies.¹

Parastatal Companies are a very important source of revenue for the Government. The role designated for Parastatal Companies is that of instruments of the Government for Public control of the economy. The importance of Parastatal Companies employers, Suppliers and Customers, and the economic and Social implications of their actions make it inevitable that the Government should take a close interest in their strategies.² Because of this interest the Government has applied several methods of control on Parastatal Companies, some of which are questionable in law. It is this interference that has given rise to a lot of problems particularly with regard to the appointment and dismissal of Chief executives. The Government feels that the issues of public

Policy involved are so large and Politically sensitive that in the name of Public interest, it can interfere with the running of these Companies contrary to laid down law. Thus it can be said that the problem of the nature of Government control stems from the Legal nature of these Companies which provides for no external interference at all. All the powers of a Company registered under the Companies Act, are laid down in the Memorandum and Articles of Association of the Company. Therefore what ever is done outside these powers is ultra vires and of no effect whatsoever.³

The purpose of this paper is to examine the contract of Service of Chief executives in Parastatal Companies and to look at whether the laid down procedures for appointment and dismissal are followed in practice, for it is not clear whether Chief Executives serve at the pleasure of the President and as such can be dismissed at his pleasure or whether they serve under master and servant contracts- as servants of the Parastatal Companies. The current practice whereby the President appoints and dismisses Chief executives at Press Conferences seems to suggest that they serve at the Pleasure of the President. However, the fact that the Legal Character of the Parastatal Companies is similar to that of private Companies makes it reasonable to assume that Chief executives are servants of the Companies. Being such an important source of revenue, it is important that Parastatal Companies should run smoothly. Thus Chief Executives should know where they stand. It is the writer's contention that Chief executives in Parastatal Companies have no Security of tenure of employment and yet they performance is very important public function. Like any other employees, they deserve Security of tenure of employment.

CHAPTER ONE:TYPES OF CONTRACTS OF SERVICE AVAILABLE:

There are several ways in which Labour can be engaged. It is usually done through a contract of Service. The type of contract of Service under which employment is served becomes important when the question of the dismissal of an employee comes up. It is the Contract of Service that determines the procedure for termination of employment. It is therefore important for the would be employees to know what type of contract of Service they will serve under.

A person may be engaged under a pure master and servant contract. This entails a number of features peculiar to this form of engagement of Labour. Under this type of contract, the master can dismiss his servant at any time, for any reason or for none.⁴ As such a contract does not carry any element of Public interest, Public office or statutory protection, the master or employer is not restricted by any Legal Principles including the rules of natural Justice when dismissing the Servant. Furthermore where it is found that the employee was wrongfully dismissed, the only remedy he is entitled to are damages. Thus in the case of RIDGE .V BALDWIN⁵ Lord Reid stated in obiter:

" The law regarding master and Servant relation ships is not in doubt. There cannot be specific performance of the contract of service, and the master can terminate the contract with his Servant at any time, for any reason or for none. But if he does so in a manner not warranted by the contract of service he must pay

damages for breach of contract so the question in a pure master and servant does not depend on whether the master has heard his Servant in his own defence; It depends on whether the facts emerging at the trial prove breach of contract."

The contract of Service under a pure master and Servant relationship was also discussed in the Zambian case of DAVIDSON V. NATIONAL AGRICULTURAL MARKETING BOARD.⁶ In this case the plaintiff was a chartered accountant employed by a Parastatal body. He was summarily dismissed without being heard in his own defence. He brought an action against his employers for wrongful dismissal. The Court found that the contract which existed in this case to be that of a pure master and servant one. It held that an employee's right in accordance with the rules of Natural Justice to know what is alleged against him as a reason for his dismissal, and to have the opportunity of being heard in his own defence, and to have the dismissal avoided do not accrue in a case which is under a pure master and servant contract.

The cases cited above show the position in law in cases of dismissal in pure master and servant contracts. The justification for this apparently unfair relationship is that the master and servant contract lies in the field of the common law of contract INTER PARTES.⁷ Here the Principles of Administrative law including the Principles of Natural Justice have no part to play.

Labour can also be engaged through a contract of Service for office holders or Public servants. There is no clear cut definition of an office holder as the Judges in cases in which

he question of who an office holder is could have been discussed have neglected to do so-The definition could have been discussed in cases such as KASEMA V. ATTORNEY GENERAL OR KANGOMBE V. ATTORNEY GENERAL.⁹ However, Kewlatt. J. attempted to define an office holder in the case of Great Western Railway V. Bater.¹⁰ as:

" A Subsisting Permanent, substantive position which had an existence independent from the person who fills it, which goes on and is filled in succession by successive holder."

The General feature of this Category of workers is that they hold office in the Public Service. The form of their tenure of employment has some appearance of Service but they are not at common law to be treated as Servants for Legal purposes. " This is because it is felt that this group of workers deserves protection against dismissal- At common law office holders were considered as having a right of property derived from their offices which was equivalent to that enjoyed by property owners.¹² These property rights entitled them to a hearing before dismissal and reinstatement if they were wrongfully dismissed from office.

These rights were the cause of action in the case of RIDGE V. BALDWIN.¹³ In this case the appellant was dismissed on the ground that he had been negligent in the discharge of his duties as Chief Constable. No specific charge was formulated against him. He appealed against the decision that he was lawfully dismissed. It was held that as the appellant

was not a servant of the respondents, they were bound to observe the rules of Natural Justice when dismissing him by informing him of the charges laid against him and giving him an opportunity of exculpating himself. A statute had classified the Chief Constable as an office holder.

In Zambia the equivalent of office holders are called public officers. Article 138 of the constitution defines a Public officer as a person holding or acting in any public office.¹⁴ The same Article defines Public office as an office of emolument in the Public Service". Thus the Public officers referred to here are mainly Civil Servants. However, it should be noted that not all Civil Servants are Public officer, for by Article 62(2) the President may by statutory instrument declare that an office constituted by him shall not be an office in the Public service.¹⁵ For example although permanent Secretaries perform public functions and are Civil Servants, they are not considered Public officers as they have been excepted under Article 62(2) of the constitution.

In the case of KASEMA V. Attorney General.¹⁶ the Legal effects of the contract of service for public officers were discussed. The plaintiff was a public officer who was dismissed after he had been acquitted of a Criminal charge. He was dismissed contrary to the Public Service Regulations which by regulation 36 provided that a Public officer who had been acquitted of a Criminal charge should not be dismissed for any

charge upon which he had been so acquitted. He brought an action for wrongful dismissal. It was held that although generally Civil Servants served at the pleasure of the President, the Public Service Regulations had excepted the Category within which the plaintiff fell. It had made special provisions for dismissal of some civil servants which were similar to those of an office holder. Moreover it is Public policy that the morale of Public officers should be high; hence the provision of a safe guard against their dismissal without following the laid down procedures. There is need for public officers to be secure in their offices because they are the main work force of the Government.

The other way in which labour can be engaged is under a contract of service at the pleasure of the President. It is debatable whether or not an employee serving at pleasure is engaged under a contract of service as the employee is unable to enforce the contract against the employer. However, the stronger view seems to be that there is a contract of service involved in Service at **pleasure**. At common law an employee serving at pleasure could not bring an action for wrongful dismissal or sue for damages due to him.¹⁷

In the case of REDERAKTIEBOLAGET APPLUTRIE V. R. Rewlatt J. attempted to bring out the rationale behind this seemingly unjust contract of service. He stated that it was not competent to letter executive action which must necessarily be

determined by the needs of the community when the question of dismissal of certain employees came up. He went on to say that the executive should not by contract hamper its freedom of action on matters which concern the welfare of the state. Public servants, according to judge Cullit, are dismissable at the Crown's pleasure because it is in the interest of the community that Ministers for the time being advising the Crown should be able to dispense with the services of their employees if they think it fit or desirable.¹⁹

In Zambia, Ministers and other political appointees such as ambassadors and high Commissioners serve at the pleasure of the President. In the case of CHANDA V. Attorney General,²⁰ the plaintiff was employed in foreign service of the government. He was recalled and detained. Upon his release he was not reemployed. He claimed damages for wrongful termination of employment, arrears of salary and allowances plus gratuity. It was held that although he was in the Public service, the Public Service Regulations which exempt public officer from being dismissed wrongfully without a remedy other than damages, did not apply to him, because he serves at the President's pleasure. Where a person's tenure of employment is at the President's pleasure, no action for wrongful dismissal can lie.

From the above, it can be seen that the contract has been subject to a lot of litigation, and debate. The problem is mainly that both the employers and employees do not seem to know the legal effects of the particular contracts they sign. Chief executives in Parastatal companies in Zambia are part of this confused group.

FOOTNOTES:

1. J.M. Mulwila, "Parastatal Companies and the law in Zambia" Phd, London, 1980.
2. Ibid P.174.
3. E.R. Ivamy, Topham and Ivamy's Company Law, (London) Butterworths, (1978) 56
4. Ridge V. Baldwin (1964) AC 40 Per Lord Reid
5. Ibid P71
6. (1975) 1 A.L.R. Comm 1.
7. Malloch V. Aberdeen Corpn (1971) 1WLR 1294
8. (1972) ZR 185.
9. (1973) ZR 177.
10. (1923) KB 266 at 274
11. R W Rideout, Principles of Labour law (London Sweet and Maxwell 1976) P 12.
12. Rideout Loc. cit P.15.
13. Supra.
14. Chapter one of the laws of Zambia.
15. Ibid.
16. Supra.
17. Rideout, op Cit P 17.
18. (1921) 3KB 500.
19. Ibid per Kewlatt J.
20. (1975) ZR 1.

CHAPTER TWOTHE CONTRACT OF SERVICE FOR CHIEF EXECUTIVES
IN PARASTATAL COMPANIES:BACKGROUND.

A Parastatal has been defined as an institution that is set up by the Government to do business.¹ From the definition, it can be seen that Parastatals are institutions in which the Government has a keen interest. Parastatal Companies in particular were set up so that the Government could have a say in the running of the Nation's economy. It can therefore be said that parastatal companies came up to control the industries that were being nationalised. Thus from the very beginning the Government has kept a very close watch over the running of the Parastatal Companies. Currently Parastatal Companies control about 80% of the country's wealth.²

Since Independence, the President has assumed the power to appoint and dismiss Chief Executives in Parastatal companies. The first Chief executive to be appointed in Indeco was Mr. Sardanis and his appointment was ratified by the board of Directors of Indeco.³ In the beginning those appointed to be Chief executives were usually Permanent Secretaries or held offices which were equivalent to that of Permanent Secretaries.⁴ This was significant because in terms of the provisions of the Constitution, Permanent Secretaries were appointed, reshuffled and dismissed by the President. This led to a system whereby the President could swop Permanent Secretaries with Managing Directors in Parastatal Companies. This practice is still

5
prevalent.

This power of the President to appoint and dismiss Chief Executives in Parastatal Companies meant that the power of the board of Directors had actually been reduced to ratifying appointments and dismissals made by him. Subsequently the appointments and dismissals did not need ratification and the President could remove or appoint Chief Executives without consulting the boards of Directors concerned.

CURRENT POSITION:

Most Parastatal Companies in Zambia are under the Zambia Industrial and Mining Company, (ZIMCO) which is the holding Company. There are two types of Chief executives in ZIMCO. There are General Managers in Charge of subsidiary Companies on one hand, and the executive Directors of the holding Company on the other hand.⁶ By executives director is meant those persons who are internal management and have been given departments to head, such as Dr. Kaunga who is executive director for Corporate planning and administration in ZIMCO.⁷ These Chief executives serve under a contract for a fixed term of three years after which the contract can be renewed for another term. It can be inferred from their contract that Chief executives in ZIMCO serve under a Master and servant contract which can be terminated by either party with notice at any time, for any reason or for none. In the case of Raine Engineering Company Limited V. Baker,⁸ it was held that a contract of Service for a fixed term was only a master and Servant contract. In ZIMCO, three months' notice or three months' salary

in lieu of notice is required before the contract of service for Chief executives can be terminated.

The procedure for the engagement or removal of the two Categories of chief executives differs slightly. Article 94 the articles of Association of ZIMCO vests the power to appoint director in the share-holders in General meeting. Article 96 of the same Articles of Association provides the Company with the power to dismiss any director before the expiration of his period of office. It states:

" The Company may by ordinary resolution remove any director before the expiration of his period of office".

The legal implication of this provision is that the power to dismiss directors is solely vested in the board of directors of the Company.

On the other hand, General Manager are nominated by the board of directors of ZIMCO which submits the list of names of people considered suitable to the President.⁹ The President in turn approves and announces the names of the appointees to the Media. In certain cases, however, the President does not announce the appointments at press Conferences, he merely approves the nominations. The subsidiary Companies of ZIMCO have provisions which empower their boards of directors to appoint and dismiss General Managers. For example Article 83 of one Articles of Association of Zambia National Commercial Bank (ZNCB), makes provision for the appointment and removal of General Managers it provides that:

" The directors may from time to time appoint a General Manager of the business and may remove or discharge any such person and appoint a substitute".

It It should be noted that the Articles of Association vest the powers to appoint and dismiss Chief executives in the directors jointly as a board. And as the Articles of Association constitute a contract among the members, all the regulations thereunder are binding on the members.¹⁰ Thus a single director cannot effectively dismiss a General Manager if the Articles provide that such action can only be taken by the board of directors.

The outline above of the manner of appointment of General Managers and directors shows that the former can be appointed and dismissed by the board of directors of their respective Companies, while executive directors can only be appointed the board of directors of the hold Company ZIMCO. Therefore, legally, the President or the executive arm of Government has no power to appoint or dismiss Chief executives in parastatal Companies. The question that may be posed here therefore is; what is the legal effect of the President's pronouncements at the Press Conferences when he purports to appoint and dismiss Chief executives?

It has been stated that in effect the President does not appoint or dismiss chief executives, he merely recommends to the board of directors as to who should be dismissed and appointed". It is the board of directors which sits and draws the formal letter of appointment or dismissal as the case may be. In

practice, however, a dismissed person is required to leave his office as soon as the President announces that he has been dismissed. Thus even before the board sits the dismissal will be effective. It can be deduced from this that the President's announcements are not mere recommendations but are more or less orders.

The other theory is that the President does in fact dismiss and appoint Chief executives, but only on the recommendations of the board of directors.¹² In other words, the board sits and decides to appoint or dismiss a Chief executive. It then passes this information to the President who will approve and announce the decision in his capacity as the head of ZINCO. However, this theory is not entirely correct as the President does not always follow the recommendations of the board. This was the case when Mr. John Mwila, who was then executive Director of Zambia National Commercial Bank was dismissed.¹³ In this case there were allegations of Corruption against Mr. Mwila. The Anti-Corruption Commission found that the allegations were true. The board of director however, disagreed with the findings of the Commission and held that the allegations were unfounded. As such Mr. Mwila could not be dismissed. The President intervened and insisted that he be dismissed. However, the board of directors chose not to follow the President's desired course of action. The whole board was disbanded and Mr. Mwila was accordingly dismissed.

This incident illustrates how insecure the tenure of service of Chief executives in Zambia is. It seems that under

such contracts, the President can arbitrarily remove any Chief executive without regard to the Provisions of the contract of service, and usually where a Chief executive is removed by the President in such a manner, he does not bring an action against the Company. It has been suggested that this may be because to do so would be tantamount to fighting the State and in a one Party State like ours when you are fighting the State you are the weaker and party.¹⁴ Here Party supremacy seems to supercede corporate Policies. Because of this very few cases reach the Courts. The case of Mr. Mwila thus, shows the glaring insecurity in the tenure of service of Chief executives in Parastatal Companies.

JUSTIFICATION FOR THE PRESIDENT'S POWER TO DISMISS
CHIEF EXECUTIVES IN PARASTATAL COMPANIES.

Three reasons have been given as justification for the President's power to appoint and dismiss Chief executives in Parastatal Companies. The first one is that the President derives his power from the constitution.¹⁵ As President of the Republic, he has wide powers of appointment and dismissal. By Article 132 (1) of the Constitution, the President has powers to appoint Public officers including Permanent Secretaries and the Secretary to Cabinet.¹⁶ These powers are thought to have extended to parastatal Companies, presumably on the ground that the bulk of shares in these Companies are the property of the Company and are held on ~~trust~~ trust by the President on behalf of the Government.

However, it should be noted that the provisions of Article 132 of the constitution cannot be extended to Parastatal Companies because this would mean that the Provisions of the Companies Act, Chapter 686 of the laws of Zambia would be contravened. The Legal effect of the extension of Article 132 would be that the power to appoint and dismiss Chief executives in Parastatal Companies would vest in the President contrary to the provisions of the Companies Act under which the Parastatal Companies are incorporated. Article 73 of Table "A" in the Companies Act. Provides that the directors of a Company may from time to time appoint one or more of their body to the office of Managing Director; In So far as Chief executives in Parastatal Companies are not considered public officers by appointing them, the President usurps the powers of the boards of directors of Parastatal Companies.

It is sometimes argued that the President has power to appoint Chief executives in his capacity as Chairman of ZIMCO and therefore overall head of all parastatal Companies.¹⁷ However, this theory does not agree with concept of Separate legal entity by which each Company is a separate legal entity from its incorporators. Thus the fact that ZIMCO is a holding Company does mean that it has power to interfere with the running of its subsidiaries. It can only exert control through the shareholders meeting.

The other reason that is often cited as Justification for the Presidents power are the recommendations of the Chona Commission.¹⁸

The Chona Commission had recommended that a common service commission be established and be given the mandate to appoint and dismiss Chief executives in Parastatal Companies. However, before the recommendations were approved, the provision that dealt with appointments and dismissals was amended so that this power was given to the President. It should be noted, however, that these recommendations have no force of law although they have been held as the third source for the President's power.

However, the view that the President has power to appoint and dismiss Chief executives seems to be supported by the Statutory functions Act.¹⁹ Section 4 (1) of the Act. provides.

" In relation to any provision other a provision the functions under which are conferred or imposed on an identified person, the President shall either retain the functions conferred or imposed thereby or allocate such functions to some other person".

It is difficult to tell whether it is this power that is being exercised by the President. If it is, then the power is being misused because the law expressly provides that the power to appoint or dismiss Chief executives shall lie in the board of directors.

It can be seen from the arguments above that the sources of the President's power are not clear. It is therefore contended that the legality or validity of appointments and dismissals by the President is questionable because the source of the power is not clear.

THE COURT'S VIEWS ON THE DISMISSAL OF CHIEF
EXECUTIVES OF PARASTATAL COMPANIES BY THE PRESIDENT:

The Zambian Courts have held a Consistent view on the issue of Chief executives by the President. Their unshaken stand is that the power to dismiss Chief executives in Parastatals incorporated under the Companies Act, rests in the board of directors of the Company. Thus in the Case of MWANZA V. National Transport Corporation,²⁰ the court clarified its stand on the question of dismissed of chief executive in Parastatal Companies. In this case the plaintiff was appointed by the President as General Manager of the United Bus Company of Zambia (UBZ), a subsidiary of the defendant, Company. He was dismissed by the Managing Director of the National Transport Corporation who was also Chairman of the board of directors for UBZ. He refused to leave on the ground that he could only be dismissed by the President and the board of directors had no power to dismiss him. It was held by the High Court that the powers of dismissal do not rest in the hands of the President when he makes nominations unless it is specifically stated in the Articles of Association of the Company. High Court Commissioner Mr. Jessy noted that:

"While I do not doubt for a moment that as a matter of practice..... matters are referred to Ministry or to Cabinet office; as a matter of law, it is the board of director which determines the conditions of Service of its employees".²²

The Courts will not hesitate to point out the correct law where a person proves that he was wrongfully dismissed.

In such a case the court will usually award damages. In the case of Mijoni V. Zambia Publishing Company,²³ the plaintiff was removed from his post as Editor-in-Chief by the board of directors on the President's recommendation. He brought an action against the Company for wrongful dismissal. Justice Ernest Sakala, as he then was, held that the board of directors was wrong to dismiss the plaintiff on the strength of the President's letter. The board had failed to prove the allegations levelled against the plaintiff and according to the contract he was entitled to six months salary in lieu of notice. The court ordered the Company to pay the plaintiff damages. In so far as the plaintiff had been dismissed contrary to the provisions of the Articles of Association of the Company, the dismissal was wrongful.

However, it should be pointed out that if the Articles of Associations had provided for the power of appointment and dismissal to lie in the President as well as the board of directors, then the President could effectively exercise the powers. It can safely be stated that in all parastatal Companies, there are no such provisions that give the power of appointing or dismissing Chief executives to the President either in Capacity as Chairman of ZIMCO or as head of State. Of course it is appreciated that the State has an interest in the running of the Companies under ZIMCO being the Majority shareholder; but should state interest warrant breaching of the contracts of service of Chief executives? The Contracts of Service of Chief executives, as we have seen earlier, indicates that

they are engaged under master and servant contracts. They do not serve at the pleasure of the President whereby he can dismiss them and shuffle them around at his pleasure. The notion of State interest is out of place in Parastatal Companies. For as Dr. Mulwila states, the legal effect of registering Parastatal Companies under the Companies Act. is that.

"They are cast in the mould intended for private enterprises and consequently are to be governed in a manner befitting private enterprises, unless it is otherwise provided.²⁴

The legal framework under which Parastatal Companies are couched makes it impossible for the President to control the running of the Companies through the appointment of Chief executives. And as long as the President is free to dismiss any Chief executive in Parastatal Companies contrary to the wishes of the board of directors, the tenure of employment of Chief executives in the Parastatal Sector will remain insecure.

FOOTNOTES:

1. J. Mulwila, "Parastatal Companies and the law in Zambia", PHD Thesis, London 1980, P11.
2. Times of Zambia, 30th May, 1980, J. Kapoma's report (then Director General of ZIMCO).
3. Mulwila op Cit. P59,
4. Mulwila P.213.
5. For example the current Director General of ZIMCO was secretary to Cabinet.
6. Per interview with Mr. Mwila-Director for Personnel and Administration of INDECO.
7. Per interview with Mr. Swabo then ZIMCO Corporation Secretary.
8. (1972) 3 ALR Comm 61.
9. Per Mwila, Director for Personnel and administration INDCO.
10. ERH Ivamy, Topham and Ivamy's Company law (London, Butterworths, 1978) P.73.
11. Per interview with Mr. Siakalima -group manpower services and training controller of INDECO.
12. Per Mwila.
13. Times of Zambia, 23rd March, 1986.
14. Per Mwila.
15. Mulwila, Op cit. P
16. Chapter 1 of the laws of Zambia.
17. Mulwila, op cit P.217.
18. Mulwila loc cit, P.218
19. No. 43 of 1970.
20.) (1979) ZR 129.
21. Ibid P. 135.
22. 1980/HP (unreported).
23. Mwila, Op cit P. 218.

CHAPTER THREE:COMPERATIVE ANALYSIS OF SECURITY OF TENURE OF
CHIEF EXECUTIVES IN PARASTATAL COMPANIES AND
OTHER CHIEF EXECUTIVES:COMPERATIVE ANALYSIS OF SECURITY OF TENURE OF CHIEF
EXECUTIVES IN ZIMCO AND UNZA (A STATUTORY CORPORATION)

There are two kinds of Parastatal bodies in Zambia. There are Parastatal Companies such as Zambia National Commercial Bank Limited, and Statutory Corporations such as Cold Storage Board of Zambia and the University of Zambia (UNZA). The former are created under the Companies Act while the latter are created by specific Acts of Parliament.¹ Whereas in Parastatal Companies, the power to dismiss Chief executives is vested in the board of directors and is laid down in the Articles of Association, in Statutory Corporations similar provisions are laid down in the Act and the power to dismiss is vested in the President.

For example, the University of Zambia is established by the University of Zambia Act. The members of staff who hold positions similar to those of Chief executives are the Vice chancellor, the Deputy vice Chancellor, the Registrar, the Chief Librarian and the Bursar. The powers to appoint the vice Chancellor and the Deputy Vice Chancellor is vested in the President. Section 4 of the Act. provides that there shall be the a Chancellor who shall be the titular head of the University and the Chancellor shall be the President. Sections 5 and 6 provide for the appointment of the vice Chancellor and the

Deputy vice Chancellor by the President on the advice of the University Council. Thus in the University, the vice Chancellor and the Deputy vice Chancellor are Presidential appointees and serve at the President's pleasure!

The other Chief executives such as the Registrar the Chief Librarian and the Bursar are appointed by the vice Chancellor on the advice of the council.³ They have the same status as the second Category of chief executives of ZIMCO which comprises of General Managers. However, they serve under contracts of service that are similar to that of office holders at common law because their tenure of office is protected. Section 31 provides if the Council has reasonable ground for believing that a member of the academic staff (other than the vice Chancellor and the Deputy vice Chancellor) or a member of the administrative staff should be removed from his office or employment on grounds of misconduct or the failure to perform the functions of his office or employment, the Council shall give notice of those grounds to the member in question and shall make arrangements for such member to be afforded an opportunity of appearing before and being heard with respect to the matter.

It can be said therefore that the members of staff at UNZA including the Registrar, the chief Librarian and the Bursar cannot be lawfully removed without adhering to the rules of natural justice. Their tenure of employment is protected by statute. Thus it can be said that Chief executives in statutory Corporations such as UNZA have a mere secure tenure of employment than their counterparts in ZIMCO in that some of their conditions of Service

are laid down in the Act. Their counterparts in ZIMCO are not backed by an Act of Parliament and have only the Articles of Association to look to when their conditions of service are breached. And these are often over looked by the President when he purports to appoint or dismiss Chief executives in ZIMCO.

Unlike in Parastatal Companies created under the Companies Act. where there are no enabling provisions which empower the President to interfere with the running of the Companies, in Statutory Corporations there are provisions which give power to the Government to unstick any of its policies into the Corporations. To this effect Section 10 of the University of Zambia Act. Provides.

"The Minister shall convey to the Chairman of Council and vice Chancellor, such General or Particular party or Government Policies as may affect the conduct of the affairs of the University".

Thus at UNZA the party or Government is empowered by Statute to interfere with the running of the institution is so far as it has to ensure that its policies are being effected. Further the President is empowered by statute to appoint a suitable person to head the institution and as such can use him to control the running of the institution. In ZIMCO, there are no special provisions for the implementation of Party or Government Policies but they are implemented all the same. The President also appoints and dismisses Chief executives in ZIMCO as a method of ensuring state control of Parastatal Companies in spite of the fact that he can only do this by breaching the Articles of Association of the Conglomerate.

COMPERATIVE ANALYSIS OF SECURITY OF TENURE OF CHIEF.EXECUTIVES AND CIVIL SERVANTS.

As earlier stated, generally all Civil Servants serve at the pleasure of the President or the crown and are therefore liable for dismissal at the pleasure of the President. Thus in the case of Dunn V. the Queen,⁴ the plaintiff who had been engaged as a consul agent for a period of three years was dismissed before expiry of that period. He brought an action for wrongful dismissal. It was held that all service in the Government being for Public benefit, the crown can terminate it at its pleasure. And in Service at pleasure no action for wrongful dismissal can lie.

However, in Zambia, the position of a Civil Servant with regard to his security of tenure of employment is different. There are constitutional provisions and regulations which govern the Civil service and somewhat dispenses with the President's power to dismiss civil servants at pleasure. Before Independence the power to dismiss Civil Servants vested in the queen but by the Independence Order it was provided.

"Where under any law in force in Northern Rhodesia immediately before the Commencement of this order, any prerogatives or privileges are vested in her Majesty, these prerogatives or privileges shall from the commencement of this order vest in the President."⁵

However although this Order by implication gave the President the power to dismiss Civil Servants at his pleasure as this power had been previously been held by the Queen, the Constitution took away this power by making special provisions for

Dismissing Civil Servants in the Public Service Regulations.

Article 132 (1) of the Constitution provides that the power to appoint persons to hold or to act in any office in the Public Service; the teaching service; the Zambia Police Force and the Zambia Prison service; and the power to exercise disciplinary control ~~orto~~ remove any such person from office shall vest in the President. However, Article 132 (3) goes on to say that the President's powers to make such appointments or to remove such persons from office shall be exercised:

- " (a) In relation to any office in the teaching service by the teaching Service Commission.
- (b) In relation to any office in Zambia Police Force or in the Zambia Prison Service, by the Police and Prison service Commission.
- (c) In relation to any other Public office by the Public service Commission; acting in the name and on behalf of the President."

However, it is the service Commission Regulations that give the Civil Servants the Security of tenure of employment. The regulations provide that whenever disciplinary proceedings are instituted, the accused officer shall be given a written statement setting out the particulars of the charges or grounds upon which such disciplinary are instituted together with a notice requiring such officer to submit an exculpatory statement in writing.⁶ Thus where a Civil servant is dismissed without giving him the charges or without giving him a chance to be heard in his own defence, the disciplinary authority is clearly in breach of regulation 38 in all the service Commission regulations. And the dismissed Civil servant has a good cause of action for wrongful

dismissal. Even the President cannot interfere with these provisions although the power is originally vested in him by virtue of article 132 (1) of the constitution.

Thus in the case of Kangombe V. Attorney General;⁷ the plaintiff, a school teacher was dismissed pursuant to a directive by the President. Disciplinary charges against him had been considered by the teaching Service Commission which found no justifiable cause for dismissal. The President disregarded the findings of the Commission and purported to dismiss him. The plaintiff applied to the High Court to have the dismissal invalidated. This was granted on the ground that the President had delegated his power to dismiss to the Commission and could not therefore act contrary to their findings. The plaintiff was entitled to reinstatement.

In another case of Zebron Katongola V. A. G.⁸ the applicant was the subject of disciplinary proceedings under the regulations made under Article 122 of the Constitution. Regulation 38 of the Public Service Regulations governs the procedural steps to be taken regarding the determination and institution of disciplinary proceedings. The applicant was demoted in rank and salary contrary to the provisions of regulation 38. The court held that the Commission had only jurisdiction to deal with the case of an accused officer of the preliminary proceedings of the case had been conducted in accordance with regulation 38. In this case the Court found regulation 38 was not followed when the disciplinary proceedings were instituted and therefore this failure resulted

in breach of the regulations. For this reason the declaration that the reduction in rank and salary was null and void was granted.

It is apparent from the two cases cited above that the terms of employment contained in the letters of appointment constitute a contract which binds both the Civil servants and the government. Thus if the terms of employment are not complied with, any purported dismissal or disciplinary measure will be ⁱⁿvalid because this will be a breach of contract. Further, it can be seen that power to dismiss Civil Servants in Zambia does not lie in the hands of the President as the Public Service Regulations have displaced this notion. The President has delegated this power by virtue of Article 132 (3) and as such cannot override their decisions.

However, it should be noted that Article 62(2) of the Constitution gives the President the power to declare that an office constituted by him shall not be an office in the Public service. Thus not all Civil Servants are protected in their tenure of employment by the Service Commission Regulations. The President has used this powers to except Permanent Secretaries and diplomats from the provisions of Service Commission regulation by declaring that their offices are not in the Public Service although they perform Public functions. They serve at the pleasure of the President and this was illustrated in the case of Chanda V. Attorney General.⁹

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ACTION FOR WRONGFUL DISMISSAL BY CIVIL SERVANTS:

From the cases above it can be seen that the position in Zambia seems to be that Civil Servants can maintain an action for wrongful dismissal if the disciplinary codes and procedures are not followed. Further in so far as the regulations provide for a right to be heard the dismissal can be impugned on the ground of failure to follow the Principles of Natural Justice.

Additional protection of the Civil Servant against wrongful dismissal is the Commission for investigations-Article 117 (1) of the Constitution establishes it while Article 117 (4) gives power to the Commission to inquire into the allegations of Misconduct or abuse of authority of person in the Civil Service. Annual Reports issued by the Commission have indicated that civil Servants have resorted to it for relief where they have been dealt with in a manner contrary to the law. Perhaps a case will confirm this. In case No. 307/75¹⁰ where it was alleged that a Provincial Forest officer abused his authority by improperly terminating the services of the Complainant, the Commission found no Justifiable ground for dismissal and recommended to the President that complainant be reinstated. The President accepted the recommendation and he was reinstated.

It can be seen clearly from the above that Civil Servants at all levels, that even those in Senior positions equivalent

to those of Chief executives in ZIMCO, have more Security of tenure than those in ZIMCO. Unlike Chief executives in ZIMCO who are only entitled to damages when they are wrongfully dismissed, Civil Servants are entitled to reinstatement. The Civil Servants have statutory protection and have the same legal status as office holders at common law. Chief executives on the other hand have only the articles of Association to fall back on. And often even the little Security that is offered by their contracts of service is taken away by the Presidents arbitrary action in dismissing them contrary to the provisions of their contracts.

FOOTNOTES:

1. Cap 686, Cap 386 and Act No. 20 of 1987.
2. Act No. 20 of 1987.
3. Ss 7,8 and 9 of the University Act.
4. (1896) Q.B. 116.
5. Zambia Independence Order Act. 1964 S.18
6. Reg. 38 of all the Service Commission Regulations.
7. (1973) ZR 177.
8. 1972 HC (Unreported).
9. (1975) ZR 1.
10. Republic of Zambia, Commission for investigations
Annual reports (Lusaka, Government printer 1975).

CHAPTER FOUR:CONCLUSION:

As can be seen from our discussion above, Chief executives in Parastatal Companies serve under master and servant contracts. They normally serve under three year contracts which can be terminated prior to the expiry date by either party at any time, for any reason or for none. But like any other contract of service under this Category, the contract of service for Chief executives can only be effectively terminated through the issue of the prescribed notice. In ZIMCO three months notice or three months' salary in lieu of notice is required for the termination of the contract of service for chief executives.

As the Parastatal Companies in issue, are incorporated under the Companies Act the power to appoint and dismiss Chief executives lies in the board of directors. As earlier seen Article 73 of table A provides for this power. The effect of the Parastatal Companies being incorporated under the companies Act, is that their legal frame work is not different from that of a private Company. Thus it is only the board of directors that is competent to determine the conditions of service of their employees-including chief executives.

However, because these Parastatal companies are owned partly or wholly by the Government, it has an interest in seeing that the Companies run smoothly. Thus the Government has to exercise some form of control over the Parastatal Companies. One way in which it does this is through the appointment of

Chief executives by the President who holds the Majority shares in these Companies on behalf of the Government. By the appointment of Chief executives by the President, the Government ensures that the men who head and run parastatal Companies will support and implement party and government Policies. In fact after being appointed, chief executives are expected to take and subscribe to the Oath of Allegiance which indicates that their loyalty will lie with the Government.

As noted earlier, the President's power to appoint and dismiss Chief executives in Parastatal Companies be legally justified as it is in conflict with the provisions of of the Articles of Association which together with the memorandum of Association form the constitutions of the Companies and any Act or power which is outside the provisions of the constitution is of no legal effect. Therefore, the Presidents power being outside the provisions of the Parastatal Companies' constitutions is Ultra vires.

The method of controlling Parastatal Companies by the President appointing chief executives has led to insecurity in the Contract of service for Chief executives; the effect of their being appointed by the President, ^{being} that they can be dismissed at his pleasure. This alters the contract of service under which they serve so much that they end up with no remedy against the Company for wrongful dismissal by the President. Ordinarily a person serving under a master and servant contract is entitled to damages

for wrongful dismissal.

As Parastatal Companies were established as a means of controlling the economy, it is important that the Government should have a say in the running of the Companies to ensure that the purpose for which they were created is being met. The Problem with the controlling of Parastatal Companies by the Government through Chief executives stems from the legal nature of the Companies. The legal form chosen restricts Governments manoeuvrability to that of a private Company. Thus time and again, there has been a proposed that a new law be enacted which will change the legal framework of Parastatal Companies so that the government Machinery for control becomes more satisfactory. In 1975, the Mwanakatwe Commission recommended that a new statute be enacted which would give the Government a free hand in the running of Parastatal Companies. However this recommendation has never been put into effect .

Earlier in 1972, the Chone Commission had made recommendations which would have removed from the President the power to appoint and dismiss chief executives in Parastatal Companies. The Commission suggested that a common services Commission be set up with power to appoint senior staff in Parastatal organisations. Some of the recommendations were:

1. That the Chairman and members of the boards of directors in Parastatal Companies and Public Corporations be appointed by Cabinet:

2. That the board elect their own vice Chairman from among themselves.
3. That administrative heads such as Managing Directors be appointed by the Common-services Commission.

The Government purported to accept these recommendations but gave the power to appoint administrative heads to the President. This robbed the recommendations of any effect they might have had on the security of tenure of the administrative heads in Parastatal Companies. In any case the Common Service Commission was never established and the recommendations of the Chona Commission remained just recommendations. Thus as at now, the Situation is still that Parastatal Companies are created under the Companies Act with the Articles of Association providing that Chief executives should be appointed and dismissed by the boards of Directors of the Companies. Meanwhile the President in furtherance of Government control of Parastatal Companies continues to appoint and dismiss chief executives therein contrary to the provisions of the Articles of Association.

The necessity for some element of public control of Parastatal Companies is not questioned, what is questioned is the method of establishing this control. If the only way in which this control, can be exercised is by interfering with the contracts of service of chief executives, then there is need for changing the Legal framework of Parastatal Companies. Being in control, of 80% of the country's wealth, parastatal Companies should run as smoothly as possible. This can only be achieved if the chief executives who are responsible for

making Company policies and the actual running of the Companies are secure in their tenure of employment. Among other reasons, a chief executive needs to be secure in their tenure of employment for the sake of long term planning. For as the practice is at the moment, if a Chief executive feels that he may be dismissed or moved somewhere else by the President, it will be difficult for him to plan effectively and implement the plans. Thus it is imperative that the Legal framework be changed.

Further the few cases that have reached the courts such as *Mijony V. Zambia Publishing Company* and *Mwanza V N.T.C* have Confirmed the view that the Government can not exercise control of Parastatal Companies through the appointment of Chief executives. The courts have consistently held that this power lies in the boards of directors of the Companies. As High Court Commissioner Mr. Jeasy observed, although the practice in the appointment of chief executives is that the matter is referred to the Minister or the President for approval, legally the power to appoint lies in the board of directors. There is need to reconcile law and practice in the appointment of chief executives in Parastatal Companies.

It is therefore suggested that the following measures are taken:

- (a) Parastatal Companies should be created under specific Acts of Parliament in the same way that statutory Corporations are created. There should be a provision which will vest the power to appoint and dismiss chief executives in the President. For in this way the will be able to exercise control over Parastatal Companies legally.

- (b) A body should be set up which will monitor the work of chief executives and make recommendations to the President as to who should be appointed or dismissed.
- (c) The status of chief executives with regard to their contracts of service should be made equivalent to that of public officers so that they have more Security of tenure than that provided by the master and servant relationship or service under pleasure. For indeed they do perform a public function and should be accorded the same protection as Civil Servants.

It is the writer's firm belief that if these considerations and suggestions offered in this chapter are heeded and implemented, we would get rid of the unwarranted insecurity in the tenure of employment of chief executives and at the same time achieve effective government control of the Parastatal Companies.

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