REPORTABLE (81)
Judgment No. SC. 93/05
Civil Appeal No. 60/03

(1) DYNAMOS FOOTBALL CLUB (PRIVATE) LIMITED
(2) DYNAMOS FOOTBALL CLUB v

(1) ZIMBABWE FOOTBALL ASSOCIATION
(2) MILTON MAKORE (REPRESENTING THE MEMBERSHIP COMMITTEE OF DYNAMOS FOOTBALL CLUB)
(3) SPORTS AND RECREATION COMMISSION

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, NOVEMBER 22, 2005 & MARCH 23, 2006

S V Hwacha, for the appellants

No appearance for the first respondent

W Muchandibaya, for the second respondent

S Sadomba, for the third respondent

MALABA JA: This appeal is against part of para 2 and the whole of para 3 of the order of the High Court (HUNGWE J) dated 5 February 2003. The order reads as follows:

> "1. It is declared that Dynamos Football Club is an independent club with the right to manage its own affairs except as prohibited by law.
>
> 2. It is ordered that the respondent (now the first respondent) or its appointees be and are hereby interdicted from participating in the management of the administrative affairs at Dynamos Football Club except in terms of a lawful directive issued by the Sports and Recreation Commission in terms of the Sports and Recreation Commission Act [*Chapter 25:15*].
>
> 3. The Sports and Recreation Commission is directed to within seven days verify the register of members of the Dynamos Football Club as at 31 December 2002 from the records kept by the Club and thereafter but within twenty-one days from today's date convene a general meeting of the Dynamos Football Club for the purposes of electing office bearers in terms of the current constitution held by the respondent.

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4. The respondent is to bear the costs of this application."

The part of para 2 of the order appealed against is the exception to the prohibition against the first respondent ("ZIFA") from participating in the management of the affairs of Dynamos Football Club. The order was made on an application by the appellants against the first respondent. The second and third respondents were joined as parties to the proceedings on appeal as a result of the terms of the order made by the court *a quo*.

Dynamos Football Club, to which I shall hereinafter refer as "the Club" when the context allows, is an unincorporated association of individuals bound together by a contract for the achievement of the common purpose of organising and promoting the game of football through a team of professional players. The contract, evidenced by a set of rules passed by the associates in 1963, gave the Club the right to acquire movable and immovable property, sue or be used in its own name and have perpetual succession.

The first appellant is a company duly registered in terms of the laws of Zimbabwe. Its incorporation was provided for in the constitution or set of rules for the administration and control of the affairs of the Club.

The first respondent is a body formed in terms of its constitution (Annexure 'B') to co-ordinate, promote and control the game of "association football" (commonly abbreviated to "soccer"). It has affiliated to it a league of the most successful teams owned by different football clubs playing against each other for championship position. That is the Premier Soccer League.

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The second respondent represents the membership committee of the Club, an organ created under the "constitution" referred to in para 3 of the order appealed against.

The third respondent ("the Commission") is a body corporate established in terms of s 3 of the Sports and Recreation Commission Act [*Chapter 25:15*] ("the Act"). Its objects, as set out in s 19 of the Act, include the promotion of the development of sport in the country, provision of facilities for sporting and recreational activities and influencing government policy on matters relating to sports and recreation.

The background facts to the case brought by the appellants to the High Court against ZIFA are these. In 1963 a group of about twenty people who had played football for such clubs as Salisbury City and Salisbury United, which had disbanded, came together and agreed to form Dynamos Football Club. The terms of the agreement, to which I shall hereinafter refer as "the 1963 constitution", governed the relationship between members and the administration of the affairs of the Club.

Membership of the Club was restricted to the twenty individuals who, by accepting the constitution, became the founder members, and anyone who became a former player of the Dynamos team at any given time (clause 7). Any other person could become a member of the Club at the discretion of the Board of Trustees, provided the decision received the unanimous approval of members at an annual general meeting.

Clause 10.15 of the constitution stipulated that supporters and fans of the Club were not members and could not attend and vote at the Club's

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general meetings. Only founder members and former players had the right to attend and vote at the general meetings.

Clause 5.1.1 empowered founder members and former players who became members of the Club in the first year of its formation to constitute an "electoral college" and elect a Board of Trustees, consisting of ten members who were to serve for a period of three years but be eligible for re-election at an annual general meeting. The trustees had to be elected from members of the Club. They, in turn, were empowered as a Board to appoint, in the first year of existence of the Club, an executive committee of six members to run its affairs. Only former players of proven leadership qualities were eligible for appointment. They held office for a period of three years but were eligible for re-election at an annual general meeting.

The positions held by members of the executive committee were chairman, vice chairman, secretary, treasurer, director of youth and committee member. Amongst the powers delegated to the executive committee by members was the acquisition of players and entering into contracts of service with them. It was also the duty of the executive committee to keep an up to date register of members of the Club (clause 9.1.8).

Members exercised control over the operations of the Club during the year through annual general meetings. Clause 10.1.1 required that annual general meetings be held soon after the playing season or before the commencement of the new season. At the annual general meeting members were able to review the previous year's events by hearing and scrutinising the chairman's and treasurer's reports. Important resolutions and decisions concerning the affairs of the Club were to be made at the annual general

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meetings and implemented by the executive committee. It was at an annual general meeting that amendments to the constitution of the Club could be made.

The procedure for calling an annual general meeting was laid down in the rules and had to be strictly followed. The chairman of the executive committee had the power to convene an annual general meeting. If no amendment to the constitution was to be proposed at the meeting, notice to all members entitled to attend and vote at the annual general meeting had to be given seven days before the date of the meeting. The notice had to set out the nature of the business intended to be transacted at the meeting. In clause 15.1.3 it was stipulated that if an amendment to the constitution was to be proposed at the annual general meeting, a written notice of the meeting containing the terms of the resolution on the proposed amendment had to be given to all members forty days before the date of the meeting.

Then clause 15.1.1 was to the effect that:

> "Founder and former players are the only *bona fide* members of the club and they are the persons who have the power and the right to change or amend the club's constitution. Any other amendments made unless proposed by and approved by the 'electoral college' are null and void."

The "electoral college" was defined in the constitution as a meeting of founder members and former player members of the Club.

When a constitution says that rules of a club can only be amended or new rules made at an annual general meeting, they cannot be changed or new rules added at an extraordinary or special general meeting. Where the rules demand that the alterations or additions be effected at an annual general meeting of a specified composition of members, and upon written notice of a prescribed number of days having been given, the changes or additions which are not made

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in accordance with the prescribed procedures and without the preconditions having been met are null and void. See: *Baird v Wells* (1890) 44 Ch D 661 at 671-673; *Harington v Sendall* (1903) 1 Ch D 921 at 926; *Thellusson v Viscount Valentia* (1907) 2 Ch D 1; *Cape United Sick Fund Society v Forrest* 1956 (4) SA 519 at 528A.

In para 7 of the founding affidavit deposed to on behalf of the appellants by one Danny Thomas Yaledi, who said he was a trustee and a member of the Club, it was said that on 10 May 1990 a meeting attended by supporters of the Club was held, at which amendments to clauses 7 and 10 of the 1963 constitution were proposed and passed. It will be recalled that Clause 7 restricted membership to founder members and former players and gave to them only the right to attend and vote at the meetings of the Club. Clause 10 also gave them the right to attend and vote at annual general meetings. It also declared that supporters and fans of the Club were not members and had no right to attend and vote at any of its meetings.

The purported amendments opened membership of the Club to any person who, upon acceptance of his application to become a member by the executive committee, had attained the age of eighteen years and thereafter paid the registration and subscription fees fixed by the executive committee. The effect of the purported amendments was that supporters and fans could become members of the Club. They would have the right to attend and vote at the Club's annual general meetings for any office bearer. In fact, any member of the public who had become a member in terms of the purported amendments could be voted into office.

There is some information on the circumstances of the meeting of 10 May 1990 in the papers placed before the High Court. The founding affidavit

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alleged that the meeting was called by the executive committee of ZIFA. The deponent said that founder members and former players of Dynamos did not attend the meeting. There was no evidence that they assented to be bound by the acts of the meeting. The opposing affidavit sworn on behalf of ZIFA by its secretary general did not deny that the meeting was convened by its executive committee. It was admitted that the meeting was attended by people who were not members of the Club at the time. The deponent said that some of the founder members and former players acquiesced in the amendments by accepting later to be elected into office in terms of the new rules. He said those who did not take up office acquiesced in the amendments by failing to challenge the validity of the acts of the meeting in court within a reasonable time.

It appears that the 1963 constitution was further amended on 12 March 1994. Apart from the document produced in the court *a quo*, which the learned Judge described as "the 1994 constitution", there is no information on what happened on 12 March 1994. It, however, appears to be a re-write of the 1963 constitution as purportedly amended on 10 May 1990.

What is clear is that the changes made to the 1963 constitution on 10 May 1990 split the members of the Club into two factions. One faction comprised some of the founder members and former players who strongly objected to the changes on the ground that they were irregular by virtue of not having been in accordance with the procedure prescribed in clause 15 of the 1963 constitution. This faction of members advocated for the running of the Club in terms of the 1963 constitution until properly amended. The other faction consisted of the remaining founder members and former players and those persons who had acquired membership as a result of the amendments adopted at the meeting of 10 May 1990. They were quite happy to have the affairs of the Club run in terms of the amended rules.

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These developments had negative effects on the fortunes of the Club. For quite a long time Dynamos Football Club had been one of the most successful football clubs in the country. Its team had built a reputation for playing attractive football. At one time they won the Premier Soccer League championship in three successive years. As a result of the team's attractive and winning style of playing the game of football, Dynamos Football Club had attracted a huge following of supporters. Its fortunes, however, began to wane, largely because of the serious disagreements amongst the members over the administration and control of its affairs.

Citing the existence of what it described as "anarchy" in the administration of the affairs of the Club, which it said affected the operations of the Premier Soccer League, ZIFA dissolved the Club's executive committee. It appointed its own committee to carry out the day-to-day management of the affairs of the Club. There were six committees running the affairs of the Club, namely, the audit committee, the constitutional committee, the finance committee, the membership committee, the technical committee and the marketing committee. Through its committees, ZIFA had access to the funds due to the Club. It decided the use to which the funds were put. I hasten to point out the fact that the constitution of the Club did not provide in the structure for the administration of the affairs of the Club for appointment of so large a number of committees, let alone by an outsider.

Things did not get any better after the intervention by ZIFA. The performance of the team continued to deteriorate. The dispute amongst members over the legitimacy of the changes made to the 1963 constitution remained unresolved.

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On 22 February 2000 the appellants instituted proceedings in the High Court by way of an application for an order declaring the participation by ZIFA in the management of the affairs of the Club unlawful and interdicting it from continuing to do so. ZIFA took its stand on article 11(k) of its constitution, which it said authorised it to act in the manner it did towards the second appellant.

Article 11(k) of the constitution of ZIFA empowers it to:

> "… cause enquiry into and the determination of any disputes that may arise whether between or within member bodies, clubs or players or between or within one or more of them and the Association and to ensure the maintenance of an effective, transparent, fair and credible disciplinary and/or dispute settlement system, rules, procedures and structures."

The court *a quo* held, correctly in my view, that, upon proper construction, the nature and scope of the powers given to ZIFA under article 11(k) of its constitution did not include the right to dissolve the executive committee of a club and appoint committees of its own to carry out the day-to-day management of its affairs. What ZIFA did was an act that its own constitution did not permit it to do. Its actions were *ultra vires* article 11(k) of its constitution and therefore null and void.

The decision on the relief claimed by the appellants against ZIFA had been made. The proceedings, as brought to the High Court, ought to have come to an end. The learned Judge, however, went on to make a pronouncement on what he described as "the 1994 constitution", the effect of which was that it comprised the rules by which the affairs of the Club had to be run. He had indirectly decided the dispute between the two factions of members of the Club in favour of one of the factions when the matter had not been brought before him for determination. What had been brought to the High Court for

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determination was whether or not the participation by ZIFA in the day-to-day management of the Club was lawful.

The learned Judge said at p 6 of the cyclostyled judgment:

> "The earlier constitution is said to be a 1963 constitution and the latter is said to be a 1994 constitution. …
>
> I do not attach any weight to the validity, or lack of it, of this particular constitution. My reason for this is that Dynamos Football Club has moved on since 1963. It cannot surely be expected to be working with an old 1963 document. That is why I believe the 1994 constitution was adopted by those claiming to be members of Dynamos. One cannot expect a football club to be governed by a static constitution in the face of more modern copies of the constitution (such) as the 1994 one. It is more representative. It captures the modern spirit of freedom of association. It has more liberal provisions in respect of membership. At the same time it is endowed with provisions which exclude undesirable elements like criminal convicts and insolvents."

The learned Judge then made the order directing the Commission to verify the register of members of the Club and thereafter convene a general meeting of the Club for the purposes of the election of "office bearers" in terms of "the 1994 constitution".

The noting of this appeal followed. ZIFA did not cross-appeal against the determination that it had no right to take over the day-to-day management of the affairs of the Club. It also did not support part of para 2 and the whole of para 3 of the order appealed against.

Knowledge of the stance taken by ZIFA on the grounds of appeal jolted into action the second respondent, particularly those persons who acquired membership of the Club as a result of the decisions made at the meetings of 10 May 1990 and 12 March 1994. Represented by Milton Makore, the second respondent applied to be joined in the proceedings on appeal for the purposes of supporting the order made by the court *a quo*. The Commission also applied to

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be joined in the proceedings on appeal, but indicated that it would abide the Court's decision. The involvement of the second respondent in the litigation brought to the fore the question of the validity of the meetings of 10 May 1990 and 12 March 1994.

I need to mention one other matter before I turn to determine the appeal. The notice of appeal set out the grounds of appeal and the relief sought. It then went on in para VIII to pray for an order declaring that:

"(a) Consequent to the interdict granted by the High Court, the management and administration of the Dynamos Football Club shall revert to the applicants.

(b) The 1963 Dynamos Football Club constitution has not been lawfully amended and remains the only lawful constitution of the Club.

(c) The ownership and management of Dynamos Football Club shall continue in terms of the 1963 constitution until such constitution is lawfully repealed or amended.

(d) There is no requirement for elections of office bearers in terms of the 1963 constitution."

I now turn to determine the appeal.

The first point taken was that the learned Judge misdirected himself in making a finding of the fact that the document he described as "the 1994 constitution" contained the rules by which the affairs of the Club were to be administered without having determined the fundamental question of whether the procedure prescribed in clause 15 of the 1963 constitution was complied with for those rules to be valid.

It is important to bear in mind what the learned Judge appears not to have appreciated. It is the fact that the legal basis of an unincorporated voluntary association of persons such as a social club is the contract between and amongst the associates. The law recognises their freedom to determine the acts

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by which they intend to be bound, who should perform them, and when. The duty of a court of law is to determine whether what is claimed to have been done is in fact what was prescribed by the members of the club in strict compliance with the procedure they laid down for validity to attach to those acts.

In *Constantinides v Jockey Club of South Africa* 1954 (3) SA 35 at 44C HERBSTEIN J said:

> "... the relationship between the parties is contractual and both are bound by the Rules and Regulations of the Jockey Club. This contract falls to be construed by the Court according to the ordinary rules of construction; the Court cannot, because it considers the contract unreasonable from the point of view of one or other of the parties, depart from the language used and attempt to make it a reasonable one according to its standards. It cannot, because it might disapprove of some of its terms, disregard them or give them a meaning other than arises from the ordinary and natural meaning of the language employed."

As was stated by BRIGHTMAN J in *Re Recher's Will Trusts* [1971] 3 All ER 401 at 407e-408a:

> "... such an association of persons is bound, ... to have some sort of constitution, i.e. the rights and liabilities of the members of the association will inevitably depend on some form of contract *inter se*, usually evidenced by a set of rules. ... The contract is the same as any other contract and concerns only those who are parties to it, that is to say, the members of the society."

Lastly, in *Re Bucks, Constabulary Widows and Orphans Fund Friendly Society (No. 2)* [1979] 1 WLR 936 at 952 WALTON J said:

> "I think that there is no doubt that, as a result of modern cases springing from the decision of O'CONNOR M.R. in *Tierney v Tough* [1914] 1 IR 142 judicial opinion has been hardening and is now firmly set along the lines that the interests and rights of persons who are members of any type of unincorporated association are governed exclusively by contracts, that is to say, rights between themselves."

The learned Judge fell into the error of accepting as a fact the illusion that there were two constitutions and his duty was to decide on which of them the affairs of the Club were to be run. The Club, being an aggregate of its

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members, could have only one constitution unless, of course, the members had split into two Clubs, each with its own constitution. There was no suggestion that two football clubs using the name "Dynamos" had emerged. The existence and scope of the Club as constituted in 1963 continued, except that disagreements had emerged amongst the members over the validity of certain terms of the "1963 constitution" said to have been adopted at the meetings of 10 May 1990 and 12 March 1994.

If the question of the validity of the disputed terms had been raised in the High Court, its determination would have required an inquiry into the question whether they had been agreed upon by the members of the Club, which in turn would have brought into focus the establishment of the fact that the disputed meetings had been convened in accordance with the procedure prescribed in clause 15 of the 1963 constitution.

The misdirection of the learned Judge lay in the fact that he decided a matter that had not been put to him for determination. Those who instituted the proceedings in the High Court on behalf of the Club in the exercise of its right to sue did so on the basis that the participation of ZIFA in the day-to-day management of the Club's affairs was unlawful. The decision of the court *a quo* on the relief sought depended upon the construction of article 11(k) of the constitution of ZIFA. The learned judge elevated the question of the validity of the terms of the contract amongst members of the Club to a cause of action when it had not been pleaded as such by the applicants.

The founding affidavit shows that those who brought the proceedings to the High Court on behalf of the Club did not raise for decision the question of the validity of the acts of the meetings of 10 May 1990 and 12 March 1994 because they believed that, following a decision taken at the annual general

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meeting held on 7 February 1998, the affairs of the Club were to be run in terms of the 1963 constitution until it was properly amended in accordance with the requirements of clause 15.

The second point taken was that the learned Judge misdirected himself in making the order directing the Commission to verify the register of members of the Club and convene a general meeting of members to elect office bearers in terms of what he described as "the 1994 constitution".

I agree. It is trite that an order requiring the performance of acts which may be prejudicial to the interests of a person should not be made by a court of law when he is not a party to the proceedings and has not been heard on the matter. See *Abrahams and Ors v Cape Town City Council* 1954 (2) SA 178 (C) at 182.

The Commission had not been cited as a party to the proceedings brought to the High Court by the appellants against ZIFA. No relief had been claimed against it. The court *a quo* was bound by the law to decide the case as between the parties before it and issue orders which affected their interests only.

The court *a quo* had no right to make an order directing the Commission to perform acts which, in terms of the constitution of the Club, were to be performed by the executive committee. The law of the court is also that it could not order the Commission to do acts that it was not permitted to do by the statute in terms of the provisions of which it was established. The statute did not confer on the Commission the power to take over administrative matters of a club, such as verification of the register of members and the convening of general meetings for the election of office bearers.

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The last question is whether this Court should grant the relief claimed in para VIII of the notice of appeal. It is clear that the order was not sought in the court below. It is being claimed for the first time on appeal. The claim is based on the contention that the meeting of 10 May 1990, at which amendments to the 1963 constitution were purportedly made, was irregular, in that it was not in accordance with the procedure prescribed in clause 15 of the 1963 constitution. The contention seeks to advance the principle that if there is a rule in the contract of the Club permitting amendment, then clearly its terms must be strictly followed.

There are authorities to the effect that a declaration based on an entirely new case sought to be built on appeal cannot be granted.

In *Commissioner for Inland Revenue* v *Lazarus Estate* 1958 (1) SA 311 the appellant sought to rely on appeal on a provision of Act 29 of 1922. Reliance had not been placed on it in the court of first instance. Holding that the contention could not be considered on appeal as it constituted a new case altogether, SCHREINER JA said at 320 F-H:

> "It is clear that in the present proceedings the Commissioner relied only on the latter provision until sec 3(3)(a) was put forward by counsel for the first time on appeal. In my view, the passage quoted by counsel for the respondents from the judgment of WATERMEYER CJ, in *Commissioner for Inland Revenue v Estate Crewe and Anor* 1943 AD 656 at p 682, is in point. In relation to a new argument sought to be raised on appeal for the first time the learned CHIEF JUSTICE said:
>
>> 'This contention, however, raised an entirely new case; it was not a contention put forward in the special case nor was it considered in the trial court, and it cannot now be considered, and I express no opinion upon it.'
>
> The present proceedings were as I have indicated substantially by way of a stated case in which the legal issues to be decided were agreed by the parties. The cases quoted by counsel for the Commissioner, which state the general principles on which new points of law will be entertained on appeal, are less directly applicable than is the passage from *Crewe's* case. The Commissioner's proposal to rely on sec 3(3)(c) would amount to

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> setting up a wholly new case and this is sufficient to lead to the conclusion that the new point must be disregarded."

In *Goto v Goto* 2001 (2) ZLR 519 (S) the appellant claimed in the court of first instance a declaration that she was entitled to 50% of the value of the matrimonial assets. On appeal she claimed a declaration that she was entitled to be given a particular property, that is to say, the matrimonial home. SANDURA JA at 527C said:

> "… it is not open to Mercy, in the absence of an amendment to her declaration, to claim on appeal something which she did not claim in the court *a quo*."

There are, however, other decisions to the effect that the appellate court has a discretion in appropriate cases to grant relief claimed for the first time on appeal if it is satisfied that all the facts on which the court of first instance would have decided the matter had it been raised with it were available for its consideration and such facts as are essential to the decision are common cause or well-nigh incontrovertible. See *Workmen's Compensation Commissioner v Crawford and Anor* 1987 (1) SA 290 at 307G; *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 at 380I-381A.

I think that, on the principle that this Court has a discretion in the matter, we should grant the order claimed. The necessary foundation therefor was laid in the founding affidavit. In my view, a decision on the validity of the acts of the meeting of 10 May 1990 could be made on the admitted facts. Regard may also be had to the powers of the Supreme Court on appeal in civil cases set out in s 22(1)(b)(ix) of the Supreme Court Act [*Chapter 7:13*], authorising it, if it thinks it necessary or expedient in the interests of justice, to take any course which may lead to the just, speedy and inexpensive settlement of the case.

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Rules of a club can be altered or added to only in accordance with the express provisions of its constitution. In this case there is incontrovertible evidence of the fact that the procedure for the amendment of the constitution of the Club prescribed in clause 15 by its members was not followed. It was admitted by the Secretary-General of ZIFA in the opposing affidavit that there were persons who were not members of the Club who attended and voted at the meeting of 10 May 1990. He did not deny the fact that the meeting was convened by the executive committee of ZIFA.

The members of the Club had agreed in clause 15 of the 1963 constitution that a decision to amend any part of the constitution, to be valid and binding on them, had to be made at an annual general meeting of founder members and former players convened by the chairman of the executive committee of the Club by written notice served on each member entitled to attend and vote forty days before that meeting.

It is, in my judgment, particularly important for the stability of such a club that, when fundamental matters such as amendments or additions to the rights and liabilities of members are undertaken, there be full compliance with all the requirements of the rules to avoid the occurrence of the kind of squabbles that have rocked the Club.

It appears to me that, upon a construction of the provisions of clause 15 of the 1963 constitution, a meeting which was not an annual general meeting of founder members and former players, convened by an outsider like ZIFA and attended by non-members of the Club, was a void and unauthorised act. It would not have been a properly convened meeting for the purpose of effecting a valid amendment to the 1963 constitution.

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There was failure to give proper notice of the meeting according to the rules. The facts show that the notice was given by the executive committee of ZIFA. The rule is that failure to give due notice to even one member of the Club who was entitled to attend and vote at the meeting renders it a mere nullity. See *Baird's* case *supra* at 671-673; *Young v Ladies Imperial Club Ltd* [1920] 2 All ER 223.

Some members of the Club who had the right to attend the meeting if it had been properly convened did not do so. The facts before us show that what happened on 10 May 1990 was not in accordance with the procedure prescribed in clause 15 of the 1963 constitution of the Club.

In *Baird's* case *supra* STIRLING J, referring to a similar failure to comply with a rule on the amendment of a constitution of a club, said at 671:

> "What was done on the 6th of December 1888 and also the proceedings of 2nd of April 1889 were entirely irregular. If the election of the committee was to be confirmed and new rules were to be adopted proper and distinct notice should have been given to the members. No such notice was given and consequently the proceedings were not binding on the members who were not present."

It was argued that the founder members and former players acquiesced in the purported amendment by not challenging its validity over a long period of time until they became part of the constitution of the Club through repeated use. Whilst I appreciate the force of the contention, I am not tempted to succumb to it.

Not only does the argument concede that the purported amendment was invalid *ab initio*, it ignores the evidence that the founder members and some of the former players persisted in their objection to the amendment and did not assent to being bound by the new rules. In any case,

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they could not have acquiesced in what was at law a nullity. In my view, the length of the interval between 10 May 1990 and the institution of proceedings in the High Court had no effect on their rights.

I would accordingly allow the appeal, with costs to be paid by the second respondent. The part of para 2, commencing with the word "except", and the whole of para 3 of the order of the court *a quo* are deleted. The order of the court *a quo* should read as follows -

"1. It is declared that Dynamos Football Club is an independent club with the right to manage its own affairs except as prohibited by law.

2. It is ordered that the respondent or its appointees be and are hereby interdicted from participating in the management of the administrative affairs at Dynamos Football Club.

3. The respondent is to bear the costs of this application.

IT IS FURTHER DECLARED THAT –

4. The 1963 Dynamos Football Club constitution has not been lawfully amended and remains the only lawful constitution of the Club.

5. The ownership and management of Dynamos Football Club shall continue in terms of the 1963 constitution until such time as it is lawfully repealed or amended."

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

Dube, Manikai & Hwacha appellants' legal practitioners

Muchandibaya & Associates, second respondent's legal practitioners

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Gill, Godlonton & Gerrans, third respondent's legal practitioners

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