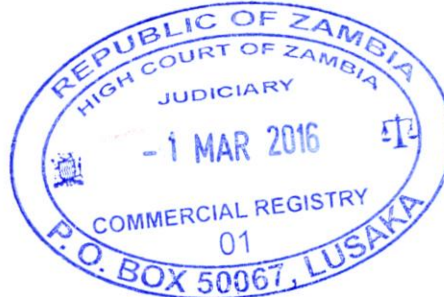
IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0209**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:



STURROCK AND ROBSON
INDUSTRIES (PTY) LIMITED **PLAINTIFF**

AND

STATUS HI- TECH ZAMBIA LIMITED **DEFENDANT**

Before the Honourable Mr. Justice W.S Mweemba at Lusaka in Chambers.

For the Plaintiff : Mr I. Siame - Messrs Corpus Legal Practitioners.

For the Defendant: Mr Wilson Banda- Messrs Wilson & Cornhill Legal Practitioners.

R U L I N G

LEGISLATION & OTHER WORKS REFERRED TO:

1. ***Rules of the Supreme Court of England 1999 Edition (White Book).***
2. ***Rules of the High Court, Cap 27 of the Laws of Zambia.***
3. ***Bowstead & Reynolds on Agency 17th Edition.***
4. ***G.H.Treitel. The Law of Contract, 9th Edition 1995 588.***
5. ***Girvin, Frisby & Hudson. Charlesworth's Company Law 18th Edition. London: Sweet & Maxwell.***

CASES REFERRED TO:

1. ***BP Zambia Plc V Interland Motors Limited SCZ Judgment No. 5 of 2001.***
2. ***Market Investigations Limited V MSS (1969) 2QB 173.***

3. ***Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd (1915) UKHL 1.***
4. ***Freeman & Lockyer V Buckhurst Park Properties (Mangal) Ltd (1964) 2QB 480.***
5. ***Hely- Hutchinson V Brayhead (1968) Ltd (1968) 1 QB 549.***
6. ***Kelvin Hang'andu & Co (a Firm) V Webby Mulubisha (2008) Z.R 82 Vol.2 (S.C).***
7. ***DBZ & Anr V Sunset & Anr (1995- 1997) ZR 187.***

This is a ruling on an application by the Defendant to dismiss the action for Abuse of Court process, Multiplicity of Actions and for Misjoinder of a party pursuant to Order XIV Rule (2) of Cap 27 of the laws of Zambia.

It is supported by an Affidavit sworn by Gwendoline Maipose Zgambo the Director of the Defendant Company and Skeleton Arguments filed into Court on 4th June, 2015. She deposed that the Defendant had been duly served with a Writ of Summons accompanied by a Statement of Claim where the Plaintiff inter alia claimed for an order that the Defendant pays the sum of ZAR1, 029,147.50 being the balance of the outstanding amount due to the Plaintiff for the supply of various goods to the Defendant.

That the Defendant commenced a case against the Plaintiff and others in the Kitwe High Court pursuant to the arbitration clause in the Articles of Association of Global Safety Zambia Limited a Company incorporated in Zambia with its registered offices in Kitwe for referral of the disputes between the parties hereto to arbitration.

It is further deposed that the Plaintiff is the 2nd Respondent in the proceedings in the Kitwe High Court where the Defendant is seeking the appointment of an arbitrator or arbitrators by the Court because a dispute has arisen between them.

That on 23rd June, 2014, the Plaintiff's Advocates wrote to the Defendant claiming for the payment of the same sums which are a subject of these proceedings. That in response, the Defendants advocates advised among

other things that it could not be disputed that there were serious differences between the parties forming Global Safety Zambia Limited as the said letter of demand by the Plaintiff attested to these. Further, that consequently, the matters therein ought to be taken to arbitration and sought for their consent which they did not give leading to the application for referral of the matters between the parties hereto to arbitration.

That the Defendant's claims against the Plaintiff in the sum of K2,000,000.00 were yet to be determined by the arbitral proceedings which were still before Court. Moreover that the application by way of an Originating Summons by the Defendant in the Kitwe High Court was something the Plaintiff's Advocates were well aware of as the Defendant herein had unsuccessfully attempted to attach the earnings for the Plaintiff's Company in Zambia following its seizure of business on the Copperbelt.

That in furtherance of the ruling disallowing the Defendant's application for an order of interim attachment of property with costs, the Plaintiff's Advocates wrote to the Defendant's Advocates demanding the payment of costs which were interlocutory and that these were payable at the conclusion of the arbitral proceedings. Further that a date of hearing of the Originating Summons to refer the matter to arbitration would be given by the Kitwe High Court soon.

That in his ruling Justice I. Kamwendo stated interalia in paragraph 4 on page R5 that it was not in dispute that the Defendant and the Plaintiff herein were shareholders in Global Safety Zambia Limited, a Company whose Articles of Association had an arbitration clause for dealing with all disputes between and among the parties involved.

That the issue of the Plaintiff's claim herein was intertwined with the Defendant's claims for the payment of the sum of K2,000,000.00 which issues were currently a subject of the proceedings in the Kitwe High Court.

Further that should it be found that is owed money after the Kitwe proceedings and a reconciliation of all figures between the parties hereto as stated in the Defendant's Advocates letter then there would be an order for the payment to that effect.

Moreover, that he had therefore been advised by his advocates that the Plaintiff's proceedings herein were an abuse of Court process as they had an opportunity to recover in the arbitration proceedings currently before the Kitwe High Court which they were trying to recover now.

That the Plaintiff in its Statement of Claim purported that it supplied to the Defendant various goods through the Plaintiff's Companies HSE Solutions and S & R Mackenzie for which the Defendant was invoiced by the Plaintiff. Further, that the Defendant did not deny that it was supplied various goods by HSE Solutions and S & R Mackenzie as companies but denies that the liability therein related to the Plaintiff as the two companies were institutions that dealt with the Defendant and they should therefore have the ability to proceed against the Defendants on their own.

Moreover that in August, 2014 the Plaintiffs advocates had drawn a proposed consent order referring all the disputes as contained in the Defendant's letter of 1st April, 2014 to arbitration. That due to all the foregoing statements in his deposition the proceedings herein should not proceed as there were similar proceedings currently subsisting in the Kitwe High Court and HSE Solutions and S& R Mackenzie were companies capable of instituting litigation on their own.

There is also an Affidavit in Opposition filed into Court on 29th July, 2015 sworn by Gary Smith the Executive Director of the Plaintiff.

It is his deposition that the Parties herein were both shareholders in a Zambian Company called Global Safety Zambia Limited ("Global Safety") and that an application had been made by the Defendant for the appointment of an arbitrator under cause 2014/HK/ARB/001 in the Kitwe High Court (the Kitwe Matter) in which the Plaintiff, Global Safety, First National Bank Zambia Limited and Mopani Copper Mines Plc had been cited as Respondents.

It is further deposed that the Kitwe High Court matter aforesaid was for the appointment of arbitrators for a different dispute involving the shareholders of Global Safety in reliance of Division 24, Regulation 83 of the Articles of Association of Global Safety.

Moreover, that on 23rd June, 2014, the Plaintiff wrote a letter to the Defendant demanding payment of R1, 002,147.50 being an outstanding balance of the amount due to the Plaintiff for the supply of various goods to the Defendant.

Further that on 9th July, 2015, the Defendants Advocates wrote a letter to the Plaintiff's Advocates, in response to the letter of demand aforesaid, acknowledging that the Defendant owed the Plaintiff a total sum of R517,753.81 for the supply of various goods to the Defendant by the Plaintiff.

That the dispute over the debt incurred by the Defendant for the goods supplied to it is not subject to arbitration. Moreover, that the Defendant's advocates distinguished the Plaintiff's claim arising from the supply of goods from the Defendant's claim arising from an intended arbitration action.

He also deposed that in the Kitwe matter, the main relief being sought by the Defendant was an order that proceeds from contracts executed between

Global Safety and Mopani Copper Mines Plc and any other Company, if any, be deposited into an account maintained with First National Bank Limited.

That the Kitwe matter was anchored on the Defendant's assertion that Global Safety had been consistently employing transfer pricing techniques when bringing in materials from South Africa to Zambia so as to avoid paying tax and subsequently no dividends had been paid out by Global Safety to be shared equally between the Plaintiff and Defendant as Global Safety had been inevitably declaring losses.

Moreover, that it was clear from the documents exhibited of the Originating Summons filed in the Kitwe matter that the dispute in that matter related to a share of profits realized by or through Global Safety and not to the goods supplied by the Plaintiff to the Defendant of which invoices were issued.

It is also deposed that his Advocates believed that the Articles of Association of Global Safety were internal regulations which were intended to govern the relationship between Global Safety and its shareholders in matters affecting it and not with respect to all and any foreseeable matters that would arise between or among Global Safety's shareholders such as the supply of goods by one shareholder to another under a separate agreement as was the case in this matter.

That the action that the Plaintiff had taken out before this Court was for an order that the Defendant pays ZAR 1,029,147.50 to the Plaintiff being the balance outstanding amount due to the Plaintiff for the supply of various goods to the Defendant for which invoices were issued.

He also deposed that the Kitwe matter and this action were separate as the underlying subject matters were totally different and it was misleading to claim that there was a multiplicity of actions. Moreover the proceedings herein arose from a separate agreement between the parties for the supply

of goods by the Plaintiff to the Defendant which agreement was not governed by the Articles of Association of Global Safety and therefore this action was not an abuse of court process.

It is further deposed that HSE Solutions and S & R Mackenzie were divisions of the Plaintiff and were acting as its agents when they supplied goods to the Defendants and therefore the Plaintiff was properly joined to these proceedings. That due to the Defendant's admission that goods were supplied to it by HSE Solutions and S & R Mackenzie this was misleading as these were not parties to the Kitwe matter and could not be joined thereto, as they were not legal entities but Divisions of the Plaintiff and were not shareholders in Global Safety.

That it is misleading to state that all matters before this Court were the same as the ones in the Kitwe matter. Further, that the purported Consent Order was meant to address only issues arising from the Plaintiff's involvement with the Defendant in Global Safety and this was clear from the letter of 1st April, 2015 from Nyirongo and Company.

Further that there were additional parties to the Kitwe matter and as such, it could not be accurately said that the parties were the same and based on these afore stated reasons it was desirable that the application to dismiss the matter must fail.

There is also an Affidavit in Reply filed into Court on 12th August, 2015 and deposed to by Gwendoline Maipose Zgambo aforesaid. She deposed that proceedings were indeed commenced by the Defendant against the Plaintiff, Global Safety Zambia Limited, First National Bank Zambia Limited and Mopani Copper Mines PLC at the Kitwe High Court under cause number 2014/HK/ARB/001 for an interim attachment measure of protection. The Defendant's application was thereafter dismissed.

Moreover, that there were also prior proceedings commenced by the Defendant against the Plaintiff at Kitwe High Court under the cause number 2014/HK/ARB/001 for an order of appointment of Arbitrators and referral of the disputes that had arisen between the Defendant and the Plaintiff to arbitration and the application had not yet been determined.

It is also stated that the application for the appointment of arbitrators and referral of the disputes to arbitration before the Kitwe High Court was for a dispute between the parties herein who are shareholders in Global Safety Zambia Limited but the Plaintiff had decided to seek the determination of this matter by also commencing these proceedings.

That the admitted sum in the Affidavit in Opposition involved the affairs in Global Safety Zambia Limited where the parties were the shareholders and the Defendant had a counterclaim against the Plaintiff for K2,000,000.00.

It is also deposed that the proceedings herein ought to have been brought before the arbitral proceedings as they emanated from shareholders of Global Safety Zambia Limited and involved the affairs of the said Company. That he had been accordingly advised by his Lawyers that parties were at liberty to bring any dispute before Court and whether or not those proceedings ought to be a subject of arbitral proceedings will not hinder the commencement of the proceedings before the Courts of Law.

That the disputes referred to arbitration therein were at the instance of the Defendant and consequently only the Defendant sought reliefs in that regard. It was also averred that the Plaintiff ought to have declared a dispute in respect of the sum of ZAR1,029,147.50 and referred it to arbitration as the Defendant had done when it was not it's duty to prosecute the plaintiff's claim which was the subject of the cause of action herein.

Mrs Zgambo further deposed that she had been advised by her Counsel that the Articles of Association of Global Safety were internal regulations and the arbitration clause therein captured any dispute that would arise between the shareholders of Global Safety Zambia Limited with regard to anything done in pursuance of its affairs as was the case in this cause of action.

Moreover, that the Defendant agreed that the Plaintiff would have a cause of action, but it ought to have been commenced by way of arbitration or that the Plaintiff should have consented to refer the disputes between the Parties to arbitration. Moreover, that a Company was prohibited and could not act as an agent of another company. As a matter of fact that the proper plaintiff rule dictated that a wrong done to a company could only be redressed by itself and not by another person thus the Plaintiff had no locus standi to do so on behalf of HSE Solutions and S & R Mackenzie companies.

That the letter dated 1st April, 2014 was done before the Plaintiff demanded payment of the sum subject of the cause of action in its letter dated 23rd June, 2014. That the proposed consent order was therefore drawn to cover the disputes between the Plaintiff and the Defendant that had arisen as each party had a cause of action. That the Plaintiff would still have an opportunity to present its disputes in the arbitral proceedings once the order of appointment of arbitrators was granted.

Counsel for the Defendant filed in Skeleton Arguments in support of his application. He submitted that in the case of **KELVIN HANG'ANDU & COMPANY (A FIRM) V WEBBY MULUBISHA (6)** it was held that:

> ***"Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that***

particular court. Forum shopping is abuse of process which is unacceptable.

The Plaintiff was guilty of abuse of court process and forum shopping. The conduct of the plaintiff was condemned and disapproved of".

He further contended that this action by the Plaintiff was centred on the joint venture that it and the Defendant entered into and which culminated in the incorporation of Global Safety Zambia Limited whose articles provided for arbitration as a means of dispute resolution mechanism. However, legal proceedings had been commenced at the Kitwe High Court under cause No. 2014/HK/ARB/001 for disputes that had arisen in Global Safety Zambia Limited and this was a notorious fact to the Plaintiff.

Counsel then argued that the Plaintiff's commencement of proceedings against the Defendant before the High Court at Lusaka was forum shopping and abuse of the legal process because there were arbitral proceedings pending before the High Court at Kitwe handling the same subject matter.

Counsel also relied on **DEVELOPMENT BANK OF ZAMBIA & KPMG PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (7)** where the Supreme Court held that:

> ***"We disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter".***

Moreover Counsel also cited the case of **DEVELOPMENT BANK OF ZAMBIA & KPMG PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (7)** which had a similar principle.

He also contended that the Plaintiff's proceedings against the Defendant would result in contradictory decisions between this Court and the one in Kitwe if decisions were made on the same matter.

In this regard Counsel cited Order XIV Rule 2 of the High Court Rules, Cap 27 of the laws of Zambia which provides that:

> ***"Where a person has jointly with other persons an alleged ground for instituting a suit, all those other persons ought ordinarily to be made parties to the suit".***

It was also Counsels submission that the Plaintiff stated that it had supplied various goods through its companies HSE Solutions and S& R Mackenzie who ought to have been made so had not been made parties herein.

Thus he finally argued that the Plaintiff's commencement of proceedings against the Defendant in this matter was an abuse of court process, multiplicity of actions, misjoinder of a party and should be dismissed forthwith with costs.

The Plaintiff also filed Skeleton Arguments in opposition to the Defendant's application. Counsel for the Plaintiff contended that in making the application for misjoinder the Defendant had relied on Order 25 Rule 5(2) of the High Court Rules, Cap 27 of the laws of Zambia. It states that:

> ***"The Court or a Judge may, at any stage of the proceedings, and on such terms as appear to the Court or Judge to be just, order that the name or names of any party or parties, whether as Plaintiffs or as Defendants, improperly joined, be struck out".***

Based on this, Counsel argued that the party making the application must show that the party to be misjoined was joined wrongfully and without

cause. Moreover that there was no dispute that the Plaintiff was a limited liability company incorporated in the Republic of South Africa. Further, that there was no dispute that the Plaintiff had had dealings with the Defendant both directly and through its divisions HSE Solutions and S& R Mackenzie which were part of the Plaintiff Company.

Further, the Defendant had admitted that various goods were supplied to it by HSE Solutions and S& R Mackenzie. In addition, the Court will note that the Defendant had admitted owing the Plaintiff a total sum of ZAR 517, 753.8. Clearly, the Plaintiff has had dealings with the Defendant and was duly indebted to it and as such liability could not be avoided.

In addition he contended that HSE Solutions and S & R Mackenzie were actually divisions of the Plaintiff which was permissible under South African Law and were acting on instructions from the Plaintiff as its departments when they supplied goods to the Defendant. He also argued that since the two acted on the Plaintiff's instructions then they were its agents.

Thus there was an agency relationship between HSE Solutions and S& R Mackenzie on the one hand and the Plaintiff on the other. Further Counsel cited the Learned Author G. H. Treitel, the Law of contract, 9th edition, 1995 at 588 where he stated in relation to the doctrine of privity of contract:

> ***"that the rule that no one except a party to a contract can be made liable under it is generally regarded as just and sensible...".***

In addition, Viscount Haldane SC stated the following on privity of contract in **DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD (3)**:

> ***"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our Law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. The appellants were a stranger in the contract giving rise to the obligations it sought to enforce".***

In the circumstances, according to Counsel, the Plaintiff could not enforce the contracts in question through HSE Solutions or S& R Mackenzie, as these were not legal entities but were part of the Plaintiff.

Counsel also contended that these divisions merely acted for and on behalf of the Plaintiff, thus there was a Principal Agent relationship between the two divisions and itself. Moreover that inherent in the principal agent relationship was the understanding that the agent will act for and on behalf of the principal. Further that the agent assumes an obligation of loyalty to the principal that he or she will follow the Principal's instructions and will neither intentionally nor negligently act improperly in the performance of the act. An agent cannot take personal advantage of the business opportunities the agency position uncovers. A principal in turn reposes trust and confidence between the principal and the agent.

In the circumstances of this case all the above duties and obligations were applicable. Counsel then referred this Court to the case of **MARKET INVESTIGATIONS LIMITED V MSS (2)** where Cooke J stated that:

> ***"The question to be determined by the Court was whether a person was in business on his own account or was employed by another under a contract of service".***

Counsel then contended that HSE Solutions and S& R Mackenzie do not conduct business on their own account. The law of Agency is unambiguous on the circumstances under which a principal can be held responsible for the acts of an agent. The authoritative text, Bowstead and Reynolds on Agency 17th edition P. 1 defines an agency relationship as:

> ***"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents to to act or so acts".***

Counsel went on to state that clearly, consent on the part of a principal was critical to the relationship of Principal- Agent. In the English case of **FREEMAN & LOCKYER V BUCKHURST PARK PROPERTIES (MANGAL) LTD** it was stated that:

> ***"An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties...An 'apparent' or 'ostensible' authority on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent had authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principle liable to perform any obligations imposed upon him by such contract".***

In the circumstances of the case at hand both HSE Solutions and S & R Mackenzie were imbued with actual authority to act on behalf of the Plaintiff. Therefore it was only the Plaintiff that could reasonably recover under the contracts in question.

In view of the foregoing Counsel argued that this application for misjoinder was misconceived because the Plaintiff was a proper party to this action. Moreover, regarding the issue of the Courts Power to Order Dismissal of the matter for abuse of Court Process, Counsel submitted that the Defendant's application was misconceived and ought to be dismissed with costs. This Court was invited to consider that the arbitration proceedings being referred to by the Defendant had not commenced and related to totally different issues.

Further Counsel argued that the documents exhibited before Court showed that there was a pending application before the Kitwe High Court for the appointment of an arbitrator. Thus it was misleading to state that arbitration proceedings had commenced when no arbitrator had been appointed by the Court. Further, the application before the Kitwe High Court was for the appointment of an arbitrator for a different dispute involving the shareholders of Global Safety in reliance on Division 24, Regulation 83 of the Articles of Association of Global Safety. This matter on the other hand related to payment for goods that were supplied by the Plaintiff to the Defendant.

Counsel also contended that on 23rd June, 2014 the Plaintiff wrote a letter to the Defendant demanding total payment of R1,002,147.50 being an outstanding balance of the amount due to the Plaintiff for the supply of various goods to the Defendant. On 9th July, 2015 the Defendants Advocates wrote a letter to the Plaintiffs advocates in response to the letter of demand aforesaid, acknowledging that the Defendant owed the Plaintiff a total sum of R517,753.81 for the supply of various goods to the Defendant by the Plaintiff.

Therefore the dispute over the debt incurred by the Defendant for the goods supplied to it was not subject to arbitration. It is clear that in the Kitwe matter, the main relief being sought by the Defendant was an order that

proceeds from contracts executed between Global Safety and Mopani Copper Mines Plc and any other Company, if any be deposited into another account maintained with First National Bank Zambia Limited.

Moreover, Counsel contended that the proceedings in Kitwe are premised on Defendant's assertion that Global Safety had been consistently employing transfer pricing techniques when bringing in materials from South Africa to Zambia so as to avoid paying tax and subsequently no dividends had been paid out by Global Safety to be shared equally between the Plaintiff and Defendant as it had been inevitably declaring losses.

Counsel also argued that the dispute in that matter relates to a share of profits realized by or through Global Safety and not to the goods supplied by the Plaintiff to the Defendant of which invoices were issued. Further, that the Black's Law Dictionary, 8th Edition, defines abuse of process at page 11 as **"The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope".**

The case of **DBZ & KPMG PEAT MARWICK V SUNVEST LIMITED & SUN PHARMACEUTICALS LIMITED (7)**, was cited in which the Supreme Court disapproved the commencement of a **"multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter."**

In addition, in **BP ZAMBIA PLC V INTERLAND MOTORS LIMITED (1)** a Supreme Court Judgment the court held that:

> ***"For our part, we are satisfied, as a general rule, that it will be regarded as abuse of process if the same parties re litigate the same subject matter from one action to another from Judge to Judge...".***

Counsel then argued that although the parties in these two matters are the same, the underlying subject matters are different. Therefore there was no multiplicity of actions.

Further Order 18 Rule 19 of the Rules of the Supreme Court, 1999 Edition provides that:

> ***"The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that....it is otherwise an abuse of the process of the Court".***

In addition, Order 18/19/18 paragraph 1(d) of the Rules of the Supreme Court, 1999 edition provides that:

> ***"The Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process".***

Moreover, that the current action was bonafide and the Court was being used for proper purposes and not being abused. That the action that the Plaintiff has taken out before this Court was for an order that the Defendant pays ZAR1, 029,147.50 to the Plaintiff being the balance of the outstanding amount due to the Plaintiff for the supply of various goods to the Defendant for which invoices were issued. That this action is not linked to the share of profits in Global safety contrary to the Defendants assertions.

Counsel then contended that in reliance of the foregoing arguments it was Counsel's prayer that this Court dismisses the Defendant's application for Misjoinder and dismissal of suit for the alleged abuse of Court process. Further that costs should be in the cause.

During the hearing on 17th August, 2015 both Counsel for the Plaintiff as well as the Defendant were present. Moreover they both relied on their Affidavits and Skeleton Arguments on record.

I have considered the Affidavit evidence and the Skeleton Arguments filed into court by both learned Counsel for the Plaintiff and the Defendant.

The gist of the arguments advanced by the Defendant in support of this application was that the Plaintiffs commencement of proceedings against the Defendant in the Lusaka High Court was an abuse of Court process and multiplicity of actions and should be dismissed forthwith. Moreover, that the Plaintiff had no locus standi in the matter since its Statement of Claim had stated that the suppliers HSE Solutions and S & R Mackenzi to the Defendants were its companies which had separate legal persona and could sue in their own capacities.

Whilst the gist of the Plaintiff's arguments to counter the application was that despite the parties being the same in cause 2014/HK/ARB/001 and in this matter, the subject matter was clearly different from the one that had been commenced in Kitwe for the appointment of an arbitrator. Moreover, that the Plaintiff herein had locus stand in the matter because the suppliers of the goods to the Defendant Company were its divisions and were acting as its agents when they did so.

It is not in dispute that the parties herein are Shareholders of Global Safety Zambia Limited. It is also not in dispute that there's a matter that has been commenced in Kitwe under Cause Number 2014/HK/ARB/001 by the Defendant herein. Counsel for the Plaintiff contended that this matter was separate as the underlying subject matter was totally different and it was misleading to claim that there was a multiplicity of actions. Moreover that these proceedings arose from a separate agreement between the parties for the supply of goods by the Plaintiff to the Defendant which agreement was

not governed by the Articles of Association of Global Safety and therefore this action was not an abuse of court process. I agree with this assertion.

The subject matter of the Kitwe action is to appoint an arbitrator and the parties thereto include the Defendant herein against Global Safety Zambia Limited, the Plaintiff herein, First National Bank Zambia Limited and Mopani Copper Mines PLC.

Whilst in the matter before this Court the only parties are the Plaintiff and the Defendant and the subject matter here concerns a private arrangement between them where the Plaintiff through its Divisions supplied goods for sale to the Defendant.

It is trite that under the law relating to Companies, a company may have divisions under it that deal with specific company objectives but have no separate legal persona. Further, when companies produce more than one product or offer more than one service, they often divide into divisions as was the case herein where the Plaintiff had HSE Solutions and S& R Mackenzie as its divisions. For avoidance of doubt a division can be contrasted from a wholly owned subsidiary under company law which is itself a separate legal persona from the company itself, but its owners in the main company retain full control over it.

In the words of Girvin, Frisby and Hudson the learned authors of Charlesworth's Company Law, 18th edition on page 762, **"a division takes place because the large company desires to divide itself into smaller units... Moreover it also happens when the company carries on a number of different businesses and wishes to reorganise its operations."**

In this case, the Defendant contends that the Plaintiff has no locus standi in this matter because the suppliers of the goods the Defendant received were HSE Solutions and S & R Mackenzi which were companies of the Plaintiff as asserted in the Statement of Claim.

I disagree with the Defendant on account of the fact that the two suppliers were in actual fact divisions of the Plaintiff Company. Further, coming to the argument on multiplicity of court actions, it is trite as was set out in the case of **DEVELOPMENT BANK OF ZAMBIA & ANOTHER V SUNSET & ANR (7)** where the Supreme Court held that:

> ***"We disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter".***

Moreover, in the case of **BP ZAMBIA PLC V INTERLAND MOTORS LIMITED (1)** the Supreme Court held that:

> ***"For our part, we are satisfied, as a general rule, that it will be regarded as abuse of process if the same parties re litigate the same subject matter from one action to another from Judge to Judge...".***

In the case in casu although the parties were shareholders of Global Safety Zambia Limited, I find that this particular matter cannot be referred to arbitration because as was stated in the Affidavit in Opposition of the Plaintiff the Articles of Association of Global Safety were internal regulations which were intended to govern the relationship between Global Safety and its shareholders in matters affecting it and not with respect to all and any foreseeable matters that would arise between or among Global Safety's shareholders such as the supply of goods by one shareholder to another under a separate agreement as was the case in this matter. Moreover it is

commonplace under company law that the dealings between shareholders are governed by shareholders agreements which even override the Articles of Association of a Company. According to Smith & Keenan the learned authors of the text Company Law 13th Edition on page 117, shareholders agreements supplement the statutory documents and they operate as binding contracts with the advantage of remaining secret as they are not registered. In this case no shareholder agreements between the parties herein were adduced.

On this basis I find and hold that the subject matter that is being dealt with in the Kitwe High Court proceedings is different from the one commenced herein. I therefore find that this matter cannot be dismissed nor any party misjoined for the reasons advanced by the Plaintiff.

In the circumstances, I hereby dismiss the Defendant's whole application before Court. Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 1st day of March, 2016.

....

WILLIAM S. MWEEMBA
HIGH COURT JUDGE