

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**

**APPEAL NO. 216/2023**

*(Civil Jurisdiction)*

26 JUN 2024

**BETWEEN:**

**AFRICAN BANKING CORPORATION ZAMBIA LTD**

**APPELLANT**

**AND**

**COPPER HARVEST FOOD LIMITED**

**1<sup>ST</sup> RESPONDENT**

**SABRINA'S FARMERS HARVEST LIMITED**

**2<sup>ND</sup> RESPONDENT**

**LUKASU PROPERTIES LIMITED**

**3<sup>RD</sup> RESPONDENT**

**ARULANADAM RAMESH**

**4<sup>TH</sup> RESPONDENT**

**CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.**

*On 24<sup>th</sup> April, 2024 and 26<sup>th</sup> June, 2024.*

***For the Appellant*** : *Mr. E. P. Kaluba, Mr. O. Sambo, Messrs Mwenye & Mwitwa Advocates*

***For the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Respondents*** : *Mr. J. Madaika, Messrs J & M Advocates*

***For the 3<sup>rd</sup> Respondent*** : *Mr. M. Mando, Mrs. E. Chibamba-Chomba Messrs Mando and Pasi Advocates*

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## **J U D G M E N T**

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**NGULUBE, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Environmental Investigations Agency Inc. & Others vs Given Lubinda & Others - CAZ/08/080/2020*

2. *Kansanshi Mine Plc vs Joseph Maini Mudimina & Others- Appeal No. 149/2010*
3. *Madison Investment Property vs Peter Kanyinji - Appeal No. 010/2016.*
4. *GBM Milling Limited vs Guardall Security Group Limited – Appeal No. 356/2023*

**Legislation referred to:**

1. *The Rules of the Supreme Court (White Book), 1999 Edition*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*

**1.0 INTRODUCTION**

1.1 This is an appeal against the Ruling of the Honourable Mrs. Justice B. G. Shonga, High Court Judge- Commercial Division in which she dismissed the appellant's case on account of its failure to cure a defect.

**2.0 BACKGROUND TO THE DISPUTE IN THIS APPEAL**

2.1 The brief background to the matter is that on 21<sup>st</sup> August, 2020, the appellant (the plaintiff in the Court below) commenced an action by Writ of Summons seeking among other reliefs: various payments from the respondents arising from a working capital facility availed to the 1<sup>st</sup> respondent (the 1<sup>st</sup> defendant in the Court below).

2.2 On 20<sup>th</sup> October, 2020, the then presiding Judge dismissed the action after upholding a preliminary issue that the appellant wrongly commenced the action by Writ of Summons instead of using Originating Summons.

2.3 On appeal to this Court by Judgment dated 9<sup>th</sup> September, 2021, it was determined that the action was not a mortgage action. The record was remitted back to the lower Court for hearing.

2.4 When the record was remitted back to the High Court, the 3<sup>rd</sup> respondent raised a motion by way of **Order 33 Rule 3 read together with Order 14A of the Rules of the Supreme Court** for the Court to determine two questions as follows-

- i. ***Whether the 3<sup>rd</sup> respondent should still be a party to this matter considering that the Court of Appeal in its Judgment found that there was no mortgage action that was created and therefore the money obtained were unsecured; and***
- ii. ***Whether the matter should not be dismissed owing to the fact that the plaintiff did not cure the defect of not filing a letter of demand with the Writ of Summons.***

### **3.0 DECISION OF THE LOWER COURT**

3.1 After considering the arguments from both sides, the lower Court recounted the finding of this Court were we made reference to

**Order VI Rule 1(1)(d) of the High Court Rules** and stated as follows-

***“The word “shall” refers specifically to the mode of commencement. However, most importantly is the aspect of prejudice and any default in procedural requirement that has no prejudicial effect on the other party is an irregularity amenable to cure.”***

3.2 The lower Court noted that despite the determination that the defect was curable, we did not pronounce ourselves on how the defect should be cured. However, the lower Court was persuaded to dismiss the action because the appellant had not taken steps to cure the defect.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the Ruling of the Court below, the appellant launched an appeal in this court advancing the following five grounds-

***1. The Court below erred in law when it held that the 3<sup>rd</sup> respondent’s issue dated 30<sup>th</sup> June, 2022 was suitable for determination under Order 14A of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition;***

2. *The Court below erred in law and fact when it dismissed the appellant's entire matter against all respondents on account of the appellant's supposed failure to serve a letter of demand on the 3<sup>rd</sup> respondent only when the record showed that letters of demand were duly served on the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents and the Writ of Summons was filed together with an affidavit of service exhibiting the letters of demand;*
3. *The Court below erred in law and misdirected itself when it held at R12 to R13 of its Ruling that the Court of Appeal in its Judgment in Appeal No. 18 of 2021 determined that there was a defect in the appellant's originating process;*
4. *The Court below erred in law and misdirected itself when it concluded that dismissing the appellant's action for being irregular on account of its supposed failure to serve a letter of demand on the 3<sup>rd</sup> defendant was the only way of curing the perceived defect in the proceedings, contrary to the guidance of the Court of Appeal in Appeal No. 18 of 2021; and*
5. *The Court below erred in law and abdicated its duty to deal with all issues arising from the proceedings and requiring the determination of the Court when it did not pronounce itself on the following issues which were raised by the appellant:*
  - i. *Whether service of letters of demand on the 1<sup>st</sup> and 2<sup>nd</sup> respondents was adequate notice to the 3<sup>rd</sup> respondent which could not be located at the time,*

*all these three (3) parties being subsidiaries of the same Group of companies; and*

- ii. Whether there was any need for the appellant to serve a letter of demand on the 3<sup>rd</sup> respondent after the 3<sup>rd</sup> respondent had entered appearance and filed a defence on its own, without being served with originating Court process, and had in fact complied with the Court's orders for directions.*

## **5.0 THE ARGUMENTS**

- 5.1 Both sides filed Heads of Argument into Court. Counsel for the appellant argued grounds one and two collectively as well as grounds three and four. Ground five was argued separately.
- 5.2 The gist of the appellant's argument in support of grounds one and two is that the 3<sup>rd</sup> respondent's application in the lower Court was not suitable for determination under **Order 14A of the White Book**, firstly because the issues raised were not capable of finally determining the entire cause of matter. Secondly that issues relating to irregularity fall under **Order 2 of the White Book** and not **Order 14A**. For this argument, the cases of **Environmental Investigations Agency Inc. & Others vs Given Lubinda & Others**<sup>1</sup> and **Kansanshi Mine Plc vs Joseph Maini Mudimina**

**& Others<sup>2</sup>** were cited where it was held that the Court has no jurisdiction where it is moved by the wrong law.

5.3 It was argued that the issues raised were not capable of determining the entire cause because the appellant had a choice to commence a fresh action even after the action was dismissed for non-service of a letter of demand. It was argued further that in fact assuming non-service of the letter of demand rendered the action irregular, the action was irregular only against the 3<sup>rd</sup> respondent and not the other respondents and only the action against the 3<sup>rd</sup> respondent would liable to be set aside.

5.4 The gist of the arguments in grounds three and four is that the lower Court misinterpreted the Judgment of this Court because there was no finding by this Court that there was a defect in the appellant's originating process. That this Court merely made a general statement with regard to a procedural requirement that has no prejudicial effect on the other party. That in any event, this Court directed that the matter should be remitted back to the High Court for hearing and could have ordered the parties to cure the defect before the trial if indeed there was a defect. It was argued that therefore the lower Court disregarded the principle of *stare*

*decisis* when it dismissed the matter contrary to this Court's direction.

- 5.5 Further, it was argued that lower Court misdirected itself because there is no defect that is cured by dismissing the action to pave way for commencement of a fresh action. That this was tantamount to finding that the defect was incurable, contrary to the Court's guidance.
- 5.6 The gist of the argument in ground five was that the lower Court did not pronounce itself on all issues which were before it. That the issue whether service of the letter of demand on the 1<sup>st</sup> and 2<sup>nd</sup> respondents was sufficient notice to the 3<sup>rd</sup> respondent since the three entities are related was not determined. It was argued that the purpose of the letter of demand is to give notice of the claimant's grievance and request the intended defendant to take remedial action to avoid litigation. That therefore, the letters of demand issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents imputed notice on the 3<sup>rd</sup> respondent which has the same Legal Counsel as the other respondents. That in any event, the 3<sup>rd</sup> respondent had already taken a step in the action by entering appearance.
- 5.7 In response, Counsel for the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> respondents submitted in grounds one and two that the 3<sup>rd</sup> respondent's application fell



within the ambit of **Order 14A of the Rules of the Supreme Court** as the issues raised are some of the questions of law that can be determined under this provision.

5.8 It was argued further that the lower Court was on firm ground when it dismissed the action against all respondents for the appellant's failure to serve the letter of demand on the 3<sup>rd</sup> respondent because the lower Court could not entertain the idea of progressing the matter without the 3<sup>rd</sup> respondent.

5.9 In response to ground three and four, it was submitted that it was inconsequential as to whether this Court expressly declared the appellant's omission as a defect because in making reference to the requirements of **Order VI of the High Court Rules**, there was a *de facto* determination that the originating process had a defect. That this is evident from the fact that the appellant did not file a letter of demand in relation to the 3<sup>rd</sup> respondent.

5.10 It was submitted that the service of the letter of demand on the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents cannot be imputed on the 3<sup>rd</sup> respondent because companies in a group are separate entities and are not agents of each other. For this argument, we were referred to the case of **Madison Investment Property vs Peter Kanyinji**.<sup>3</sup>

5.11 It was submitted in response to ground five that **Order VI of the High Court Rules** provides that the Court shall not accept the originating process not accompanied by a letter of demand. That the use of the word “*shall*” implies that it is a mandatory provision.

## **6.0 THE HEARING**

6.1 At the hearing of the appeal, the respective counsel relied on the heads of argument filed with brief augmentation.

## **7.0 CONSIDERATION OF THE MATTER AND DECISION OF THIS COURT**

7.1 We have carefully considered the record of appeal, the grounds of appeal and the Ruling appealed against. It was contended in ground one that the 3<sup>rd</sup> respondent’s preliminary issue was not suitable for determination under **Order 14A of the Rules of the Supreme Court**. The appellant argued that the issues raised did not determine the entire action.

7.2 This falls under the requirement in **Order 14A** that: “***such determination will be final as to the entire cause or matter or any claim or issue therein.***”

7.3 The lower Court discerned that from this requirement, **Order 14A** is intended for the determination of points of law without a

full trial, where the points of law will finally determine the entire cause or matter or any claim. The lower Court determined that the questions raised by the 3<sup>rd</sup> respondent would finally determine the issues in the action. We therefore cannot find fault in the determination of the lower Court. This is because **Order 14A of the Rules of the Supreme Court** deals with raising questions of law, which are typically issues that pertain to the interpretation, application, or validity of legal principles, statutes, regulations or precedents. The lower Court therefore had the requisite jurisdiction to determine the application. Ground one of the appeal succeeds and we accordingly allow it.

7.4 In grounds two and four it was contended the lower Court erred when it dismissed the entire action for the appellant's failure to serve the letter of demand on the appellant. We find it necessary to recite the amended provisions of **Order VI Rule 1 of the High Court Rules**. The relevant portion provides as follows-

***“1. (1) Except as otherwise provided by any written law or these Rules, an action in the High Court shall be commenced, in writing or electronically by writ of summons endorsed and accompanied by—***  
***(a) a statement of claim;***

***(b) list and description of documents to be relied on at trial***

***(c) list of witnesses to be called by the plaintiff at trial, and***

***(d) letter of demand whose receipt shall be acknowledged by the defendant or an affidavit of service attesting to the service of the letter of demand, which shall set out the claim and circumstances surrounding the claim in detail.”***

7.5 ***Sub-Rule (2)*** clearly provides that a Writ of Summons which is not accompanied by the documents listed in ***Sub-Rule (1)*** shall not be accepted. However, the question is what the effect of receiving the Writ of Summons not accompanied by the letter of demand is.

7.6 In the case of ***GBM Milling Limited vs Guardall Security Group Limited***<sup>4</sup> we held that-

***“In an event that the documents are inadvertently received by the Court registry, the defect is not curable because they should not have been accepted in the first place.”***

7.7 It is therefore our firm view that the lower Court was on firm ground when it dismissed the appellant’s action for failure to send the letter of demand to the 3<sup>rd</sup> respondent.

- 7.8 However, it was erroneous for the lower Court to have dismissed the entire action as the appellant had served letters of demand on the other respondents. After finding that the action should be dismissed because the appellant did not send the letter of demand, the lower Court should have dismissed the action against the 3<sup>rd</sup> respondent only. Ground two of the appeal accordingly succeeds but ground four fails for lack of merit.
- 7.9 In ground three, it was contended that the lower Court misdirected itself when it found that this Court in ***African Banking Corporation vs Copper Harvest Foods Limited*** determined that there was a defect in the appellant's originating process. We are of the view that the issue whether this Court pronounced that the appellant's originating process was defective is neither here nor there because it is clear that there was a defect in the appellant's originating process for failure to file the letter of demand along with the originating process. This ground has no merit and we accordingly dismiss it.
- 7.10 In ground five, it was submitted that the lower Court did not address the issue whether service of the letter of demand on the 1<sup>st</sup> and 2<sup>nd</sup> respondents was adequate notice to the 3<sup>rd</sup> respondent. That the issue whether there was need for the

appellant to serve a letter of demand when the 3<sup>rd</sup> defendant had already entered appearance and filed a defence was also not dealt with.

7.11 In the case of ***Madison Investment Property vs Peter Kanyinji (supra)*** the Supreme Court held that companies in a group are treated as separate entities and are not agents of each other. We are therefore of the firm view that service of the letters of demand on the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondent cannot be imputed on the 3<sup>rd</sup> respondent.

## **8.0 CONCLUSION**

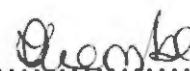
8.1 In view of the foregoing, we are of the firm view that ground two of the appeal has merit while grounds one three, four and five are accordingly dismissed for lack of merit. We award costs to the respondents, to be taxed in default of agreement.



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P.C.M NGULUBE  
**COURT OF APPEAL JUDGE**



.....  
K. MUZENGA  
**COURT OF APPEAL JUDGE**



.....  
Y. CHEMBE  
**COURT OF APPEAL JUDGE**