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**Kenneth Kaoma Mwenda.** *Zambia's Stock Exchange and Privatisation Programme: Corporate Finance Law in Emerging Markets.* Lewiston, NY: Edwin Mellen Press, 2001. xvi + 565 pp. \$139.95 (cloth), ISBN 978-0-7734-7560-1.

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The book, *Zambia's Stock Exchange and Privatisation Programme*, is the first of its kind on Zambia. It contributes to the establishment of a foundation for the development of corporate jurisprudence in Zambia and to some extent, in some of the countries in the Southern African Development Community.

For many years, before and after Zambia achieved independent nationhood, corporate law had remained static. Before 1994, the only available company statute was the one received from the United Kingdom and enacted by that country's Parliament in 1921. That was before Northern Rhodesia (now Zambia) came into being. The country only became a protectorate of the United Kingdom on the 1st April 1924. For a period of seventy year—and notwithstanding changes to the company legislation in the United Kingdom itself on a number of occasions—that of Zambia only changed in 1994 with the enactment of the Companies' Act, 1994. This amended the United Kingdom legislation, which had applied to the country since 1924.

As the author has asserted, this piece of legislation was enacted without much research. In fact it was enacted in answer to pressure from donors, the World Bank and the International Monetary Fund—the two multilateral lending institutions invited by the Zambian government to restructure the country's economy. The Securities Act of 1993, which repealed the Stock Exchange Act of 1990 and created the Lusaka Stock Exchange, was also in answer to demands from the international donor community just as the Privatisation Act of 1992 was enacted to facilitate the sale of State owned companies. This may explain some shortcomings in these pieces of legislation as argued by the author.

The foreword is by Dr Gerry Nkombo Muuka who is an Associate Professor of Management and Business Strategy in the College of Business at Murray State University in Kentucky. In commending the book to readers, Dr Muuka points out that the book advances several reasons for the attractiveness of emerging capital markets in developing countries such as those in the SADC region. These include diversification of global portfolios as well as the markets being capable of delivering significant financial returns. The author also identifies some constraints militating against the efficacy of public distribution of securities. One of these is the legal framework in place.

The author argues that the Lusaka Stock Exchange was created to deal with and act as a vehicle for the privatisation of State owned companies that were being divested of their state ownership under the privatisation programme. He deals in detail with the role of the Zambia Privatisation Agency, an agency created under the Zambia Privatisation Act, 1992. The Agency was empowered to prepare state companies for privatisation. This is the only recognised Agency given power to sell state owned companies under the law. It is also this Agency which is given power to delegate its functions to Committees for purposes of carrying out its work. The composition of the agency is broad based.

However the author has rightly pointed out that some of the functions of this Agency operated against the provisions of the Companies Act of 1921 and later of the Companies Act of 1994. This waters down the powers of parastatal directors. Since the powers of directors to distribute securities to the public are usually found in articles of association of the company, the enactment of

statutory law on the matter disenfranchises parastatal directors from negotiating with prospective buyers (p. 269).

Most State owned companies in Zambia were either private limited companies or statutory companies like the Zambia Electricity Supply Corporation Limited. In the case of those incorporated under the 1921 Companies Act, there was a preemptive clause in their Memorandum of Association and in their Articles of Association restricting the transfer of their shares to members of the public without first offering such shares to the existing shareholders. Each of these companies had its own Board of Directors. Members of the Board were empowered under the Companies legislation to act on behalf of their companies. It is these Directors who had the authority to authorize the sale of shares to an annual general meeting of the shareholders. The advent of the Zambia Privatisation Agency giving it statutory powers to prepare companies for sale had no legal basis under existing law. As the author suggests, there was need to specify in the law creating the Agency that the provisions of the act would take effect notwithstanding the provisions of the Companies Act, 1921 or any other Articles of Association of state owned companies. To buttress his argument the author has stated that although legislation prevails over contractual and fiduciary duties of directors, parastatal directors have been abiding by instructions from the Agency mainly due to their political subservience to the State and not because legislation prevails over powers of directors in the Articles of Association. The Privatisation Act permits the interests of outsiders such as the Agency and Cabinet to prevail.

The Privatisation Act confers powers on the Zambia Privatisation Agency to convert a private limited company scheduled for privatisation into a public company. In the Companies Act of 1921 which was in place when the Privatisation Act was enacted, only members of the concerned private company could pass a special resolution and file with the Registrar statement in lieu of a prospectus to convert the company into a public company. The new law (Companies Act 1994) enacted after the Privatisation Act of 1992 makes no major changes to the position found in the 1921 Act. This underscores the argument by the author that the government was in a hurry to put together a piece of legislation that was little understood by it and members of its legislature. The reality that The World Bank and International Monetary Fund thrust these ideas on the government is adverted to within the text.

The following event took place after the research into this book was finalized. This event justifies the fears of the author regarding the authority of the Agency and the Zambian Cabinet in the privatisation of the state owned companies. The privatisation of the copper mining companies was to bring in much needed direct foreign investment into Zambia. According to Mr Musonda Cheta, Investments Manager, Zambia National Provident Fund, interviewed by the author on the 12th December 1996, Zambia was to receive a lot more money with the privatisation of the mines.[1] Konkola Deep was to bring in US\$600 million, while ZCCM Limited, Zambia's mining giant, was to net over US\$2 billion. What in fact happened was that a committee to negotiate the privatisation of the mines was appointed by the President outside the Privatisation Agency. The negotiation process was so badly done and the period of negotiation unnecessarily protracted that in the end Zambia received no actual cash out of the privatisation of the mines.[2]

Some attempt had been made in 1970 to create a Stock Exchange in Zambia. The Stock Exchange Act, 1970 was enacted into law. A Council to run the exchange had been appointed and a Mr Ernest Malenga had been sent to Nairobi for training. He was to be the first chief executive of the Lusaka Stock Exchange. The project did not proceed because it was discovered that at that time the State owned about 80 percent of business in the country and only 20 percent was in private hands. It was the period when there was nothing wrong for the state to participate in business. In August of 1970 President Kaunda, in what was to be known as the Matero Declaration, nationalised the two copper mining companies in Zambia.[3]

Both business people and politicians often spoke of a mixed economy, meaning the co-existence of state and private capital side by side. Even in Western Europe at the time it was not anathema for the State to participate in business. The British Labour Party had nationalized private industry soon after coming into power after the Second World War. The Iron Curtain was also influencing the development of economic events in much of the independent African states.

The law of 1970 (the Stock Exchange Act, 1970) was nonetheless left on the statute book. Twenty years on with the economy still under the command of the State, the Government of the day decided to enact another law regarding the Stock Exchange. According to what the present Chief Executive of the Securities and Exchange Commission, Mr Mumba Kapumpa, has told the author, not much thought or detailed study went into the enact-

ment of the Stock Exchange Act of 1990. According to him all he did on instructions of the then Minister of Finance to draft the law relating to the stock exchange, was to dig out the old law and change the dates. One wonders why this should have been necessary when all he could have told the Minister was that the law already existed. As it was, the old law had to be repealed to give way to the new law that according to him, was substantially the same as the old one.[4] That law, as the author demonstrates, was way behind what was required in modern corporate practice. In any case the Stock Exchange Act, 1990 was replaced by the Securities Act, 1993. According to the author the Securities Act, 1993 makes an attempt to define and distinguish securities from shares. The law also provides requirements to be met before securities can be distributed to the public namely:

the applicant company must be incorporated in Zambia as a public company;

the securities must be registered under the Securities Act;

the applicant company must have a trading record of at least 3 years under one management;

there must be an adequate market in the securities and sufficient public interest in the business;

there must be an open market in the securities

Both the Stock Exchange Act and the Securities Act provide no methods of marketing securities to the public. The Securities Act, 1993 creates a Securities and Exchange Commission as a competent authority for regulating public distribution of securities in Zambia. The Securities and Exchange Commission replaces the Council of the Stock Exchanges which was created under the Stock Exchanges Act, 1990. Functions of the Securities and Exchange Commission include:

supervision and monitoring activities of securities exchanges;

settling transactions in securities;

coordinating with other supervisory bodies in Zambia and abroad;

licensing and monitoring securities exchanges, dealers, investment advisers and representatives of dealers and advisers;

approving constitutions and regulations of securities exchanges;

providing and enforcing rules and regulations of securities exchanges;

providing and enforcing rules to regulate the conduct of participants in the securities industry;

revoking licences, supporting the operation of a free, orderly, fair, secure and properly informed securities market;

promoting high standards of investor protection;

and promoting a self-regulatory securities industry in Zambia.

The Lusaka Stock Exchange in Zambia is relatively new, having opened its doors for listing of companies towards the end of 1994. It is therefore no wonder that, to the question whether the Exchange and Securities Commission has been effective in supervising the operations of the stock exchange, the answer from those to whom this question was posed was in the affirmative. Funding of the Exchange and Securities Commission is from parliamentary allocation. Other sources of income being from money earned by the Commission from charging licence fees, money earned from transaction commissions and other monies accruing to and assets vesting in the Commission.

The Lusaka Stock Exchange is the only exchange in Zambia that has been established. There is provision in the law that presupposes that applications could be made to the Exchange and Securities Commission for the establishment of other stock exchanges in other parts of the country. The volume of trade at the Lusaka Stock Exchange would militate against establishing other exchanges in other parts of the country. There is just not adequate business. Only eight companies are listed and the annual volume of transactions is US\$300 million. Since the author wrote his book there does not appear to have been much improvement in the volume of trade. The market is still dealing mainly in equities; dealing in bonds not having gotten off the ground.

The author goes into detail explaining liabilities and responsibilities of brokers and dealers in the stock market. As the market is relatively new and its activities very much limited, the issues dealt with by the author would appear for the moment, at any rate, to be of academic value. This does not however imply that with time the situation will remain as it is. The situation is bound to improve as the economy of Zambia picks up. As the writer ably points out, the Zambian Government was in a hurry to privatise much of its more lucrative parastatal compa-

nies. Had the government stuck to its original sequence of privatisation starting with those companies which required massive injection of foreign capital, other companies would have remained unsold so as to compete with those privatised and the ones still in private hands. To this group of companies could have been added the new ones coming on the market as a result of direct foreign investment.

The exposition of corporate law by the author will be helpful to business people, academics, and members of the legal profession, accountants and those sitting on the bench and adjudicating in commercial and industrial disputes. Responsibilities and obligations of members of the Stock Exchange, intermediaries and financial institutions participating in the stock market are well delineated. Inside dealing and false representation in the market is prohibited and is a criminal offence under the provisions of the Securities Act, 1993. In addition Section 54 of the Securities Act provides that civil action could also be brought against any person convicted of an offence relating to improper trading—insider dealing. The burden of proof however is on the plaintiff to prove on a balance of probabilities that the defendant committed the civil wrong against the plaintiff and that the plaintiff is entitled to civil remedies which include damages. The people interviewed by the author who included important players in the stock market all stated that there had been no evidence of inside dealing and manipulation of the market by any of the players since the stock exchange opened its doors to business. This was put down to the fact that the stock exchange is relatively new and there has been limited trading. The author extends liability for inside dealing to companies and defacto Directors; journalists; intermediaries; trustees who might be in conflict with their fiduciary duties.

The author compares the role of the Minister in the appointment of and control of the functions of members of the Stock Exchange Council appointed under the Stock Exchange Act, 1990 and the absence of such ministerial control in the regulation of securities and stock markets under the Securities Act, 1993. This is an indication of the Government's efforts to liberalize the economy and is a sign of the government's hasty implementation of the structural adjustment programme. The truth however must be known. This is that the government and its bureaucracy were ill prepared to implement measures such as those spelt out in the Securities Act and in the Privatisation Act. This explains the reason for so many shortcomings in both pieces of legislation including the Companies Act, 1994. There was very little input from

both the civil service and the politicians in the drafting of these pieces of legislation. They were all enacted at the behest of the World Bank and the International Monetary Fund.

The author argues that the Lusaka Stock Exchange was introduced primarily to facilitate the privatisation of the state owned enterprises in Zambia. As already noted, the Stock Exchange is new and it is possible that the volumes of trade in equity securities could increase temporarily during the period of privatisation. The author however doubts if that trend would continue to increase after privatisation. The author said this in 1996. Five years later his doubts have been justified in that the nadir of privatisation has quite considerably slowed down business on the Stock Exchange. The incompetent and rather corrupt handling of the privatisation of the copper mining industry—the lifeblood of the Zambian economy—has taken away the enthusiasm which had been built up prior to the privatisation of the copper mines.[5] Besides, the Lusaka Stock Exchange is regarded as an institution based in Lusaka, which has no relevance to the rural parts of Zambia. With the depressed economic situation overall, it is becoming increasingly difficult to sell the stock exchange to the rural parts of the country.

It is under this background that the proposal for the creation of a regional stock exchange for Southern and Eastern Africa should be viewed. South Africa has had a stock exchange in Johannesburg for some one hundred years; Zimbabwe for fifty years; Namibia for some time because of its previous administration by South Africa under a trusteeship from the United Nations; Kenya for some time as well. The stock exchanges in Botswana and that in Zambia are the creation of the 1990s. Malawi, Tanzania and Uganda are in the process of creating their own. It is possible that there will also be plans for Angola and Mozambique to do the same. The author's proposal was put to some players in the Lusaka Stock Exchange to sound their opinion. There was a varied opinion ranging from complete support for the proposition to skepticism. Those who expressed some skepticism argued that the levels of economic development in the countries of the Sub-region were different and that one needed to wait to see how the newly created stock exchanges operated before considering the creation of a regional stock exchange which would co-exist with national ones.[6]

Two regional integration schemes—the Common Market for Eastern and Southern Africa (COMESA) and the Southern Africa Development Community (SADC)

have been suggested as schemes under which a regional stock exchange could be set up. Angola, Botswana, Democratic Republic of the Congo, Lesotho, Swaziland, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe are members of SADC. Botswana and South Africa are not members of COMESA. The following, however, are members—Democratic Republic of the Congo, Eritrea, Ethiopia, Kenya, Lesotho, Malagasy, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Sudan, Swaziland, Tanzania, Uganda, Djibouti, Angola, Burundi, Comoros, Seychelles, Somalia, Zambia and Zimbabwe.

The aim and objectives of the Common market are:

to attain sustainable growth and development of the member states by promoting a more balanced and harmonious development of its production and marketing structure;

to promote joint development in all fields of economic activity and joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and foster closer relations;

to cooperate in the creation of an enabling environment for foreign, cross-border and domestic investment including joint promotion of research and adaptation of science and technology for development

to cooperate in the promotion of peace, security and stability among member states in order to enhance economic development in the region;

to cooperate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora;

to contribute towards the establishment, progress, and realisation of the objective of the African Economic Community.

Article 80 of the COMESA Treaty provides, among other things, the following:

the member states undertake to implement a regional-wide capital market development programme to be determined by the Council and shall create a conducive environment for the movement of capital. To this end, member states shall;

establish national stock exchanges and an association of national stock exchanges to enable objectives to be pursued in a concerted and coordinated manner including promotional activities, training, standardisation and

harmonization of operational rules and regulations;

establish a Common Market rating system of listed companies and an index of trading performance to facilitate the negotiation and sale of shares within the Common Market and also external to the Common Market

to develop a region-wide network of national capital markets, with the purpose of facilitating the flow of information on national stock exchanges and their functioning, listed companies, availability of stocks, bonds, securities, treasury bills, notes, and other monetary instruments for the cross-border marketing of such instruments

The Treaty creating SADC is concerned with the issue of development in all its facets. Article 5(1) of the SADC Treaty states that some of the objectives of SADC regional integration scheme are to achieve development and economic growth, alleviate poverty and enhance the standard and quality of life of the peoples of Southern Africa. SADC is headquartered at Gaborone in Botswana while COMESA has its secretariat at Lusaka in Zambia.

On examination of the aims and objectives of the two regional schemes, it would appear that the logical location of the regional stock exchange should be in a member state of COMESA. This decision would rule out the possibility of South Africa housing such a regional exchange. It would also rule out Botswana. This is because both of these countries are not member states of COMESA. This would appear to leave Kenya, Namibia and Zimbabwe as possible venues for the regional stock exchange. The question to be answered before arriving at such a decision is the size of the economies of the three countries. In the interviews carried out by the author, the only countries seriously canvassed as possible location for a regional stock exchange were South Africa, Botswana and Zimbabwe. At the time Zimbabwe was picked on because of its thriving economy. Five years on the situation has dramatically altered. Zimbabwe's fortunes have fallen during the last two years as a result of the Government's economic and political policies. That would leave South Africa and Botswana in the running. But as mentioned before none of these countries are members of COMESA. The infrastructure and the economies of the rest of the member States of COMESA are still very much undeveloped.

With the greatest respect to the learned author, one would be inclined to take the view of those players interviewed who argued that a regional stock exchange would appear to be too ambitious a proposition to be under-

taken in the current economic climate prevailing in the member states of COMESA.

It is however an idea for the future. The flame should be kept alight. In the meantime the number of stock exchanges which have been or are in the process of being established in the Southern African region should be developed and the people living in these countries sensitized in the manner the stock market works. Instances have been identified by the author and by the players on the Lusaka Stock Exchange interviewed during the preparation of this book, of the shares in Chilanga Cement PLC which had been floated on the Lusaka Stock Exchange and which attracted some 3,700 ordinary Zambians. The shares were being sold for K65 per share. A few months later a number of those who had bought these shares went back to the company seeking to borrow some money on the strength of their shareholding in the company. They told the company that they wanted the cash in order to pay school fees for their children. The shareholders were told that they would not be lent the money. Instead they were advised to sell their shares. This they proceeded to do. However they could find no buyers at the price they had bought these shares. They decided to reduce the price to as low as K40. Even at this price which was K25 below their original purchase value, there were still no buyers. This example has a lot to tell about the popularity of the Lusaka Stock Exchange and the availability of cash in the pockets of the people of Zambia to enable them to adequately participate in the operations of the market. The other factor that has been disclosed in the interviews is that the prices of shares on the Lusaka Stock Exchange do not react to events taking place in the country. Indeed one interviewee has described the situation after the Presidential and parliamentary elections of 1996, which aroused much controversy, and yet this did not affect the price of shares. The other incident was the arrest and detention of the first President of Zambia on trumped up charges of treason by the incumbent President very early in the morning on Christmas Day in 1997. Again that led to national and international controversy, yet the prices on the Zambian stock market were not affected. It would appear that not much has happened to change this.

The whole privatisation process of the Zambian State-owned enterprises has been murky, soured and riddled with corruption at the very highest levels in the political echelon.[7] This has meant that companies which should have played a catalytic role in stimulating business on the Lusaka Stock Exchange have not made it. They were shared between the ruling political leadership

of the country.[8] In addition, there has been inadequate infusion of new money into the economy of the country contrary to what had been promised would have been the price of liberalisation of the economy.

The author is, however, to be commended. He has identified the inadequacy of legal and accountancy training in corporate law in the country. The reason for this is that business in Zambia had been in the hands of the State for close to 30 years. Because of this constraint, practising lawyers in the country did not specialise in any specific field of the law, let alone commercial law which was a limited field of practice. Unlike members of the accounting profession, lawyers have had a law school established at the University of Zambia as early as 1966. In spite of this as the author, himself a lawyer and a former lecturer of the University has pointed out, the Law school curricula does not offer specialised training in commercial and corporate law. With the anticipated change in the business landscape in the country this will become essential. The Zambia Institute for Certified Accountants, an institute charged with the responsibility of training accountants in Zambia, was only established in 1989. Most accountants have had their training in the United Kingdom. Their training has been in the Companies and Tax Laws of the United Kingdom. This has meant that when they returned to Zambia, they were not really fully conversant with the law of their own country. There is a need to rationalise their training and ground it in the corporate law of Zambia.

In addition to the proposals for the training of lawyers and accountants in corporate law, there is also need to train judges who are to hear and determine disputes arising from commerce and industry. There is need for the Zambian Government to create a Commercial Court as a Division of the present High Court. The Commercial Court would deal with disputes arising from commerce and industry. As a specialist court it will provide an answer to complaints from the Zambian business community that the present court arrangement does not fully address their specific problem. Kenya has had to address a similar problem by creating a Commercial Court. This appears to have worked well there.

#### Notes

- [1]. Interview with Musonda Cheta, pp. 461-469.
- [2]. *Mail and Guardian* Business Report, November 9 1999.
- [3]. "The Matero Economic Declaration"—a speech

by President Kenneth Kaunda delivered to the UNIP National Council in August 1970. Roan Selection Trust and Anglo-American Corporation Limited—the two major copper mining companies in Zambia were nationalised with the State taking 51 percent holding in either company—[Zambia Information Service].

[4]. Interview with Mumba Kapumpa, Chairman of the Securities and Exchange Commission, p. 425.

[5]. *Mail and Guardian* Report, November 9 1999.

[6]. Interviews with players in the Zambian stock market, pp. 409-505.

[7]. Colin Barraclough, “Shoot out in Lusaka: Privatisation that went Sour,” *International Investor*, December 1998.

[8]. *Ibid.*

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