IN THE HIGH COURT OF ZAMBIA **2016/HP/ARB/13**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF : SECTION 11(b) OF THE ARBITRATION ACT No 19 OF 2000

BETWEEN:

HORIZON PROPERTIES ZAMBIA LIMITED **1st APPLICANT**

QUEST CONCEPTS ZAMBIA LIMITED **2nd APPLICANT**

AND

JAGUAR OVERSEAS LIMITED **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28th DAY OF FEBRUARY, 2017

For the Applicant : *Captain I.M. Chooka, Lewis Nathan Advocates*

For the Respondent : *Mr M. Desai, with Mr S. Bwalya, Solly Patel, Hamir & Lawrence.*

RULING

CASES REFERRED TO:

1. ***Macfoy V United Africa Company Limited 1961 1 ALL ER 1169***
2. ***Sipalo V Mundia 1966 ZR***
3. ***American Cynamid Co V Ethicon Limited 1975 AC 396***
4. ***Leopold Walford (Z) Limited V Unifreight 1985 ZR 203***
5. ***Lily Drake V M. B. L Mahtani and Another 1985 ZR 236***
6. ***Zambia Revenue Authority V Hitech Trading Company Limited 2001 ZR 17***
7. ***Zambia Revenue Authority V Jayesh Shah 2001 ZR 60***

8. ***Zambia Revenue Authority V T and G Transport 2007 ZR 13***
9. ***Post Newspapers Limited V Rupiah Bwezani Banda 2009 ZR 254***
10. ***First Merchant Bank Zambia Limited (in liquidation), The Attorney General and Al Salms Building Materials Limited, Jayesh Shah SCZ No/8/258/2009 unreported.***
11. ***Visa International Limited V Continental Resources (USA) 2009, 2 SCC 55***
12. ***Kenneth Van Der Westherzen V Rota Rabel Limited and Ying Duan Li Ling 2010 ZR***
13. ***John Kaunda (suing as Country Director and on behalf of the Adventist Development and Relief Agency (ADRA) V Karen Motors (Z) Limited 2011 Vol 1 ZR 451.***
14. ***African Alliance Pioneer Master Fund and Vehicle Finance Limited SCZ/8/08/2011 unreported***
15. ***Enercon (India) Limited V Enercon GMBH and another 2014 5 SCC 1***
16. ***Standard Chartered Bank Zambia PLC V Wisdom Chanda and Christopher Chanda SCZ No 18 of 2014***
17. ***Access Bank (Zambia) Limited V Group Five/Zcon Business Park Joint Venture SCZ/8/52/14 unreported***
18. ***Vangelatos and Vangelatos V Metro Investments Limited and others SCZ No 35 of 2016***
19. ***Robert Chirwa V SAZ Solutions and Establishments Prime Trading Solutions 2016/HP/0970 unreported.***
20. ***Finsbury Investment Limited V Antonio Ventriglia and others SCZ No 42 of 2016***
21. ***Henry M. Kapoko V The people 2016/CC/0023***
22. ***CMA CGM Zambia Limited V Interfood Zambia Limited 2016/HPC/0267***

The Applicants on 13th December, 2016 filed an ex-parte Originating Summons, for an order of interim attachment of funds pursuant to Rule 9 (4) of the Arbitration (Court Proceedings) Rules, Statutory Instrument No 75 of 2001. The said application is accompanied by an affidavit.

On 23rd December 2016, Counsel for the Respondent filed a notice of motion to raise preliminary issues, pursuant to Order 14A as read with Order 33 Rules 3 and 7 of the Rules of the Supreme Court 1999 edition, and as read together with Order II Rule 4 and Order XLIX Rule 3(1), and Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia, as read with Order III Rule 2 and Section 9 and Rules 9(3)(a) and 9(3)(g) of the Arbitration Act, No 19 of 2000, as read together with Practice Direction No1 of 2002, as read with Section 3 of the Authentication of Documents Acts, Chapter 75 of the laws of Zambia.

The preliminary issues raised were;

1. *Whether the Applicants have complied with the mandatory provisions of Order II Rule 2 and Order XLIX Rule 3 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia, by obtaining leave of this honourable court before filing the Originating Summons for an order of interim attachment of funds and the affidavit in support, during the Christmas vacation*

   And that if this honourable court finds that the Applicant has not complied with the aforesaid provisions, then whether this court honorable has the jurisdiction to hear and determine the Applicant's application for an order of interim attachment of funds

And that if this honourable court finds that it does not have the jurisdiction to hear this matter, then the Respondent humbly prays that the Applicant's application for an order of interim attachment of funds be dismissed with cots.

2. *That in the alternative, whether this honourable court has jurisdiction to hear and determine the Applicant's application for an order of interim attachment of funds in view of the Originating Summons being based upon Section 11(b) of the Arbitration Act, No 19 of 2000, which Section is a non –existent legal provision, contrary to Practice Direction No 1 of 2002*

   And that if this honourable court finds that it does not have jurisdiction to hear this matter, then the Respondent humbly prays that the Applicant's application for an order for interim attachment of funds be dismissed with costs;

3. *That further in the alternative whether this honourable court has the jurisdiction to hear and determine the Applicant's application for an order of interim attachment of funds in the absence on an arbitration agreement between the 1st Applicant and the Respondent herein being exhibited in the affidavit in support of the Originating Summons contrary to the mandatory requirement of Rule 9 (3) (a) of the Arbitration Act No 19 of 2000*

   And if this honourable court finds that the Applicant has not complied with the aforesaid provisions, then whether this honourable court has the jurisdiction to hear and determine the

Applicant's application for an order for interim attachment of funds

And that if this honourable court finds that it does not have the jurisdiction to hear this matter, then the Respondent humbly prays that the Applicant's application for an order for interim attachment of funds be dismissed with costs

4. *That in the alternative whether the Applicant's application for an order for interim attachment of funds is legally tenable in the absence on an undertaking by either of the Applicants to pay damages in case this honourable court decides to discharge the interim measure of protection herein contrary to the mandatory requirement of Rule 9(3)(g) of the Arbitration Act, No 19 of 2000*

   And that if this honourable court finds that the Applicant has not complied with the aforesaid provisions, then the Respondent humbly prays that the Applicant's application for an order for interim attachment of funds be dismissed with costs;

5. *That in the alternative whether the alleged arbitration agreement between the 2nd Applicant and the Respondent herein complies with Section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia*

   And that if this honourable court finds that the alleged arbitration agreement does not comply with the requirements of Section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia, then whether this honourable court has

jurisdiction to hear and determine the Applicant's application for an order for interim attachment of funds

And that if this honourable court finds that it does not have the jurisdiction to hear this matter, then the Respondent humbly prays that the Applicant's application for an order for interim attachment of funds be dismissed with costs.

At the hearing of the application inter parte, both Counsel indicated that they would file written submissions in support of and in opposition to the preliminary issues raised, and that the court would render its ruling based on the documentation filed.

The affidavit in support of the application in paragraphs 7 and 8 states that the Christmas vacation of the court was from 11th December, 2016 until 9th January, 2017, and that it is mandatory to obtain leave of the court before filing court process during the Christmas vacation. That seeing that no such leave was obtained, this court has no jurisdiction to hear the application.

It is deposed in paragraphs 11 and 12 of the said affidavit that reliance was placed on Section 11(b) of the Arbitration Act, No 19 of 2000 in making the application in support of interim attachment of funds, which section is non – existent.

Further that the arbitration agreement between the 1st Applicant and the Respondent, has not been exhibited, and that there is no undertaking as to damages that has been made, should this court decide to discharge the interim measure of protection. The averment

in paragraph 16 of the affidavit in support of the notice of motion is that the alleged arbitration clause between the 2nd Applicant and the Respondent has not been authenticated for use in Zambia, as the same was executed in New Dehli, in the Republic of India.

In the skeleton arguments filed on 17th January, 2017, the Respondent refers to Order 14A of the Rules of the Supreme Court, 1999 edition, which empowers this court at any stage of the proceedings, to determine any question of law or construction of any document where it appears that such question is suitable for determination without a full trial of the action, and where such determination will finally determine the entire cause or matter or any claim, subject only to any possible appeal.

Further reference is made to Order 33 Rule 3 of the said Rules of the Supreme Court which gives power to the court to try any question or issue arising in a cause or matter whether of fact or law, or partly fact, and partly law, and whether raised by the pleadings or otherwise, at or after the trial of the cause or matter. There is also reference to Order 33 Rule 7 of the Rules of the Supreme Court which provides that a court may try any question or issue separately from the main cause or matter, which substantially disposes of the cause, and the court may dismiss the cause or matter or make such other order or give judgment therein as may be just.

The submission is that the effect of Order 14A as read together with Order 33 Rules 3 and 7 is that this court may at any stage of the

proceedings determine any question of law arising in any matter, provided that the court is firstly satisfied that the question is suitable for determination without a full trial of the action, and secondly that such determination will finally determine the entire cause or matter.

To this end reliance is placed on the case of ***POST NEWSPAPERS LIMITED V RUPIAH BWEZANI BANDA 2009 ZR 254*** where it was stated that ***"on 3rd October, 2008 when the two applications came up for determination, the trial court was obliged to dispose of the preliminary issue, first, as a matter of procedure, and because the outcome of the preliminary issue might affect the motion for committal, especially, if it were successful."***

The provisions of Order III Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia are also highlighted which provide that; ***"subject to any particular rules, the court or a judge may in all causes or matters, make any interlocutory order, which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not".***

It is submitted with regard to the preliminary issue raised pertaining to the obtaining leave before filing process during the Christmas vacation, that Order II Rule 4 states that summonses and pleadings may be amended, delivered or filed during the last eleven days of the Michaelmas and Christmas vacations

respectively, but pleadings shall not be amended, delivered or filed during any other part of such vacations, unless by the direction of the court or a judge.

That Order XLIX Rule 3(1) of the High Court Rules, Chapter 27 of the Laws of Zambia provides that the Christmas vacation shall commence on 11th December, and terminate on the 9th of January.

It is argued that the Originating Summons and the affidavit in support were filed on 13th December, 2016, two days after the court had started its vacation. That going by the provisions of the law, the last eleven days of the Christmas vacation commenced on 29th December, 2016. As no court directive authorizing the Applicant to file the application during the Christmas vacation was served on the Respondent, the filing was done in flagrant breach of the rules, and going by Order II Rule 4 of the High Court Rules, as read with Order 49 Rule (3) (1) of the said High Court Rules, the failure to obtain leave is fatal to the application.

To support this argument reliance is placed on the case of ***ZAMBIA REVENUE AUTHORITY V T.G TRANSPORT 2007 ZR 13*** where leave was not obtained from the Deputy Registrar to appeal against the assessment of damages. It was stated in that case that ***"....the English case of White V Burton ...a persuasive authority states that the requirement of leave to appeal goes to the jurisdiction of the court of appeal. Therefore since jurisdiction cannot be conferred by the express consent of all parties- a foriori, it cannot be conferred in consequence of an applied waiver by***

one party. In view of the foregoing reasons, the appeal is therefore misconceived and we decline to entertain it."

Further reliance is placed on the case of ***VANGELATOS AND VANGELATOS V METRO INVESTMENTS LIMITED AND OTHERS SCZ No 35 of 2016*** wherein Mutuna JS on behalf of the Supreme Court stated that ***"where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given..."***

Counsel's submission is that if this court finds that the Applicant did not obtain leave before filing the court process, and it proceeded to hear the matter, then the proceedings would be a nullity. To support this position the case of ***MACFOY V UNITED AFRICA COMPANY LIMITED 1961 1 ALL ER 1169*** is relied on. It is argued that as no such leave was obtained, the proceedings are a nullity, and the action must be accordingly dismissed.

Counsel's view is that leave cannot be granted retrospectively, as this would be tantamount to closing the stable doors after the horses have bolted. Moreover that this court has got no jurisdiction to grant leave retrospectively as can be seen from the ***ZAMBIA REVENUE AUTHORITY V T.G TRANSPORT 2007 ZR 13*** case.

The argument in the alternative is that in the event that this court finds that it has jurisdiction to hear the matter, then reliance on Section 11(b) of the Arbitration Act, No 19 of 2000, a non-existent

provision, contravenes Practice Direction No 1 of 2002. The Practice Direction states that;

"all applications brought to court should indicate the Act and the Section or Order and Rule under which the application is brought, failure to which the application shall not accepted for filing or entertained".

Therefore in this matter, the reliance on the non-existent Section 11(b) of the Arbitration Act No 19 of 2000 is fatal going by the decision in the case of ***FIRST MERCHANT BANK ZAMBIA LIMITED (IN LIQUIDATION), THE ATTORNEY GENERAL AND AL SALMS BUILDING MATERIALS LIMITED, JAYESH SHAH SCZ No/8/258/2009 UNREPORTED.*** That case held that Practice Direction No 1 of 2002 uses the words *"should"* and *"shall"* which denote mandatory. Therefore failure to comply with the same was fatal, and the notice was incompetent, and was dismissed with costs.

It is argued that Practice Direction No 1 of 2002 is designed at aiding the court to identify the source of its jurisdiction to hear any matters, as opposed to allowing the parties to state in blanket terms that they rely upon an entire statute, when bringing an action. That in any event the court ought to be moved on the basis of a specific provision of the law, and in default thereof, the application has no proverbial leg to stand on. Counsel prayed that the Applicant's application for interim measure of attachment be dismissed for

want of jurisdiction, and want of compliance with Practice Direction No 1 of 2002.

The further argument in the alternative is that if this court finds that it has jurisdiction to hear the application, it is the Respondent's argument that the Applicant has not exhibited the arbitration agreement between the 1st Applicant and the Respondent in the affidavit in support of the application, contrary to Rule 9(3) (a) of the Arbitration Act, No 19 of 2000.

The submission is that Rule 9(3) (a) of the Arbitration (Court Proceedings) Rules, Statutory Instrument No 75 of 2001, provides that an affidavit in support of an application for interim relief shall exhibit a copy of the arbitration agreement. That a perusal of the affidavit in support of the Originating Summons shows that no agreement between the 1st Applicant and the Respondent has been exhibited. Thus the application for the interim relief cannot be considered, as the requirement to exhibit the arbitration agreement is mandatory.

Counsel's further argument is that the requirement to exhibit the arbitration agreement is premised on the fact that it exists, and goes to the court's jurisdiction. On that basis the application should be dismissed.

The other argument in the alternative if this court finds that it has jurisdiction to hear this matter, is that the Applicants have not made any undertaking to pay damages, if this court discharges the

interim measure of protection. Again reference is made to Rule 9(3)(g) of the Arbitration (Court Proceedings) Rules, Statutory Instrument No 71 of 2001, which makes it mandatory for all applications for interim relief under the Rule to have an undertaking to pay damages. That the failure to do so is incurable rendering the application defective ab initio, and makes the application a nullity.

The case of ***AMERICAN CYNAMID CO V ETHICON LIMITED 1975 AC 396*** is relied on in support of this position. In that case Lord Diplock stated that ***"when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the Plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be made at a time when ex hypothesi, the existence of the right or the violation of it, or both, is uncertain, and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the Plaintiff during that period before the uncertainty could be resolved that the practice arose of granting relief by way of interlocutory injunction; but since the middle of the 19th century, this has been made subject to his undertaking to pay damages to the Defendant, for any loss sustained by reason of the injunction, if it should be held at the trial that the Plaintiff had not been entitled to restrain the Defendant from doing what he was threatening to do."***

Therefore based on the holding in the above case, as well as the provisions of Rule 9(3) of the Arbitration (Court Proceedings) Rules, this court should not consider the application, as the Applicants have not come to court with clean hands, as they have not made any undertaking as to pay damages to the Respondent.

The last argument in the alternative if this court finds that it has jurisdiction to hear the matter, is that the alleged agreement between the 2nd Applicant and the Respondent has not been authenticated in line with Section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia.

Counsel in his submissions states that Section 3(b) of the Authentication of Documents Act requires that any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia, in the case of a document executed in any part of her Britannic Majesty's dominions outside the United Kingdom if duly authenticated by the signature and seal of office of the mayor or any town or notary public or of the permanent head of any government department in any such part of her Britannic Majesty's dominions.

That the purported arbitration agreement bears a date stamp stating New Dehli, presupposing that the document was signed in New Dehli in India. It therefore requires to be authenticated before it can be used in Zambia. The case of ***AFRICAN ALLIANCE PIONEER MASTER FUND AND VEHICLE FINANCE LIMITED SCZ/8/08/2011 UNREPORTED*** is relied on, which case laid down

three aspects that the court needs to consider in order to establish whether a document requires authentication within the requirements of the Authentication of Documents Act. These are that;

1. The place of execution as agreed to and specified in the contract, even if the contract was signed elsewhere.
2. The place where the parties actually signed or sealed the contract, if all the parties signed in one location.
3. If the contract does not specify a place of execution and the parties do not sign or seal the contract in the same place, the place where the last signature was executed.

With regard to the first consideration, Counsel submits that the arbitration agreement does not contain any clauses that reveal where the document was executed, and it therefore fails to meet the first test. That the second consideration is evidence by the document bearing a date stamp indicating New Dehli, and in the absence of evidence to the contrary, the presumption is that it was signed in New Dehli. As regards the last consideration the date stamp for New Dehli gives effect to the fact the document was signed there.

Thus the document not having been authenticated in line with the provisions of the Authentication of Documents Act, it is ineffectual against third parties, and cannot be a basis upon which this court can exercise it jurisdiction to hear the Applicants application on the

merits. Counsel prays that the said application be dismissed with costs.

The Applicants on 1st February 207 filed skeleton arguments in opposition on which they rely. The argument is that while Orders 14A, 33 Rules 3 and 7 of the Rules of the Supreme Court empower this court to determine any question of law or fact, and try the same separately from the main trial, substantially determining the main action, conditions have to be met before this can be done.

These are found in Order 14A which state that the question must be one which is suitable for determination without a full trial of the action, and secondly that such determination, will finally determine the entire cause or matter.

Their argument is that these pre requisites are inapplicable to this case as the cause or matter sought to be determined by the Respondents relates to a dispute that is being referred to arbitration by the parties, in line with the respective contracts. That Orders 14A, 33 Rule 3 and 7 cannot be extended to the validity or otherwise of the arbitration agreements exhibited by the Applicants.

This is because arbitration proceedings by their nature are an alternative method of dispute resolution, distinct and separate from the courts of law. It is trite that where a dispute is subject of an arbitration agreement, it can only be legally amenable to arbitration, and the courts have no jurisdiction to hear and

determine any cause or claim, other than in accordance with the law, where such is prevailing.

The case of ***KENNETH VAN DER WESTHERZEN V ROTA RABEL LIMITED AND YING DUAN LI LING 2010 ZR*** is relied on, arguing that in that case reference was made to *Julian D.M Lew Loukas A. Mistellis and Stefan M. Knolls* ***Comparative International Commercial Arbitration 2003 at page 129*** which provides that ***"an arbitration agreement is the expression of the intent of the parties to withdraw their dispute from a national court system and submit them to arbitration. The arbitration agreement will deliver the intended results if it is enforceable".***

Thus the court in this matter must be mindful of the supremacy of the parties' intentions to have their disputes settled by arbitration, and reliance is also placed on the case of ***JOHN KAUNDA (suing as Country Director and on behalf of the Adventist Development and Relief Agency (ADRA) V KAREN MOTORS (Z) LIMITED 2011 VOL 1 ZR 451.*** That case made reference to the book *Law and Practice of International Commercial Arbitration 3rd Edition by Redfern and Hunters* which states "***that by choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is in principle, final and binding. Arbitration is not intended to be a proposal as to how the dispute might be resolved, nor is it intended to be the first step on a ladder of appeals through the national courts".***

It is further argued by the Applicant that the Arbitration Act No 19 of 2000 provides very limited scope for the court to exercise any judicial functions in relation to arbitration agreements. That the said Act has not left any lacuna capable of being filled by Orders 14A and 33 Rules 3 and 7. Further that the Rules of the Supreme Court, 1999 Edition can only be resorted to where such reference does not conflict with the intentions of the legislator as encapsulated in the Act.

His argument is that Orders 14A and 33 Rules 3 and 7 are in conflict with the Arbitration Act. That Section 11 of the Arbitration Act No 19 of 2000 gives power to the court before or during arbitral proceedings to grant interim measures of protection. Going by this provision there is no jurisdiction extended to the court to determine the questions raised by the Respondent.

With regard to the submission that the application has been brought pursuant a non-existent provision of the law, Counsel for the Applicant submits that reference to Section 11 (b) in the caption was a typographical error, and that the proceedings have been brought pursuant to Section 11 of the Arbitration Act.

The other argument is that reliance on the provisions of Orders 14A and 33 Rules 3 and 7 of the Rules of the Supreme Court, 1999 Edition is flawed and at odds with intention and or purposes of the Arbitration Act. This is because these provisions pre-suppose that there are proceedings which have been brought before a court for determination. That this is not the position in this matter, as no

case is pending before the High Court, which is capable of being determined under the said provisions.

It is Counsel's argument that their application is properly secured under the provisions of Sections 11 (2) (b) and Section 11 (4) (a) of the Arbitration Act. That if this court is to extend its jurisdiction by considering questions relating to the arbitration of the matter, or otherwise of the dispute between the parties, or the validity or otherwise of the documents executed by the parties, then the court will be acting outside its jurisdiction, and the proceedings will be irregular.

The case of ***VANGELATOS AND VANGELATOS V METRO INVESTMENTS SCZ No 35 of 2016*** relied on by the Respondent, is relied on. On the submissions that the Applicants have not complied with Order 2 Rule 4 and Order 49 Rule 3 (1) of the High Court Rules, Counsel's argument is that Sections 9 (4) and (5) of the Arbitration Act adequately provide for how urgent applications with regard to the relief of interim measures of protection shall be made, instead of extending the existing court rules to such applications.

Further that an application for interim measure of protection is similar to applications under Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia, and that such applications are capable of being filed during the Christmas vacation, and do not require an applicant to obtain leave before filing them. Thus there is no impropriety in the Applicants lodging an urgent application

pursuant to Section 11 of the Arbitration Act, during the Christmas vacation.

It is also argued that their understanding of Order II Rule 4 as read together with Order 49 of the High Court Rules that these provisions do not in any way relate to urgent interlocutory applications, especially those made pursuant to Section 11 of the Arbitration Act, as read together with Rule 9 of the Arbitration (Court Proceedings) Rules, Statutory Instrument No 75 of 2001.

Counsel's view is that Order II of the High Court Rules relates to the reckoning of time for amending, delivery or filing of pleadings, while Order 4 Rule 2 of the said High Court Rules provides that proceedings shall not be amended, delivered or filed during any part of the vacations, unless by the direction of the Court or a Judge. That therefore to argue that this provision extends to the prohibition of a party from filing, without first seeking leave, for an order of interim measure of protection pending the appointment of an arbitral tribunal, is in their view, taking the provisions of the order out of context.

The case of ***SIPALO V MUNDIA 1966 ZR 105*** is cited as an example of a case where applications have been heard during the Christmas vacation without first applying for leave, thus the provisions of Order II Rule 4 and Order 49 of the High Court Rules are not blanket provisions requiring leave to be obtained before filing applications during the Christmas vacation. That the said ***SIPALO V MUNDIA 1966 ZR 105*** case illustrates the point that

time does in fact run during the Christmas vacation, and that certain papers can be filed, except those relating to amendment, delivery or filing of pleadings. Thus applications brought under Section 11 of the Arbitration Act, can be filed without first obtaining leave during the Christmas vacation.

It is argued in the alternative that should this court find that the Applicant's application is irregular, such defect can be cured, as the breach is of a regulatory rule. The case of ***LEOPOLD WALFORD (Z) LIMITED V UNIFREIGHT 1985 ZR 203*** where it was held that ***"as a general rule, breach of regulatory rules is curable and not fatal, depending on the nature of the breach, and the stage reached during the proceedings"***.

The Applicants also rely on the case of ***ZAMBIA REVENUE AUTHORITY V JAYESH SHAH 2001 ZR 60*** which held that cases must be decided on their substance and merits, and that the rules must be followed, but that the breach thereof will not always be fatal, if the rule is merely regulatory or directory. That going by the above authorities, the court should order that the defect is curable by deeming the application as having been filed on the day after the end of the Christmas vacation, rather than dismissing the application, following the judgment in the case of ***LILY DRAKE V M.B.L MAHTANI AND ANOTHER 1985 ZR 236.***

In that case process was incorrectly commenced, thereby raising issues of the jurisdiction of the court, and the court ordered amendment of the originating process, rather than dismissing the

action on the ground that no injustice had been done to the other party.

The argument that reliance on Section 11 (b) of the Arbitration Act was typographical error is reiterated, and that in any event the application has been made pursuant to Rule 9 (4) of the Arbitration (Court Proceedings) Rules, which rule has been properly cited in the caption. Further that the first schedule of the Arbitration (Court Proceedings) Rules requires a party to state the application as ***"in the matter of the Arbitration Act 2000".***

Counsel argues that dismissing the Applicant's argument on account of failure by the 1st Applicant to exhibit the arbitration agreement will be grossly prejudicial to the 2nd Applicant. That the Respondent's indebtedness to the 1st Applicant is already the subject of a consent order, and what remains to be determined is the quantum of that debt, which has been referred to arbitration.

As regards the argument that the application for interim measure of protection is not tenable as the Applicants have not made an undertaking as to damages, the cases of ***LEOPOLD WALFORD (Z) LIMITED V UNIFREIGHT 1985 ZR 203*** and ***LILY DRAKE V M.B.L MAHTANI AND ANOTHER 1985 ZR 236*** are relied on.

The Applicant's response to the submission that the arbitration agreement between the 2nd Applicant and the Respondent does not comply with Section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia, is that the court when dealing

with determination of the validity or otherwise of a contract containing an arbitration clause, it must pay regard to the doctrine of severability of an arbitration clause in a contract.

To this end the UNICTRAL Model Law on International Commercial Arbitration, 1985 popularly known as the *model law* is relied on as authority. In particular Article 16 of the said model law is referred to, which states that an arbitral tribunal may rule on its own jurisdiction, including objections relating to the existence or validity of an arbitration agreement. Further that for that purpose an arbitration clause which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision of an arbitral tribunal that the contract is null and void, shall not entail ipso jure, the invalidity of the arbitration clause.

Based on this, Counsel argues that the High Court is only empowered to determine whether or not the arbitration agreement is null and void, inoperative or incapable of being performed by virtue of flying in the teeth of Section 6(2) of the Arbitration Act, as read with Section 10 of the same Act.

It follows therefore that as a general rule, subject only to the court's powers in Sections 6(2) and 10 of the Arbitration Act, No 19 of 2000, the determination of the validity of an arbitration clause, independent from the validity of the contract setting out the arbitration clause, falls squarely in the province of the arbitrator.

It is Counsel's argument that the operation of the doctrine of severability is to the effect that if a contract is declared void for any reason, the validity of an arbitration clause contained in such a contract would be effective, as it has autonomous character. That a court cannot hold an arbitration clause to be invalid after a contract has been terminated, and that is why Section 6 (3) of the Arbitration Act No 19 of 2000 confers jurisdiction on a court or other tribunal to determine any matter, but shall not, on that ground alone be construed as preventing the matter from being determined by arbitration.

That Section 10 of the said Arbitration Act provides that arbitral proceedings may be commenced or continued, and an award may be made while proceedings are pending before the court. The case of ***ENERCON (INDIA) LIMITED V ENERCON GMBH AND ANOTHER 2014 5 SCC 1*** is relied on. In that case the doctrine of separability of the arbitration clause or agreement from the underlying contract was held as necessary in order to ensure that the intention of the parties to resolve the dispute by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract.

Reliance is also placed on the case of ***VISA INTERNATIONAL LIMITED V CONTINENTAL RESOURCES (USA) 2009, 2 SCC 55*** which held that what is required to be gathered is the intention of the parties from the surrounding circumstances, including the conduct of the parties, and the evidence, such as exchange of

correspondence between the parties to show the intention of the parties to go for arbitration.

In conclusion Counsel submits that the complimentary role of the court in arbitral proceedings is aimed at ensuring the success of arbitration. That the application by the Respondent is merely intended to stifle an amicable resolution of the dispute between the parties, and it should be dismissed with costs.

The Respondent in the submissions states that it reserves its rights to filing an affidavit in opposition to the substantive application for an order of interim attachment of funds, if the notice to raise preliminary is decided in favour of the Applicants.

Their submission is that the Applicants have not filed affidavits in opposition to the notice to raise preliminary issues, entailing that the facts deposed to by the Respondent in the affidavit in support, are deemed to be unchallenged, as held by Hon Mr Justice Chitabo SC in the case of ***ROBERT CHIRWA V SAZ SOLUTIONS AND ESTABLISHMENTS PRIME TRADING SOLUTIONS 2016/HP/0970 unreported.***

Further reliance is placed on the case of ***ZAMBIA REVENUE AUTHORITY V HITECH TRADING COMPANY LIMITED 2001 ZR 17*** where the Supreme Court stated that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence. Thus failure by the Applicants to oppose the facts averred in the affidavit in support of the

application to raise preliminary issues, as well as the fact that there is overwhelming weight in the evidence given on oath by the Respondent, the Applicants application cannot stand.

The Respondent in the submissions reiterates the provisions of Order 14A Rule 1 of the Rules of the Supreme Court, arguing that the said provision does not provide exceptions with respect of interim relief being sought prior to arbitration being commenced. Further that the said Order 14A Rule 1 does not limit the Court's power in construing any document in any cause or matter, at any stage of the proceedings. Thus the said provision is suited for the determination of points of law, and the application by the Respondent is properly before court.

It is argued that the Applicants have placed reliance upon the arbitration clause between the 2nd Applicant and the Respondent to seek the interim relief from the court. That the complimentary role of the courts in arbitration is recognized, as arbitration is an alternative source of dispute resolution.

However the Respondent's position is that Section 11 of the Arbitration Act No 19 of 2000, as well as Rule 9(1) of the Arbitration (Court Proceedings) Rules, Statutory Instrument No 75 of 2001 give the court jurisdiction to grant the interim relief sought. Thus the argument by the Applicants that to determine the propriety of the arbitration agreement or clause, one has to go to the Arbitrator is flawed.

To support this argument reliance is placed on the book titled *The Law and Practice of Commercial Arbitration, Second Edition at page 332* by Sir Michael J. Mustil where it is stated that ***"where the right of a party to a specific fund is in dispute in a reference, the court has power to order the fund to be paid into court or otherwise secured....It is probable that the court alone, and not the arbitrator, has power to make such an order".***

It is also argued in the submissions that the Applicants in order to be successful on the application, need to show that this court is the only body vested with power to grant such relief, and that the arbitration clause exists. In this case it must further be shown that the arbitration clause is compliant with the law governing authentication of documents. That where the rules relating to authentication are not complied with, then it would be logical to conclude that the party seeking relief under such flawed arbitration clause or agreement, cannot benefit from it.

It is argued that the Applicants are asking the court to blindly apply the law to any and every arbitration clause that comes before it, whether or not that clause or agreement is even legally binding. Counsel further argues that in cases of interim relief such as the one before court, this court is obliged to consider whether the said clause can even be relied upon to ground the application for payment of the sum in dispute into court.

Further that as this court is the body clothed with jurisdiction to grant the relief, it equally must be the body to consider whether

there is a legal entitlement to the relief sought. Thus the Applicants cannot obtain relief from one party being this court on the assumption that the arbitration clause or agreement is legally valid, and then proceed to defend their arbitration clause or agreement after the fact, before another body being the Arbitrator. The argument that only this court, and no other body has jurisdiction to grant the interim relief sought is emphasized.

The argument in the alternative is that reliance on Order 33 Rules 3 and 7 of the Rules of the Supreme Court, and Section 13 of the High Court Act as read with Order III Rule 2 of the said High Court Rules, Chapter 27 of the Laws of Zambia is on firm ground, as this court has power to resolve preliminary issues of law without the need for a full trial. However that the Applicants application leaves much to be desired in the realm of procedural compliance, and should therefore be dismissed with costs.

The case of ***FINSBURY INVESTMENT LIMITED V ANTONIO VENTRIGLIA AND OTHERS SCZ No 42 of 2016*** is relied upon wherein Mutuna JS emphasized that the practice and procedure in the High Court comprises a system to deal with obviously hopeless, frivolous or vexatious matters at interlocutory stage without full hearing, and that this ensures saving already overstretched resources of the court, and matters are disposed of, at least cost to the parties.

Pursuant to this, the court should dismiss the Applicant's application, as it does not comply with the rules of the court, as

Rules 38(1) and (2) of the Arbitration Rules, which give power to this court to hear any preliminary issue, provides the procedure to be followed when there is a lacuna in the arbitration rules. That the said rules provide that where there is a lacuna in the arbitration rules, then recourse must be had to the High Court Act, which Act then allows referral to the Rules of the Supreme Court, as well as the provisions of Section 13 and Order III Rule 2 of the High Court Act, Chapter 27 of the Laws of Zambia.

With regard to the question of whether the Applicants have complied with the provisions of Order II Rule 4 as read together with Order 49 Rule 3 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia, Counsel submits that the Applicants argument that the application for interim relief is so urgent that it did not require leave of court, before being filed during the Christmas vacation. It is submitted that Order 27 of the High Court Rules deals with urgent applications, and the Applicants had not shown that their application was urgent.

Reference is made to Rule 9(5) of the Arbitration Rules stating that this rule has a mandatory requirement that an applicant shall file a certificate of urgency, where the application is urgent in nature.

That paragraph 15 of the affidavit in support of the notice of motion shows that no certificate of urgency was filed by the Respondent, a fact that is not disputed. It is also submitted that Order 49 Rule 3 (2) (b) as read with Order 3 Rule (3) of the High Court Rules,

Chapter 27 of the Laws of Zambia lays down the procedure for handling urgent applications during the Christmas vacation.

Under that provision an application by summons requesting for an order that the matter be heard during the vacation should have been made, and that no such order shall be made, unless the Judge is satisfied that there is urgent need to hear the matter during the Christmas vacation, as stipulated in the proviso to Order 49 Rule 3(3).

As the Applicants did not make such an application, it can be inferred that the matter was not urgent, and could be dealt with after the Christmas vacation. That in any event Order II Rule 4 of the High Court Rules provides that pleadings shall not be filed during any part of the Christmas vacation, unless by direction of the court, and there is no such direction in this case.

It is argued that Order II Rule 4 of the said High Court Rules does not contain any exceptions to what are termed as urgent applications. Therefore the rule applies to all applications brought before the court, whether urgent or not. That as the Applicants had not indicated the application as being urgent, to assume so would be to go against the overwhelming evidence on the record, to the contrary.

Counsel maintains that it is imperative to obtain leave during the Christmas vacation before filing pleadings, and in the absence of

that leave being obtained, the proceedings are a nullity, and the court has got no jurisdiction to hear the matter.

In reply to the argument that the failure to obtain leave is curable as argued by the Applicants, it is Counsel's submission that obtaining leave ex post facto is tantamount to closing the stable doors after the horses have bolted. The case of ***STANDARD CHARTERED BANK ZAMBIA PLC V WISDOM CHANDA AND CHRISTOPHER CHANDA SCZ No 18 of 2014*** is referred to where it was stated that 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 effect, and of its own motion, proceed as if the defect never existed.

That additionally the case of ***LEOPOLD WALFORD (Z) LIMITED V UNIFREIGHT 1985 ZR 203*** which dealt with the requirement of obtaining leave before a writ could be issued out of jurisdiction, the Supreme Court in that case did not waive this requirement. That going by the authorities, in the absence of an order curing the defect, this court is obliged to dismiss the Applicants application for being defective, as no steps were taken prior to the raising of the preliminary issues by the Respondent, to cure the defects.

As to whether this court has jurisdiction to hear the application in view of a non- existent provision of the law being cited in support of the application, the Respondent submits that this defect is incurable and it deprives the court of the jurisdiction to hear the

matter, as the correct legal provision upon which to base its decision is absent.

With regard to the argument that this court has got no jurisdiction to hear the application for interim attachment of funds as the arbitration agreement between the 1st Applicant and the Respondent has not been exhibited to the affidavit in support of the application, the submission is that where there is no arbitration agreement exhibited, then there was no intention to arbitrate. Thus no interim relief can be granted, as it is a condition precedent that an arbitration agreement must be exhibited to an application of such a nature.

The argument in the skeleton arguments that the Applicants must make an undertaking as to damages in the event that the interim relief is discharged is repeated, stating that as such an undertaking has not been made, it would be inequitable to grant the application, as the Applicants have not come to court with clean hands.

Counsel's submission with regard to the arguments pertaining to the provisions of Article 118 (2) (e) of the Constitution of Zambia Act No 2 of 2016 that the breaches are curable, is that this is not the position. Reliance is placed on the case of ***ACCESS BANK (ZAMBIA) LIMITED V GROUP FIVE/ZCON BUSINESS PARK JOINT VENTURE SCZ/8/52/14 unreported*** where it was stated that *rules of procedure and timelines serve to make the process of adjudication fair, just and certain and even handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in*

the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party.

The other case relied on in support of this position is ***CMA CGM ZAMBIA LIMITED V INTERFOOD ZAMBIA LIMITED 2016/HPC/0267*** where the court stated that in her view Article 118 (2) (e) of the Constitution should not be used by defaulting litigants like a magic wand, where the stroke of the wand will make lapses and errors go away in total disregard of the court rules.

The last case cited is ***HENRY M. KAPOKO V THE PEOPLE 2016/CC/0023*** where the Constitutional Court observed that *Article 118 (2) (e) of the Constitutional Court cannot be treated as a one size fits all answer to all manner of legal situations. It is a guiding principle.....each court will need to determine whether in the particular circumstances what is in issue is a technicality , and if so whether compliance with it will hinder the determination of a case in a just manner.*

Therefore based on the above arguments, the Applicant's application should be dismissed with costs to the Respondent.

I have considered the application. I will begin with the issue of leave being sought before filing the application during the Christmas vacation. As seen from the arguments, the Respondents position is that as the Court was on vacation on 13th December,

2016, when the ex- parte Originating Summons was filed, leave of Court needed to be obtained before the same was filed.

Reliance is placed on Order II Rule 2 and Order XLIX Rule 3(1) of the High Court Rules to support this argument. Order XLIX Rule 3 (1) states that;

"3. (1) The vacations to be observed in the several courts and offices of the High Court shall be four in every year, that is to say, the Easter Vacation, the Whitsun vacation, the Michaelmas vacation and the Christmas vacation. The Easter vacation shall commence on Good Friday and terminate on Easter Tuesday; the Whitsun vacation shall commence on the Saturday before Whit Monday and shall terminate on the Tuesday after Whit Sunday; the Michaelmas Vacation shall commence on the 8th August and shall terminate on the 6th September; and the Christmas Vacation shall commence on 11th December and terminate on the 9th January".

Order II Rule 4 on the other hand provides that;

"Summonses may be issued and pleadings may be amended, delivered or filed during the last eleven days of the Michaelmas and Christmas vacations respectively, but pleadings shall not be amended, delivered or filed during any other part of such vacations unless by the direction of the Court or a Judge".

It is clear from the above provisions that during the Christmas vacation summons may be issues and pleadings amended, delivered or filed during the last eleven days of the vacation without leave of the court before doing so. That where the said summonses and pleadings are to be filed before the last eleven days of the Christmas vacation, leave of court must be obtained.

Counsel for the Applicants argues that this requirement is not applicable to applications for interim measures of protection made under the Arbitration Act, No 19 of 2000, as arbitration by its very nature is an alternative method of dispute resolution, and the courts only play a complimentary role in such matters. It is also argued by the Applicants that making the application pursuant to Orders 14A, and 33 Rules 3 and 7 of the Rules of the Supreme Court 1999 Edition is flawed as the said provisions are in conflict with the Arbitration Act No 19 of 2000, as well as the Arbitration (Court Proceedings) Rules, Statutory Instrument No 75 of 2001, which adequately provide for how urgent interim applications should be made.

It is trite that arbitration proceedings are conducted by an arbitrator. Further parties agree to resolve their disputes through arbitration which is an alternative method of dispute resolution, and that the courts only play a complimentary role in relation to the same by granting interim measures of protection among others. The disputes are resolved by arbitration if there is agreement by the parties to that effect.

Thus the question that arises for determination is whether the procedure available in the High Court for making interlocutory applications, is applicable to applications for interim measures of protection, made pursuant to the Arbitration Act, No 19 of 2000?

Rule 9 (3), (4), (5) and (6) of the Arbitration (Court Proceedings) Rules, Statutory Instrument No 75 of 2001 provides as follows;

"(3) The application for an interim measure of protection shall be supported by an affidavit-

(a) exhibiting a copy of the arbitration agreement;

(b) stating the nature of the interim measure required;

(c) stating the particulars of the subject-matter of the dispute in respect of which the interim measure is sought;

(d) stating the particulars of any person in possession of the subject-matter of the dispute and that person's address;

(e) stating the particulars of any arbitral proceedings pending;

(f) exhibiting any ruling or finding of fact made in pending arbitral proceedings;

(g) giving an undertaking to pay damages in case the court or the arbitrator decides to discharge the interim measure or to order the payment of damages; and

(h) stating any other facts relevant to the application.

(4) An application for an interim measure of protection which is urgent may be made to the court ex parte by affidavit, in accordance with the Rules of the Court, upon filing the originating summons; and the application shall be heard inter parties on the return day stated in the originating summons.

(5) Where an application for an interim measure of protection is urgent, it shall be accompanied by a certificate of urgency.

(6) Rules of the court relating to ex parte application, service thereof and disposal or urgent applications shall apply to applications for interim measures of protection".

A careful reading of these provisions reveals that applications for interim measures of protection made under the Arbitration Act No 19 of 2000 are subject to the Rules of court, in this case High Court Rules, as well as the Rules of the Supreme Court of England, 1999 Edition, in the event that the High Court Rules have lacuna, as provided in Act No 7 of 2011, being an amendment to Section 10 of the High Court Act.

Therefore where a challenge to an application for interim measures of protection is made, as in this case, the procedure for raising such challenge available for matters commenced in the High Court will apply. Order 30 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that all applications in chambers shall be made by summons.

This provision is of general application to matters to be determined in chambers. However Order 14A of the Rules of the Supreme Court, 1999 Edition relied on by the Respondent is specific, as it relates to the determination of questions of law or the construction of any document, at any stage of the proceedings. It states that;

"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just".

Order 33 Rules 3 and 7 also relied upon by the Respondent in making the application provide that;

"3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

7.If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just".

The two provisions effectively deal with the determination of questions of law or issues without the matter proceeding to trial, where the determination disposes of the action.

While I do agree with argument by Counsel for the Applicants that in this case what the Applicants have filed is an application for interim measure of protection only, and not a matter concerning the determination of the dispute between the parties, I do not agree that because of this position, the application by the Respondent should not have been brought pursuant to Orders 14A and 33 Rules 3 and 7.

This is because as rightly submitted by Counsel for the Applicants, an application under Order 14A can only be heard where the court is satisfied that the issue or question raised is suitable for determination without trial in the matter being had, and that the issue or question will subject only to an appeal, determine the matter.

The issues or questions raised in the notice by the Respondent go to the Court's jurisdiction, and if successfully raised, will determine

the application for interim measure of protection. Thus while the interim measure of protection is an interlocutory relief, its success will determine this action, as it is the only relief sought from the court, pending the arbitration proceedings.

I therefore find that the issues raised by the Respondent are suitable for determination under Order 14A and 33 Rules 3 and 7, and I shall proceed to determine the issues raised in the notice.

Having established so, the argument by the Applicants that the provisions of Orders 14A and 33 Rules 3 and 7 of the Rules of the Supreme Court of England, 1999 Edition are in conflict with the Arbitration Act, lacks merit, as the Arbitration (Court Proceedings) Rules expressly provide for how application are made.

It has been seen from Order II Rule 4 that this court commenced its Christmas vacation on 11th December 2016 and the said vacation ended on 9th January 2017. The ex-parte Originating Summons for interim measures of protection was filed on 13th December, 2016 without leave of court, clearly before the eleven days before the vacation ended. This was a breach of the rules of the court.

Counsel for the Applicants relied on the case of ***SIPALO V MUNDIA 1966 ZR*** to argue that the requirement to obtain leave is not hard and fast, and also on the case of ***LILY DRAKE V M.B.L MAHTANI AND ANOTHER 1985 ZR 236*** to argue that the proceedings to be deemed as having been commenced with leave. In the ***SIPALO V MUNDIA*** case there was an appeal before the High Court against

the decision of Deputy Registrar made on 9th August, 1966 dismissing the Defendant's application for further and better particulars.

The Defendant filed a notice of appeal against the said decision on 5th October, 1966, clearly beyond the seven day period prescribed for appealing against the decision. The Defendant's argument for not filing the notice of appeal in time was that the court was on vacation, namely Michaelmas which runs from 8th August to 6th September.

Ramsey J in that matter noted that "***I am told that the practice in the High Court Registry is not to file any papers other than those in the causes and matters detailed in order 40A, rule 3 (4). It appears to me that, if this is so, the practice is wrong, and that, apart from the amending, delivering and filing of pleadings time runs during the vacations.***

It follows, therefore, that the notice of appeal is seven weeks out of time. The fact that seven days is the period allowed not only for the filing of the notice of appeal but also for the hearing before the judge shows that the rules are designed to cut out procedural delays in bringing a case to trial. Here the notice was at least six days out of time before the beginning of the vacation, and it is now seven weeks out of time".

My understanding of the holding in that case is that where a decision has been made, pursuant to which a party is entitled to

appeal against, time will run for filing an appeal, even if the decision appealed against, goes into vacation time. Therefore one who desires to appeal against any such decision, must file the notice of appeal during the vacation, to avoid being out of time. That it is only fresh applications or pleadings that may not filed during the vacation.

Going by this, the argument by the Applicants that only documents related to amendment, delivery or the filing of pleadings cannot be filed during the vacation, cannot stand. There was no time that was running for the Applicants to file the ex-parte Originating Summons for interim measure of protection that would have provided exception to such filing during the vacation, without leave of court. The argument fails.

Thus the next question to be determined is whether in light of the filing of the ex-parte Originating Summons without leave of the court, the application is doomed to be dismissed? The case of ***LILY DRAKE V M.B.L MAHTANI AND ANOTHER 1985 ZR 236*** relied on by the Applicants in support of the argument that the matter should not be dismissed, dealt with commencement of the action using a writ of summons instead of originating notice of motion as provided under the Rent Act.

The Supreme Court in that case stated that ***"Consequently as that rule provides for the commencement of applications by originating notice of motion the exception to Order 6 Rule 1 applies and the matter is not to be started by writ of***

summons. We appreciate that these technicalities may not always be clear and for that reason it has always been the practice of this court to allow amendment of proceedings which have been incorrectly commenced so long as no injustice is done to the parties. In this case no injustice will be done to the appellant by allowing the respondents to amend their form of action to one of originating notice of motion. We accordingly allow such an amendment".

That matter concerned commencement of the action using a wrong mode, while this matter relates to the failure to obtain leave to file the application during the Christmas vacation, and is therefore distinguishable from that matter, on that basis. The Respondent on the other hand relied on the case of ***ZAMBIA REVENUE AUTHORITY V T AND G TRANSPORT 2007 ZR 13.*** That matter involved an appeal against the judgment of the Deputy Registrar on assessment of damages before the Supreme Court without leave being obtained to appeal. It was held in that case that;

"In accordance with Rule 55 of the Supreme Court Rules, failure to obtain leave before filing a notice of appeal is a default in lodging an appeal and merits a dismissal; and the appeal is not properly before the court since no order granting leave to appeal has been filed".

Therefore any proceedings commenced without leave of the court where such leave is required, renders the same liable to be dismissed. Accordingly as no leave was obtained to file the ex-parte

Originating Summons during the Christmas vacation, the application for ex-parte interim measure of protection is dismissed. I will not proceed to consider the other preliminary issues raised, as doing so would be to consider the merits of the application, after the matter has been held to be incompetently before the court. Costs of the application go to the Respondent, to be taxed in default of agreement.

DATED THE 28th DAY OF FEBRUARY, 2017

Skaunda

S. KAUNDA NEWA
HIGH COURT JUDGE