IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 190 of 2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

COPPERBELT ENERGY CORPORATION PLC **Appellant**

AND

PATRICK MWILA **1st Respondent**

ZESCO LIMITED **2nd Respondent**

ZAMBIA DAILY MAIL LIMITED **3rd Respondent**

Coram: **Chashi, Muzenga and Patel, JJA**

on 19 September and 19 October 2023

For the Appellant: Mr. M. Mwenye S.C. & Mr. E. Kaluba
Messrs Mwenye & Mwitwa Advocates

For the 1st & 2nd Respondent: Mr. M. Musukwa
Messrs. Andrew Musukwa & Co

For the 3rd Respondent: Mr. J. C Kalokoni
Messrs Kalokoni & Co.

JUDGMENT

Patel, JA, delivered the Judgment of the Court

Cases referred to:

1. African Banking Corporation Zambia Ltd v Copper Harvest Foods Limited & 3 Others -CAZ Appeal No. 18 of 2021.
2. Megha Engineering and Infrastructure Limited and Attorney General v Marks Industries Limited -CAZ Appeal No. 270 of 2021
3. John Sangwa vs Sunday Bwalya Nkonde- SCZ Appeal No. 2 of 2021.
4. Guardall Security Group Limited v Reinford Kabwe- CAZ Appeal No. 44 of 2019.
5. Citibank Zambia Limited v Suhayl Dudhia -SCZ Appeal No. 6 of 2022
6. Bellamano v Lingure Lombard Limited (1976) Z.R. 267.
7. Kansanshi Mine Plc v Joseph Maini Mudimina and others- SCZ Appeal No 149/2010 (unreported)
8. Hakainde Hichilema and 5 others v The Government of the Republic of Zambia- SCZ Appeal No. 28 of 2017
9. Charles Mambwe and Others and Mulungushi Investments Limited (In Liquidation), Mpelembe Properties Limited -SCZ No. 36 of 2016,
10. Leopold Walford (Z) Limited v Unifreight (1985) Z.R. 203
11. Standard Chartered Bank Zambia Plc v John M. C. Banda- SCZ Appeal No. 94 of 2015
12. Copper Harvest Foods & 3 Others v African Banking Corporation Zambia Limited -CAZ Application No. 49 of 2021
13. Standard Chartered Bank v Wisdom Chanda and Christopher Chanda -SCZ Judgment No. 18 of 2014.

Legislation referred to:

1. The Court of Appeal Rules, Statutory Instrument No. 65 of 2016.
2. The High Court (Amendment Rules) Statutory Instrument No. 58 of 2020.
3. The Rules of the Supreme Court of England 1965.
4. The Companies Act, No.10 of 2017.

1.0 INTRODUCTION

1.1 This is an appeal against the Ruling of *P.K. Yangailo J* of the High Court, delivered on 4th June 2021.

1.2 For context, we have noted that the Plaintiff instituted suit against the three (3) Defendants for an article reported in the 3rd Defendants daily newspaper of 15 June 2020, volume 24 No. 143 at pages 1 & 3. The said article was also printed in a publication called ''News Diggers Limited'' of the same date, which appeared at pages 1 and 7 of the 708th edition, which story quoted the 1st Defendant, as its source.

1.3 Aggrieved by the said publications referred to above, the Plaintiff in the Court below, commenced an action against the three (3) Defendants by originating process filed on 25th August 2020, which resulted in the 1st & 2nd and 3rd Defendants, both mounting preliminary applications, to set aside the Writ for irregularity, culminating in the now assailed Ruling of the lower Court of 4th June 2021. Disenchanted with the Ruling, the Plaintiff has now launched this appeal. In this Judgment, (save for the narrative of proceedings in the court below), we will refer to the Parties as Appellant and Respondents, as they appear in this Court respectively.

2.0 BACKGROUND

2.1 By its Writ of Summons and Statement of Claim dated 25th August 2020, the Appellant, (as Plaintiff), commenced an action against the three Respondents, (as Defendants) claiming the following reliefs:

(i) Against the Defendants and each of them:

a. Compensatory damages;

b. Exemplary damages;

c. Interest at the current commercial bank lending rate on the sums found to be due; and

d. Costs of and incidental to this action.

(ii) An order of injunction to restrain the Defendants whether by themselves, their servants, agents, officers or otherwise from making and publishing any further defamatory statements against the Plaintiff in their public pronouncements; and

(iii) Any other relief the court may deem fit.

2.2 On 7th September 2020, the 3rd Defendant entered conditional appearance and filed its application on 10 September 2020, by Summons for an Order to set aside the Writ and Statement of Claim for irregularity.
The 1st & 2nd Respondent filed an application on 11 September 2020, to set aside process, also for irregularity as cited.

2.3 The opposing arguments of the Plaintiff filed on 28th September 2020 are seen at *pages 69 to 91* along with the 3rd Defendant's arguments in reply of 6th October 2020 at *pages 92 to 97* of the Record of Appeal respectively.

3.0 DECISION OF THE COURT BELOW

3.1 The trial Judge considered the issue in controversy and narrowed it down to four issues that required determination as follows:

i. *Whether or not the Plaintiff's originating process should be set aside for irregularity on grounds that the Plaintiff did not serve a letter of demand on the 2nd and 3rd Defendants.*

ii. *Whether the Plaintiff stated the alleged intentional and negligent publication of the alleged libelous material as against the 3rd defendant.*

iii. *The sufficiency or otherwise of the particulars of the alleged defamatory publication against the 1st & 2nd defendants.*

iv. *Whether News Diggers Limited should have been cited as a Party in the action.*

3.2 The learned Judge, in the Court below, having interrogated the law and authorities cited by counsel respectively, found the Plaintiff's Writ as against the 2nd and 3rd Defendants being irregular and set it aside with costs.

3.3 Having dismissed the action against the 3rd Defendant, the lower Court refused to consider the second issue.

3.4 On the 3rd issue, the lower Court found that the Plaintiff's claim against the 1st defendant was irregular and dismissed the same with costs.

3.5 On the issue of News Diggers Limited, the lower Court found against the 1st Defendant and dismissed the issue with costs to the Plaintiff.

4.0 THE APPEAL

4.1 Being dissatisfied with the Ruling of the lower Court, the now Appellant filed its Notice of Appeal and Memorandum of Appeal on 24th June 2021 advancing seven (7) grounds of appeal as follows:

i. *The learned High Court Judge misdirected herself in law when she dismissed the Appellant's matter on account of an application that was brought pursuant to Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, a provision which only empowers the court to issue interlocutory orders and not final dismissal of a matter.*

ii. *The learned High Court Judge erred in law and fact when she held at paragraph 5.9 of the Ruling that the 1st Respondent had complied with the law in the manner, he moved the court to dismiss the matter.*

iii. *The learned High Court Judge erred in law and fact, at paragraph 5.6.1. of the Ruling, when she decided to give full effect to the word 'must' in Order 82 Rule 3(1) of the RSC without giving equal weight to the same word 'must' in Order 2 Rule 2(2) of the RSC.*

iv. *The learned High Court Judge erred in law and fact when she held at paragraph 5.4 of the Ruling that it was clear from the evidence placed before court that no letter of demand was actually served on the 2nd and 3rd Respondents and neither had any proof of such service made by the Appellant been presented to court in the acceptable form or at all when in fact the evidence on record showed that letters of demand were served on both the 2nd and 3rd Respondents.*

v. *The learned High Court Judge erred in law and fact when she held at paragraph 5.7 of the Ruling that the Appellant's pleadings do not properly and clearly give sufficient particulars of the alleged defamatory materials complained of in the statement of claim in respect of which the action is brought against the 1st Respondent, when in fact the statement of claim at paragraphs 10, 13, and 14 clearly particularized the defamatory publications and the specific words complained of.*

vi. *The learned Judge in the court below fell into grave error when she dismissed the Appellant's case in the Court below on the basis of alleged irregularity of the statement of claim when in fact and at law, any alleged irregularity, if any, was curable.*

vii. *The learned Judge erred in law when she delivered her Ruling on 4th June 2021 on an application that was filed into court on 7th September 2020, thereby taking 9 months to deliver a Ruling on an interlocutory application contrary to the provisions of Order 36 rule 2(2) and (3) of the High Court Rules, Chapter 27 of the Laws of Zambia, as amended by Statutory Instrument No. 58 of 2020*

5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The Appellant's heads of argument were filed on 20th August 2021 and heads of argument in reply (to the 3rd Respondent), on 7th September 2023 and (to the 1st & 2nd Respondents) on 15th September 2023, have been duly considered and appreciated and will not be recast here save for emphasis as necessary.

We shall speak to these late filings in paragraph 7 below.

6.0 THE RESPONDENTS HEADS OF ARGUMENT

6.1 The 1st & 2nd Respondents heads of argument filed on 22 September 2021, have also been considered and will not be recast save for emphasis where appropriate.

6.2 The 3rd Respondent filed its heads of argument in response on 20th September 2021. These too, have been duly considered, and will not be recast save for emphasis where appropriate.

7. THE HEARING

7.1 At the hearing of the appeal, the Court took issue with the Appellant having filed its Arguments in reply to the 3rd Respondents Heads of Argument, on 7 September 2023 and to the 1st & 2nd Respondent's Arguments, on 15 September 2023. In response, Counsel Kaluba explained that the Appellant had only been served with the 1st & 2nd Respondent's Heads of Argument as late as, 13 September 2023.

Counsel Musukwa tendered the feeble explanation that they were under the mistaken belief that they had in fact served their Heads of Argument, when in fact not and that they intended to seek leave from the Bar that morning.

We stated then, as we do now, the conduct of late service by the Respondents, was, and is, unacceptable.

To file heads of argument on 22 September 2021 and 20 September 2021, respectively, and to only serve the Appellant in September 2023, days before the hearing, without leave, and with no satisfactory explanation, is unacceptable and condemned in the strongest terms.

We warned Counsels to desist from such shabby practice, which will not be endorsed or supported by the Court.

7.2 State Counsel Mwenye placed reliance on the Appellant's arguments before Court and proceeded to make detailed submissions in support of the appeal. State Counsel sought to augment grounds 3 and 5 together and ground 6 separately. He argued that the facts of this case were straight forward and that the Judge in the court below dismissed the case against the 2nd and 3rd respondent on the ground that a letter of demand was not served before court process was filed and dismissed the action against the 1st Respondent, on the ground of insufficient particulars of the alleged defamatory statement.

7.3 State Counsel submitted that the particulars required under **Order 82 Rule 3 (1)**[3] are only required where the allegation is an innuendo and not on the ordinary basis or meaning of the word. In dismissing the argument, State Counsel referred to *paragraph 5.7* of the Judgment, and submitted that this is where the learned Judge of the lower court fell into grave error.

7.4 State Counsel referred the Court to *page 43* of the Record of Appeal and to *paragraphs 10 and 11,* which set out the publication and argued that the words complained of were used in their natural and ordinary meaning.

7.5 In addressing ground 6, State Counsel invited the court to observe from the Record of Appeal, which makes it clear that the 1st Respondent uttered these words in his capacity as director in the 2nd Respondent Company. He argued that it is not disputed that the letter of demand sent

to the 1st Respondent of the record of appeal was sent in his duo capacity as a Defendant and as a Director. He referred the Court to *page 106* of the Record of Appeal, which exhibited the letter of demand that was copied to the Managing Director and Director Legal Services and argued that the 1st and 2nd Respondents were served.

7.6 As regard the 3rd Respondent, it was his submission that the Appellant conceded that there was no service before proceedings were filed. It was their submission that once proceedings were filed, the letter of demand was served, arguing that any irregularity was cured at that stage and with no prejudice to the 3rd Respondent.

7.7 State Counsel referred to the case of **Africa Banking Corporation v Copper Harvest and others**[1], in which this Court decided that the irregularity based on failure to serve the letter of demand is curable and it ought not to lead to dismissal.

7.8 In response, Counsel for the 1st and 2nd Respondent, Mr. M. Musukwa, relied on 1st and 2nd Respondents Heads of Argument on 22nd September 2021 and augmented the arguments briefly.

7.9 Counsel addressed ground 5 and submitted that it was on the particularization of the pleadings. He argued that the Lower Court was on firm ground to say that the pleadings did not meet the required threshold and relied on Heads of Arguments for all other arguments.

7.10 In addressing ground 6, Mr. Musukwa referred the Court to *page 105* of the Record of Appeal, being a letter addressed to the 1st Respondent. He referred the Court to *page 107* of the Record and referred to an air waybill exhibited in the Record filed by the Appellant in support of his

submission that only the 1st Respondent was served with a letter of demand. There was no demand letter sent to the 2nd Respondent and this is not curable. He argued that the lower court was on firm ground for dismissing the matter.

7.11 It was his submission that the Appellant was at liberty to recommence the matter and argued that according to **Atkins, Volume 15 at paragraph 28**, a dismissal of action is not a bar to a fresh action.

7.12 Counsel for the 3rd Respondent, Mr. J.C Kalokoni, acknowledged that Counsel for the Appellant conceded that the 3rd Respondent having not been served with a letter of demand prior to the action having commenced, could not seek to cure it after the event. He argued that the lower Court was on firm ground and prayed that the entire matter be dismissed with costs.

7.13 In Reply, State Counsel reiterated his arguments and relied on the case of **African Banking Corporation v Copper Harvest and others**[1] and the case of **Megha Engineering**[2] on the issue of conditional appearance as entered by the Respondents.

8.0 DECISION OF THIS COURT

8.1 Preliminary Issue

We note that the 1st & 2nd Respondent have attempted to raise a preliminary issue within their heads of argument filed on 22nd September 2021. We have noted the arguments opposing the preliminary issue.

We must state at the onset that we are concerned at the emerging practice of Counsel, raising what they term 'preliminary issues', which are themselves improperly raised. **Order XIII rule 5 (1)**[1] is categoric in the

procedure to be followed for raising preliminary issues by a respondent to an appeal. No such Notice as required, having been filed, and in any event, whilst we do not in any way condone a wrongly compiled Record of Appeal, we are alive to the fact that the 'defects' complained of are so minor and do not go to substance. For example, the defect cited on *page 8* of the Record of Appeal, does not manifest itself on the copies before the Court and while *page 114* of the Record of Appeal, not having been numbered in accordance with **Order III rule 11 subrule 6**[1] does little or nothing to confuse the record.

Counsel having magnanimously acknowledged that the 'defects' they speak to, not being fatal are indeed curable. We do not make any orders accordingly, more so that the Respondents themselves have been found wanting in the manner they served the Appellant with their heads of argument, as stated above.

8.2 We have scrutinized the seven grounds of appeal, which obviously attack several findings made by the Court below. We have however opted to start with ground 7, which we believe is totally misplaced in the context of the appeal. We are alive to the provisions of the High Court Rules under which this ground was canvassed, namely **Order 36 rule 2 (2) & (3) of the High Court Rules**[2]**.** We draw Counsel's attention to the fact that, from the record of proceedings, the application was heard on 29th September 2020, albeit filed on 7th September 2020 and Ruling delivered some 8 months later. (See *page 115* of the record of Appeal).

8.3 In mounting this challenge, the Appellant has argued based on the decision of the Supreme Court in the case of **John Sangwa vs Sunday Bwalya Nkonde**[3] which decision emphasized the importance of delivering justice without delay. The Appellant has also referred to our decision

rendered in the matter of **Guardall Security Group Limited vs Reinford Kabwe**[4] on the issue of loss of jurisdiction on account of delay in delivering judgment.

8.4 We believe the reference to the two cited decisions, is out of context, as the former, relates to an action initiated against the learned Judge (*as he then was*), in a specific matter, whereas the latter has since been overturned by the Supreme Court in the case of **Citibank Zambia Limited v Suhayl Dudhia**[5] on the issue of the alleged loss of jurisdiction that the Appellant appears to canvass before us.

8.5 That notwithstanding, we remind Counsel, that as an appellate court, we do not sit in judgment of the discharge of the duties of the Court below, nor do we apply sanctions, on what we perceive to be, are complaints on the delay in the delivery of the said Ruling. The record does not show if **Order 36 rule 2 (3)**[2] was complied with, (although the Appellant appears to argue that it was not), and in any event, that would be an internal administrative matter. Save to state, as we have noted, that the Court below in *paragraph 1.1* of its now assailed Ruling, did tender reasons for the delay in delivery of the Ruling.

We note that when invited by the Court to speak to ground 7, State Counsel Mwenye, graciously, and for good reason, in our opinion, decided to abandon the ground. However, we felt compelled to pronounce ourselves on this, as the issue was not only canvassed as a ground of appeal, but vehemently supported in the Appellant's Heads of Argument, and also in their Heads of Argument in Reply. The ground having been abandoned; these comments are offered to guide litigants accordingly.

8.6 We have noted that the Appellant has argued *grounds 1 & 2* together which assails the dismissal of the matter under an irregular application. The Appellant has advanced two reasons in support of its argument that the Respondents' application for dismissal was irregular. It has submitted firstly that the application was brought pursuant to a wrong provision of the law, **Order 3 rule 2 of the High Court Rules**[2] and that it did not comply with the provisions of **Order 2 rule 2 of the Rules of the Supreme Court**[3]**.**

8.7 In support of these two grounds of appeal, the Appellant has relied on several decisions of the Apex Court. In the case of **Bellamano v Lingure Lombard Limited**[6] the Supreme Court held as follows:

"....it is always necessary, on the making of an application, for the summons or notice of application to contain a reference to the order and rule number or other authority under which the relief is sought..."

8.8 In the unreported decision of **Kansanshi Mine Plc v Joseph Maini Mudimina and Others,**[7] the Supreme Court in dismissing with costs, a notice of motion brought pursuant to a wrong provision of the law, stated as follows:

"We accept the submissions by learned counsel for the appellant that the absence of an indication of the correct provision under which the motion was taken out, makes the application by the respondent ipso facto irregular.

8.9 It was also argued that **Order 3 rule 2 of the High Court Rules**[2], refers to the wide discretionary power of the Court to make any interlocutory Order, whereas the applications before the lower court (seeking orders of dismissal), was a final order. In support of its argument, the appellant has

relied on the case of **Hakainde Hichilema & 5 others v The Government of the Republic of Zambia**[8] where the Supreme Court held as follows:

"From its wording, Order 3 rule 2 gives wide discretionary power to a court to make interlocutory orders even if the said orders are not expressly asked for and in order to meet the ends of justice. The question is: does this discretion extend to final orders? In the case of Zambia National Holding Limited and United National Independence Party v Attorney General, we held that although the constitution conferred unlimited jurisdiction on the High Court, the Court must exercise its discretion within the confines of the law. In short, such jurisdiction is not limitless.
Looking at the provisions of Order 3 rule 2 of the HCR, it is clear that the Order only applies to interlocutory orders and not final orders."

8.10 We therefore opine that a party seeking to challenge an irregularity, it must necessarily be done with regard to established rules of procedure. We are alive to the wide powers conferred on a trial Court under **Order 3 rule 2**, but the same must not be used as a blanket refuge for Parties to lean on, especially in circumstances calling the Court to make a final order dismissing the matter.

The Supreme Court in the case of **Charles Mambwe and Others and Mulungushi Investments Limited (In Liquidation), Mpelembe Properties Limited**[9], guided that the Order, **(Order 3 rule 2)** grants the (trial) Court the jurisdiction to determine any interlocutory application before the Court.

Hon Mr. Justice Nigel Mutuna stated the following at page J24:

"The effect of this Order (Order 3r.2) is that it gives a Judge of the High Court and Court such as the Deputy registrar, wide discretionary powers to grant any such interlocutory order that the justice of the case deserves. Such an interlocutory order may be given whether or not the beneficiary party has requested for it. This demonstrates how wide the powers of the Judge and court are in this regard."

We caution litigants to not employ rules of the Court where they are clearly inapplicable and whose provisions do not serve the ends of the application made. An application to dismiss under **Order 3 rule 2** is clearly misconceived. We reiterate that **Order 3 Rule 2 of the High Court Rules**[2] does not empower the Court to make a final order dismissing a matter. Placing reliance on the decision of the Supreme Court in the cited case of **Kansanshi Mine Plc,**[7] we find that the application to dismiss was *ipso facto* irregular.

8.11 At the hearing, State Counsel Mwenye submitted that the Court below erred in considering the applications to dismiss, as the 1st & 2nd Respondents as well as the 3rd Respondent had not filed the requisite Appearance and defence. This line of submission was objected to for not having been raised in the Court below. However, and although this was not canvassed in the Court below, being a point of law, and one which goes to jurisdiction, we allowed the submission.

Although we have already upheld grounds 1 & 2 for the reasons above, we are alive to the confusion that has continued in the aftermath of what we may term the 'new dispensation' in our High Court procedure, brought in by the **High Court Amendment Rules of 2020**[2].

For the avoidance of doubt, we reiterate what we have stated in our own decision recently rendered in the case of **Megha Engineering and**

Infrastructure Limited and Attorney General v Marks Industries Limited[2].
In this case, with reference to **Order 11**[2], we stated at *paragraph 7.3* of the Judgment:

''Under the current Order 11/1, there is no requirement for entering a conditional appearance. What that entails is that, if a party wishes to apply to court for setting aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, has to do so by entering a memorandum of appearance and defence in accordance with the current Order 11 (1) (a) and (b) and promptly, make the necessary application to challenge the writ.''

We have time and time again, emphasized that the manner in which the court is moved is important as it determines whether the matter is competently before court.

In the view that we have taken above, on the erroneous reliance on **Order 3 rule 2,**[2] as well as the failure to enter appearance and defence by the Respondents respectively, the Court below erred in dismissing the matter. Grounds 1 and 2 therefore succeed.

8.12 We have also considered the argument advanced in ground 4 on the failure to issue a letter of demand prior to issuing the process. We have noted the argument tendered by the 3rd Respondent that the originating process filed by the Appellant was essentially incompetent as it was issued in breach of the mandatory provision of **Order VI rule (1) (d) of the High Court Rules**[2], an argument which goes to jurisdiction of the Court, and one which can be raised at any time.

8.13 In considering this ground of appeal, we have also considered the arguments canvassed in as afar as they relate to service on a Company

and reference to **Section 34 of the Companies Act**[4] has been duly noted. We find and hold that the letter of demand served on the 1st Respondent was served on him in his dual capacity and find that service on him, effectively constituted service on the 2nd Respondent.

We now focus specifically on the admitted failure to issue a letter of demand on the 3rd Respondent. We refer to the admission by the Appellant of not having served a letter of demand on the 3rd Respondent and having served it after the commencement of the Action at *paragraph 3.7* of the Plaintiffs skeleton arguments in opposition at *page 74* of the Record of Appeal. An admission which they stand by in their Arguments in Reply dated 7th September 2023.

8.14 Arising from the above admission, and from the opposing arguments of the Parties, the question we must ask ourselves is this:

what is the effect of failure to issue a letter of demand ***prior*** *to a Party issuing process?*

8.15 It is in the public domain, and we take judicial notice of the fact that the High Court (Amendment Rules) 2020 were promulgated on 19th June 2020 by the passing of **Statutory Instrument No. 58 of 2020**[2]. The cause of action, the subject of this appeal, was filed very shortly thereafter (on 25 August 2020).

We are guided by our earlier pronouncement, specifically on the effect of non-compliance of **Order VI rule (1) (d)**[1], in our decision rendered in the case of **African Banking Corporation Zambia Ltd v Copper Harvest Foods Limited & 3 Others**[1]. We refer to paragraph *9. 13* of the said Judgment in which the 3rd Respondent (*in that case before us*), argued that failure to

file the writ of summons together with a letter of demand as prescribed by **Order VI rule 1(d)**[2] entitles the Court to dismiss the matter. It was argued by way of opposing argument, that the penalty for such omission under sub-rule (2) was non-acceptance of the writ of summons.

8.16 We were further invited at paragraph *9.14* of our Judgment, to espouse the position that once the defective summons is accepted by the Registry, the default becomes an irregularity subject to cure and not one that is fatal to the whole matter. This submission was buttressed by the cases of **Leopold Walford (Z) Limited v Unifreight**[10] and **Standard Chartered Bank Zambia Plc v John M. C. Banda**[11] among others. In which both cited cases, the Supreme Court made the point that breach of a regulatory rule is not always fatal, and one of the factors that determine whether a breach is fatal or not, is its prejudicial effect to the other party.

8.17 It was our analysis (*of the rule*) in the **African Banking Corporation v Copper Harvest and Others**[1] case, that it provides the general mode of commencing an action in the High Court either in writing or electronically to be by writ of summons where other laws do not provide otherwise. We took the considered view that the word "shall" contained in the cited Rule, refers specifically to the mode of commencement. We further opined, with regard to the aspect of prejudice, that any default in procedural requirement that has no prejudicial effect on the other party is an irregularity amenable to being cured. In arriving at our decision as regards the failure by the Appellant to file a letter of demand along with the writ of summons and statement of claim, we took the view that **Order VI rule 1(d) of the High Court Rules**[2] does not provide for any penalty once the documents have passed through the Registry and arrived at the conclusion that the default was not fatal to the case.

8.18 We stand by what we have stated in the case of **African Banking,**[1] with the caveat, that there is currently pending before the Supreme Court, an appeal arising out of our decision in the case of **Copper Harvest Foods & 3 Others v African Banking Corporation Zambia Limited**[12] for the Apex Court to pronounce itself on the effect of failure to comply **with Order VI rule 1 (d)**[2].

It is for this reason that we asked Counsel to note that all references to decisions such as the one in **Leopold Walford,**[10] were made prior to the new rules, the subject of this appeal. We however accept the argument that based on the doctrine of *stare decisis*, we are bound by the said Judgment and indeed the decision reached by this Court.

8.19 Having stated the law as it currently stands, we, however, distinguish the circumstances of the above cited case from the one *in casu,* based on the evidence presented to us on Record. As previously noted, it is without doubt that the Appellant, upon realization of its omission to serve its letter of demand on the 3rd Respondent, as seen at *paragraph 3.7* (of the Plaintiffs skeleton arguments in opposition) at *page 74* of the Record, purport to justify such service as having been effected before the 3rd Respondent took out the application for irregularity, as though that in itself cured the initial defect.

We stand by the pronouncement of the Supreme Court in the cited case of **Standard Chartered Bank v Wisdom Chanda & Christopher Chanda**[13] where the Apex Court stated at page 8:

"We have stated in a plethora of cases that, any reason, no matter how well articulated, cannot of its own cure a defect. The Party concerned ***must*** *take out an appropriate application seeking to cure the defect; and*

that the court has no mandate to choose to ignore the defect and, of its own motion,proceed as if the defect never existed.'' (emphasis is by the Court).

We opine that the seeking of leave is and remains fundamental before purporting to cure any defect, as the same has already been occasioned.

We heard arguments on whether a dismissal in the circumstances in *casu,* was a bar to the commencement of fresh proceedings, and note the submissions of the Parties. However, we note that this was merely an academic debate as the same were not raised as a ground of appeal and were merely submissions from the Bar.

9. CONCLUSION

9.1 Having already found that the Court below lacked jurisdiction to hear the Respondent's applications, we order that the Order of dismissal be set aside, and the matter be referred back to the High Court for determination before another Judge.

9.2 The effect of this Order, obviously entails that we will not pronounce ourselves on the other grounds of appeal, in as far as they touch on the particulars of the alleged defamatory words.

9.3 For the avoidance of doubt, we state that the omission to serve the letter of demand on the 3rd Respondent was not fatal, did not prejudice the 3rd Respondent and order that the letter served, after commencement of the action, be deemed to have been served, with leave.

9.4 The net result is that the appeal is successful with costs to the Appellant, to be taxed in default of agreement.

J. CHASHI

COURT OF APPEAL JUDGE

K. MUZENGA

COURT OF APPEAL JUDGE

A. N. PATEL S.C.

COURT OF APPEAL JUDGE