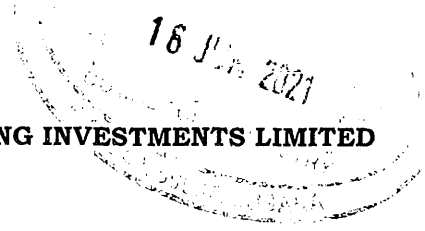
IN THE HIGH COURT FOR ZAMBIA **2021/HPC/0105**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

ZAMBIAN HIGH LIGHT MINING INVESTMENTS LIMITED **APPELLANT**

AND

REGISTRAR AND CHIEF EXECUTIVE OFFICER **RESPONDENT**
PATENTS AND COMPANIES REGISTRATION AGENCY

Before the Honourable Mr. Justice K. Chenda on the 16th day of June 2021

For the Appellant: *Mr K. Phiri of Corpus Legal Practitioners*
For the Respondent: *Mrs B. M. Siakumo and Mr K. Kamfwa - In House Counsel*

JUDGMENT

Legislation referred to:

(i) The Companies Act No. 10 of 2017 in sections 3, 12(3)(a), 25, 26, 27(1), 33(1), 60, 67(1), 68, 71(6), 85(1), 89, 92(2), 101(1), 140(1) and 341;

(ii) The High Court Act, Chapter 27 of the Laws of Zambia in section 13;

Case Law:

(iii) *Anderson Mazoka & Ors v Levy Mwanawasa & Ors* (2005) ZR 138 at p.158-159;

(iv) *The Attorney General & Dora Siliya v Maxwell Moses Boma Mwale & Hastings Sililo* - Vol 2 (2015) ZR 56 at p.81 lines 10-40) and p.82 (lines 1-40) and p.83 (lines 1-12); and

(v) *Afrope Zambia Limited v Anthony Chate & Ors* - Appeal No. 160/2013 at p.J16.

1. INTRODUCTION AND BACKGROUND

1.1 The feud in this matter is between the Appellant as a locally registered company and the Respondent as the regulator.

1.2 The Appellant seeks to assert its right to manage its internal affairs through provisions in its articles of association, while the Respondent insists that same falls foul the primary legislation.

1.3 The brief background is that the Appellant had altered its share capital by ordinary resolution, which act was registered with the Respondent's office and the companies' register updated.

1.4 Based on representations made to the Respondent, the registration of the said alteration was reversed and the companies' register restored to its pre-alteration state as far as the records of the Appellant are concerned.

1.5 The Appellants efforts to get the Respondent to rescind the reversal proved futile.

1.6 Aggrieved by the foregoing the Appellant moved this court by originating notice of motion of appeal seeking that:

(i) the said reversal by the Respondent be set aside;

(ii) the Respondent be directed to increase the share capital of the Appellant from 15,000 to 31,022 upon such terms as the Court deems fit; and

(iii) costs, or any further order.

1.7 The Appellant's case was supported by an affidavit filed 19th April 2021 with arguments of even date. The Respondent reacted with an opposing affidavit on 13th May 2021 accompanied by arguments of the same date.

1.8 The filings were completed by the Appellant's arguments in reply filed 23rd May 2021 after which the appeal was heard on 2nd June, 2021.

1.9 At the appeal, learned Counsel for the respective parties relied on the documents on record and this is the reserved judgment.

2. FACTS, EVIDENCE AND ISSUES

2.1 I propose to dispense with a copious reproduction of the arguments for reasons which shall become apparent below.

2.2 In the case before Court the relevant resolution of the Appellant company was couched as follows-

> *"Company No. 120130118214*
>
> *ZAMBIAN HIGH LIGHT MINIING INVESTMENT LIMITED*
>
> *EXTRACT FROM THE MINUTES OF THE EXTRAODINARY GENERAL MEETING OF THE MEMBERS HELD ON 31ST JULY 2020 AT 09:30 HOURS AT PLOT NO. 52 CENTRAL STREET, JESMONDINE, LUSAKA, ZAMBIA*
>
> ---
>
> *INCREASE OF SHARE CAPITAL AND ALLOTMENT SHARES*
>
> ---

PRESENT:
Andy (Fengjie) Huang - For and on behalf of Midnight Sun (BVI) Two Corp.
Sydney Orobia - For and on behalf of Midnight Sun Mining Zambia Limited.
Andy (Fengjie) Huang - Chairperson

In attendance:
Sydney Orobia -Secretary of Meeting
Mutinta Zulu -Legal Counsel for Midnight Sun (BVI) Two Corp.

THE SHAREHOLDERS RESOLVED:

1. ***THAT the share capital be increased by creating 16,022 ordinary shares of par value ZMW 1.00***
2. *THAT the Board of Directors be authorised to allot the 16,022 ordinary shares of par value of ZMW 1.00 at a premium of $618.52 per share.*

CERTIFIED TO BE A TRUE EXTRACT FROM THE MINUTES OF EXTRAODINARY GENERAL MEETING OF THE MEMBERS HELD ON 31 JULY 2020 AT 09:30 HOURS AT PLOT NO. 52 CENTRAL STREET, JESMONDINE, LUSAKA, ZAMBIA

CHAIRMAN	*SIGNATURE*	*DATE*
Andy (Fengjie) Huang	----------	----------
SECRETARY		
Sydney Orobia	----------	----------"[1]

(Emphasis added)

2.3 The Respondent's eventual decision (over the same), which gave rise to this litigation, was communicated in the following terms -

"1st December, 2020

D Bunting & Associates
Third Floor, Lusaka Telecoms House
Plot No. 5 Mwaimwena Road
Rhodespark
LUSAKA

[1] See the affidavit in support of originating notice of motion of appeal in appendage to exhibit 'AH5'

RE: INCREASE OF SHARE CAPITAL – ZAMBIAN HIGH LIGHT MINING INVESTMENT LIMITED

We refer to the captioned matter and your letter dated 27th November 2020.

On 25th September 2020, Zambian High Light Mining Investment Limited filed a 'Directors Declaration' through which the company increased its share capital from 15,000 to 31,022. The declaration was signed by representatives of Midnight Sun BVI Two Corporation and the company Secretary. After the increase in share capital, 16,022 shares were allotted to Midnight Sun BVI Two Corporation.

Alteration of share capital requires a special resolution in accordance with section 140 of the Companies Act. *Further, Section 3 of the Companies Act defines a special resolution as a resolution passed by not less than seventy-five per cent of the votes of members of a company, entitled to vote in person or by proxy at a meeting duly convened.*

On 25th September when the 'Directors Declaration' was filed by the company to alter its share capital, the members who signed the declaration held a total of 8,999 and a single share respectively, representing sixty percent of the total of the votes of members of company entitled to vote. This falls short of the requirement for a special resolution. It did not meet the requirements of the Companies Act.

We have therefore reversed the increase in share capital and allotment of shares that was made based on the purported special resolution for not meeting the requirements set out in the Companies Act. *The Agency shall await a duly executed special resolution and the appropriate forms for it to affect any alterations to the company's share capital.*

Yours faithfully,

Anthony Bwembya
REGISTRAR & CEO

cc: Corpus Legal Practitioners
Robson Malipenga & Company
Zambian High Light Mining Investment Limited"[2]
(Emphasis added)

[2] Ibid,. in exhibit 'AH13'

2.4 Aggrieved with the same, the Appellant replied in a letter that set out its competing views as:

> *"08 December 2020*
>
> *The Registrar & CEO*
> *PACRA House*
> *Haile Selassie Avenue*
> *P.O Box 32020*
> *Lusaka*
>
> *Attention: Mr. A Bwembya*
>
> *Dear Sir,*
>
> *We refer to the captioned matter and to the letter we received from Patents and Companies Registration Agency (the "Agency") of 1st December 2020 whose contents and history are known. Please note that we continue to represent the interests of Midnight Sun (BVI) Two Corporation (our "Client") and Zambian High Light Mining Investment Limited (the "Company").*
>
> *As a precursor to our contention set out in this and our earlier correspondence, we encourage you to act in accordance with the spirit and objective of the Companies Act No. 17 of 2017 (the "Act") as set out in the preamble to the Act namely to promote the development of the Zambian economy by encouraging entrepreneurship, enterprise efficiency, flexibility and simplicity in the formation and maintenance of companies.*
>
> *We note that you continue to entertain the minority shareholders contrary to the above objective of the Act and in process negatively impacting the efficient investment and operation of the Company which has already been beneficiary of huge injection of capital from our client and is now at the cusp of a further major investment which the minorities are trying to prevent. Please note also that we are currently assessing whether your action as set out in your letter of the first instance constitutes a breach of your mandate under the Act especially that your liability for your actions and or your omissions by acting in bad faith or without reasonable care to*

consider all the facts supplied to you and reasonably interpret the law is not exempted under section 366 of the Act.

The matter brought before you by the minority shareholder is a simple issue between shareholders for which the minority shareholders are entitled to take before a court of law if they have a dispute or feel mistreated. Our assessment is that you are not permitted to intervene in the operations of the Company in the way you did as this resulting in sabotaging the future of the Company to the detriment of the main investors in the Company including our client. As already explained to you the Company requires funding to operate and the shareholders agreed to fund the Company in accordance with the provisions of the articles of association of the Company (the "Articles") including via equity funding through the issue of shares by the Company (the "Equity Funding").

The minority shareholders were given the first opportunity to inject capital via the Equity Funding and upon their failure to provide the Equity Funding they have now come to you to prevent the Equity Funding by our Client being the majority shareholder contrary to what the minority shareholders subscribed to under the Articles. ***The provisions of section 140 of the Act that you cite in your letter make it very clear that the provisions of the Articles on the alteration of capital including the increase of capital will supervene and that the provisions of the Act in this respect will only apply if the Articles do not provide otherwise.*** *We have taken the liberty to reproduce the provisions of section 140 of the Act below:*

(1) A company may, unless its articles provide otherwise, by special resolution, alter its share capital as stated in the certificate of share capital by__
(a) Increasing its share capital by issuing new shares of such an amount as it considers expedient..."

In the premise, we would like to draw your attention to the articles in particular article 9 which provides for alteration of share capital by resolution and further article 1 of the articles which define resolution as an ordinary resolution. *We enclose a copy of articles for the Company herewith for ease of your reference.*

What is even more concerning for us with respect to your continued entertainment of the minority shareholders is that the misinterpretation of the Act and complete omission to consider the relevant provisions of the Articles has been made

even where the standard articles which are scheduled to the Act (the "Standard Articles") make similar provisions at Regulation 9 as the Articles with respect to the alteration of share capital via a simple resolution. The Standard Articles are what the law and the Act prescribe and it is difficult to understand the abuse of your office by the minority shareholder to apply a conflicting interpretation to a simple and straight forward provision of the Act that is aligned to the main objective of the Act permitting simplicity, efficiency and continuity of operation of the Company.

We have instructions to demand that the reversal of the increase in share capital and allotment of shares be immediately reverted to the initial declaration and allotments as was depicted in the 'Directors' Declaration" filed on the 25th September 2020 *in line with the law, the Act and the Articles to which the minority shareholders are bound.* ***If the restoration is not accordingly done within the next seven (7) days from the date of this letter we have been instructed to proceed with issuing Court process*** *against you personally and against the Agency for the reversal of your action and for the reparation of damage and inconvenience caused by your negligent and unreasonable action and omission.*

Kindly acknowledge receipt of this latter and its enclosures by signing our return copy.

Yours faithfully

Corpus Legal Practitioners
Encl."[3] (Emphasis added)

2.5 From the foregoing it is clear that the entire controversy between the parties is hinged on the interpretation of section 140(1) of the **Companies Act**.[4]

[3] Ibid,. in exhibit 'AH14'
[4] No. 10 of 2017

3. THE LAW ON INTERPRETATION OF STATUTES

3.1 In the case of ***Anderson Mazoka & Ors v Levy Mwanawasa & Ors***[5] the Supreme Court guided as follows in terms of interpretation of legislative provisions -

> *"**It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning**. It is only if there is ambiguity in the natural meaning of the words **and the intention of the legislature cannot be ascertained from the words used by the legislature that recourse can be had to the other principles of interpretation**."* (Emphasis added)

3.2 Also useful is the case of ***The Attorney General & Dora Siliya v Maxwell Moses Boma Mwale & Hastings Sililo***[6] where the Supreme Court observed and guided:

> *"We have been referred to a number of authorities on interpretation of statutes. According to decided cases, the duty of the courts in the interpretation of statutes is to give effect to the intention of the legislature. And the primary rule of interpretation of statute is that the meaning of any enactment is to be found in the literal and plain meaning of the words used, unless this would result in absurdity, in which case the court's authority to cure the absurdity is limited. **The court is entitled to depart from the literal rule of interpretation to purposive approach, in order to promote the legislative purpose underlying the provision**. Whenever the strict interpretation of a statute gives rise to unreasonable and unjust situation, judges can and*

[5] (2005) ZR 138 at p.158-159
[6] Vol 2 (2015) ZR 56 at p81 lines 10-40) and p 82 (lines 1-40) and p 83 (lines 1-12)

should, use their common sense to remedy it – that is by reading words if necessary – so as to do what Parliament would have done, had they had the situation in mind. ***The essence of purposive interpretation of the statute is to give effect to its foundational values and objects****: See the following:*

(a) The Attorney General and Anor v Lewanika and 4 Ors,
(b) Nzowa v Able Construction Limited

Lord Scarman put it this way:

> *"... in the field of statute law, the judge must be obedient to the will of Parliament as expressed in its enactment. In this field, Parliament makes and unmakes the law and the judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires... If the result be unjust but inevitable, the judge may say so and invite Parliament to consider the position. But he may not deny the statute. Unpalatable statute may not be disregarded or rejected merely because it is unpalatable." See Duport Steels Limited v Sirs,*

Lord Denning is of the same view. In Deeble v Robinson, he said:

> *"When Parliament has been thus specific, we are not at liberty to depart from it."*

Further to give effect to the subject or purpose of the statute, all the provisions bearing on a particular subject ought to be brought into view and interpreted together*: See:*

(a) State v Petrus and Anor,
(b) Rafliu v S,
(c) South Dakota v North Carolina,---"

(Emphasis added)

3.3 It follows from the said authorities that the starting point in construing a statute is to ascribe the ordinary grammatical and natural meaning of the words used in a provision.

3.4 If there is ambiguity or absurdity from such literal interpretation, the Court can seek the aid of purposive interpretation to give effect to the foundational values and objects of the statute.

4. ANALYSIS AND FINDINGS

4.1 After a close study and careful evaluation of the originating process, body of evidence and useful submissions from the Bar, my decision is as set out hereunder.

4.2 Section 140(1) of the **Companies Act** prescribes:

> *"140. (1)* ***A company may, unless its articles provide otherwise, by special resolution, alter its share capital as stated in the certificate of share capital by-***
> *(a) increasing its share capital by issuing new shares of such an amount as it considers expedient;*
> *(b) consolidating and dividing all or any of its share capital into shares of a larger amount than its existing shares;*
> *(c) converting all or any of its paid-up shares into stock and re-converting that stock into paid-up shares of any denomination;*
> *(d) subdividing its shares, or any of them, into shares of smaller amounts than is stated in the certificate of share capital; or*
> *(e) cancelling shares which, at the date of the passing of the resolution, have not been allotted to any person, and diminishing the amount of its share capital by the amount of the shares so cancelled."* (Emphasis added)

4.3 Applying the principles of statutory interpretation outlined earlier, it is clear that the ordinary grammatical and natural meaning of the words used in section 140(1) is ambiguous as it can be interpreted to mean either that:

(i) a company can alter its share capital by special resolution unless the articles prohibit alteration; or

(ii) a company can alter its share capital by special resolution but the articles can prescribe a different mode of alteration.

4.4 When section 140(1) is looked at in isolation it would favour adopting the first meaning.

4.5 However when one construes the **Companies Act** as a whole and also that:

(i) the articles of a company regulate its internal affairs (see definition in s.3 and prescription in s.25);

(ii) the articles amount to a binding contract between a company and its members and between the members *inter se* (see prescription in s.26);

(iii) the **Companies Act** has a recommended form of articles termed as the '*Standard Articles*' which companies are however at liberty to style otherwise (see definition in s.3 and provisions of s.12(3)(a));

(iv) the '*Standard Articles*' allow for alteration of share capital by way of ordinary resolution (see definition of '*resolution*' in regulation 1 paragraph 1(1) and enabling provision in regulation 9 paragraph 37);

it is manifestly clear that the intention / objective of the legislature was for the threshold of a special resolution under section 140(1) of the **Companies Act** to simply be the default position which can however be relaxed (by the articles) to the lower threshold of an ordinary resolution as per example given in the Standard Articles.

4.6 It is also noteworthy that the provisions of the articles of the Appellant on both the power to alter share capital through a resolution and the definition of a resolution are akin to those of the Standard Articles which require only an ordinary resolution. I reproduce the relevant provisions of the '*Standard Articles*' for ease of reference:

"FIRST SCHEDULE
(Section 12(3))
STANDARD ARTICLES
REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES, UNLIMITED AND PUBLIC LIMITED COMPANIES

1. Interpretation
1. (1) In these regulations, unless the context otherwise requires:
" Act " means the Companies Act;
" prescribed rate of interest " means the rate of interest prescribed in regulations made in accordance with the Act for the purposes of the Standard Articles;
" seal "means the common seal of the company and includes any official seal of the company;
" resolution " means an ordinary resolution of the company;
" secretary " means any person appointed to perform the duties of a secretary of the company.
(2) Unless the context otherwise requires an expression, if used in a provision of these regulations that deals with a

matter dealt with by a particular provision of the Act, has the same meaning as in that provisions of the Act.

9. Alteration of Capital

36. The provisions of these regulations that are applicable to paid up shares shall apply to stock, and references in those provisions to share and shareholder shall be read as including references to stock and stockholder, respectively.

37. ***The company may by resolution increase its authorized share capital*** *by the creation of new shares of-*

(a) such amount as is specified in the resolution;
(b) consolidate and divide all or any of its authorised share capital into shares of larger amount than its existing shares;
(c) subdivide all or any of its shares into shares of smaller amount than is fixed by the certificate of share capital, so that in the subdivision the proportion between the amount paid and the amount (if any) unpaid on each such share of a smaller amount is the same as it was in the case of the share from which the share of a smaller amount is derived; and
(d) cancel shares that, at the date of passing of the resolution, have not been taken or agreed to be taken by any person or have been forfeited, and reduce its authorised share capital by the amount of the shares so cancelled."

4.7 I also reproduce the coordinate provision from the Appellant's articles for the same purpose:

"***1- Interpretation***

1.(1) in these regulations, unless the contest otherwise requires:
"Act" means the Companies Act, 1994;
"prescribed rate of interest" means the rate of interest prescribed in regulations made under the Act for the purposes of the Standard Articles;
"seal" means the common seal of the company and includes any official seal of the company;

"resolution" means an ordinary resolution of the company;
"secretary" means any person appointed to perform the duties of a secretary of the company.

9. Alteration of Capital

37. ***The company may by resolution-***

(a) ***increase its authorized share capital*** *by the creation of new shares of such amount as is specified in the resolution;*
(b) consolidate and divide all or any of its authorized share capital into shares of larger amount than its existing shares;
(c) subdivide all or any of its shares into smaller amount than is fixed by the certificate of share capital, but so that in the subdivision the proportion between the amount paid and the amount (if any) unpaid on each such share of a smaller amount is same as it was in the case of the share from which the share of a smaller amount is derived; and
(d) cancel shares that, at the date of passing of the resolution, have not been taken or agreed to be taken by any person or have been forfeited, and reduce its authorized share capital by the amount of the shares so cancelled."[7] (Emphasis added)

4.8 Therefore, the share capital of the Appellant company could validly be altered by way of ordinary resolution on the strength of its articles, which are aligned with the Standard Articles in respect of the exercise of that power by the members.

[7] See the affidavit in support of originating notice of motion of appeal, attached to exhibit 'AH14'

4.9 Further, to the extent that the articles of the Appellant are binding on all its members and on the Appellant company (see s.26 of the **Companies Act**), the alteration could not be impugned on the basis of the threshold of the relevant resolution.

5. CONCLUSION AND ORDERS

5.1 The **Companies Act** has numerous provisions that prescribe a default position that can however be varied by a company through its articles. These include s.27(1) [on amendment of articles], s.33(1) [on use of the common seal abroad], s.60 [on *locus standi* to convene a meeting of a class of members], s.67(1) [on voting powers at a meeting of members], s.68 [on conclusiveness of a chairman's statement as evidence of the passing of a resolution], s.71(6) [on the issue that a proxy need not be a member], s.85(1) [on appointment of directors], s.89 [on appointment of sub-committees of a board], s.92(2) [on disqualification of directors from being members / shareholders], s.101(1) [on appointment of an executive director] and last but not least s.140(1) [on alteration of share capital].

5.2 The role of the Respondent is to *inter alia* regulate and not micro-manage the affairs of registered companies. Accordingly, by seeking to impose the default position (of a special resolution) under section 140(1) of the **Companies Act** on the Appellant company, the Respondent failed to heed the boundaries of its authority.

5.3 The Appellant was instead in order to alter its share capital (by ordinary resolution) anchored on its internal regulations as embodied in its preferred style of articles and so I find.

5.4 Consequently, the decision of the Respondent communicated in the letter of 1st December 2020 is a nullity and is hereby set aside pursuant to section 13 of the **High Court Act** and section 341 of the **Companies Act**.

5.5 By the same authority, the Respondent is directed to rectify the register of companies established under section 21 of the **Companies Act** to reflect:

(i) the relevant alteration of the Appellant's share capital as resolved on 31st July 2020; and

(ii) any lawful allotment of the new shares.

5.6 The Appellant having succeeded in its case against the Respondent should ordinarily be entitled to claim costs. Such is anchored on various authorities including ***Afrope Zambia***

Limited v Anthony Chate & Ors[8] where the Supreme Court also guided that the general rule can be departed from depending on *inter alia* the nature of the case.

5.7 The case before Court is set in unchartered waters owing to the infancy of the **Companies Act, 2017** in our statute books. Thus there is little jurisprudence available to illuminate the current statutory boundaries of the relationship between the regulator (Respondent) and the regulated (such as the Appellant).

5.8 It is therefore fair and just that, for this novel difference in that relationship, each party should bear its own costs and so I order.

Dated this 16th day of June 2021

K. CHENDA
Judge of The High Court

[8] Appeal No. 160/2013 at p.J16