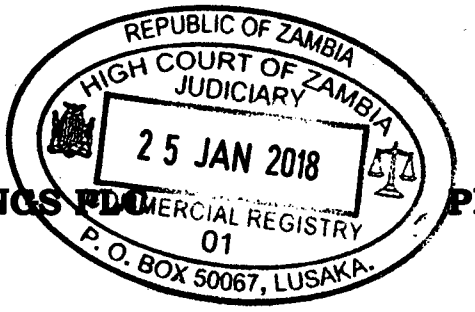
IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0515**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



BETWEEN:

ZCCM INVESTMENTS HOLDINGS PLC **PLAINTIFF**

AND

FIRST QUANTUM MINERALS LIMITED	**1ST DEFENDANT**
FQM FINANCE LIMITED	**2ND DEFENDANT**
PHILIP K.R. PASCALL	**3RD DEFENDANT**
ARTHUR MATHIAS PASCALL	**4TH DEFENDANT**
CLIVE NEWALL	**5TH DEFENDANT**
MARTIN R. ROWLEY	**6TH DEFENDANT**
KANSANSHI MINING PLC	**7TH DEFENDANT**

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 25th day of January, 2018

For the Plaintiff:	Mr. B. Mutale, SC. and Mr. K. Kaunda, of Messrs. Ellis & Co.; Dr. J. Mulwila, SC., of Messrs. Ituna & Partners; Ms. Y. Mkandawire and Mr. Mbalashi, In-house Counsel, ZCCM Holdings Plc; Mr. M. Lungu of Messrs. Lungu Simwanza & Co.
For the 1st Defendant:	Mr. Sakwiba Sikota SC. and Mr. K. Khanda of Central Chambers
For the 2nd Defendant:	Mr. M. Mulele of Messrs. G. M. Legal Practitioners
For the 3rd to 6th Defendants:	Prof. M.P. Mvunga, SC and Mr. D. Jere of Mvunga and Associates
For the 7th Defendant:	Mr. S. Chisenga and Mr. J. Kawana of Messrs Corpus Legal Practitioners

RULING

Cases referred to:

1. *Ituna Partners v. Zambia Open University Limited SCZ/8/128/2008.*

2. *Marren v. Dawson Bentley & Co Ltd (1961) 2 Q.B 135.*
3. *Donovan v. Gwentoys Ltd (1990) 1 WLR 472.*
4. *B.P. Zambia Plc v. Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited SCZ Judgment No. 21 of 2011.*
5. *City Express Limited v. Southern Cross Motors Limited SCZ No. 8 of 2006.*
6. *Williams v. Central Bank of Nigeria (2014) UKSC 10 esp at 96-102.*
7. *Manfred Kabanda and Kajeema Construction v. Joseph Kasanga (1990/92) Z.R. 145 (S.C.).*
8. *Kabwe Transport Company Limited v. Press Transport (1975 Limited) (1984) Z.R. 43 (S.C.).*
9. *Jonathan Alexander Limited v. Procta (1996) 1 WLR 518.*
10. *Leopold Walford (Z) Limited v. Unifreight (1985) Z.R. 203.*
11. *Chikuta v. Chipata District Council (1974) Z.R. 241.*
12. *Bellamano v. Ligure Lombarda Limited (1976) Z.R. 267.*
13. *Sheldon and Others v. RHM Outwaite (Underwriting Agencies) (1995) 2 All E.R. 558.*
14. *Josia Tembo and Henry Jawa v. Peter Mukuka Chitambala (Sued as Administrator of the Estate of the Late Frank Macharious Chitambala) (2009) Z.R 326.*
15. *Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture SCZ/8/52/2014.*
16. *Sablehand Zambia Limited v. Zambia Revenue Authority (2005) Z.R. 109 (S.C).*

Legislation referred to:

1. *Order 10, Rule 16 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

2. *Practice Direction No. 4 of 1977.*
3. *Section 215 of the Companies Act, Chapter 388 of the Laws of Zambia.*
4. *Order 33/3 and Order 33/7 of the Rules of the Supreme Court, 1999 Edition (White Book).*
5. *Order 10, Rule 15 of the High Court Rules.*
6. *Section 2 of the Limitation Act, 1939.*
7. *Order 3, Rule 2 and Order 53, Rule 6(1) of the High Court Rules.*
8. *Rule 2 of the Rules of the Supreme Court.*
9. *The Penal Code Act, Chapter 87 of the Laws of Zambia.*
10. *Order 2, Rule 2 of the Rules of the Supreme Court.*
11. *Order 12, Rule 8 of the Rules of the Supreme Court.*
12. *Order 18, Rule 8 (1) of the Rules of the Supreme Court.*
13. *Order18, Rule 19 (1) (c) of the Rules of the Supreme Court.*

Publications referred to:

1. *Bryan A. Garner (Ed), Black's Law Dictionary, 10th Edition [Thomson Reuters, 2014.*
2. *Halsbury's Laws of England, 5th Edition [RELX (UK), 2015], Volume 47, paragraphs 252 and 253.*

There are three applications to Set Aside Writ of Summons and Statement of Claim for Irregularity made independently by:

(a) the 1st Defendant;
(b) the 5th Defendant; and
(c) the 3rd, 4th and 6th Defendants.

For purposes of expedience, the three applications were considered collectively on 29th and 30th June, 2017, 7th July, 2017 and 9th August, 2017.

The background to the aforesaid applications is that the Plaintiff commenced this matter against the Defendants on 28th October, 2016 by way of Writ of Summons and accompanying Statement of Claim. The period indicated on the said Writ of Summons, as to when appearance was to be entered, was twenty-one (21) days despite the fact that some of the Defendants were outside the jurisdiction. The relief sought by the Plaintiff has itemized several claims, the gist of which is that the Plaintiff seeks an account to be rendered by the Defendants for monies and/or assets allegedly transferred between the 2nd and 7th Defendants; compensation and damages from the Defendants in management for breach of fiduciary duty and breach of trust; an injunction against the disposal of the said assets; and damages for fraud.

The Defendants all entered conditional appearance as follows:

(a) the 7th Defendant, on 14th November, 2016;
(b) the 2nd Defendant, on 3rd January, 2017;
(c) the 1st Defendant, on 3rd January, 2017;
(d) the 5th Defendant, on 4th January, 2017; and
(e) the 3rd, 4th and 6th Defendants, on 14th February, 2017.

Following the conditional appearances, the Defendants made their respective applications to dismiss the Writ of Summons and Statement of Claim for irregularity. With the exception of the 7th Defendant which filed in its defence on 20th January, 2017, the Defendants have not filed in any defences.

The first of the applications is the 1st Defendant's Summons to Set Aside Writ of Summons and Statement of Claim for irregularity,

which was made pursuant to Order 10, Rule 16 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as "the High Court Rules"); Practice Direction No. 4 of 1977, Section 215 of the Companies Act, Chapter 388 of the Laws of Zambia; and the Statute of Limitation. The said Summons was filed into court on 25th January, 2017 and the grounds set out on therein are as follows:

(a) that the action is irregular for indicating the wrong time in which to enter appearance;
(b) that the action is statute barred;
(c) that the action is incompetent for lack of Board Resolution to commence and maintain it; and
(d) that the action is null and void for want of leave to issue process outside jurisdiction.

The said Summons is supported by an Affidavit sworn by Mr. Sakwiba Sikota SC., Counsel for the 1st Defendant; and filed into court on 25th January, 2017. The said Affidavit is accompanied by Skeleton Arguments and List of Authorities, also filed on the same day.

It is the deponent's testimony in the said Affidavit that the Plaintiff commenced this matter against the Defendants, some of whom are outside jurisdiction, without first seeking leave of court to issue and serve process outside the jurisdiction.

It is also the deponent's testimony that from the newspaper adverts placed by the Plaintiff, he believes that process was issued without a Board Resolution as the Plaintiff's Board was dissolved at the time of commencement of this matter. To this end, Counsel has produced

exhibit "SS1", being a copy of a Times of Zambia Newspaper extract of 24th January, 2017.

Counsel has, thus, deposed that he believes the action cannot be maintained because the Plaintiff's current Board lacks quorum and power to ratify instructions in this matter; and that the action is irregular for indicating the wrong time within which the Defendants are to enter appearance.

Counsel has further deposed that he believes the Plaintiff's claims are statute-barred for limitation and therefore, that this is a proper and fit case for the Court to set aside the Writ of Summons and Statement of Claim for irregularity.

In the accompanying Skeleton Arguments and List of Authorities, Counsel for the 1st Defendant cited Section 215 of the Companies Act, which enacts that a company shall be managed by the directors. In this regard, Counsel submitted that the Plaintiff did not have directors at the time of commencing this matter; and was therefore, in breach of the law and lacked authority to take out the Writ of Summons. Counsel in this respect, referred the Court to the case of *Ituna Partners v. Zambia Open University Limited*[1].

It is also submitted that the Court has power, under Order 33/3 and Order 33/7 of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as "the White Book"); to dismiss a matter where a question or issue arising is unnecessary. He thus, contended that as the Plaintiff did not have authority to take out the Writ of Summons, the said Writ is of no effect.

Counsel for the 1st Defendant, also submitted that the Writ of Summons is irregular as under Practice Direction No. 4 of 1977, the correct proper period for entering appearance where a Writ of Summons is to be served out of jurisdiction is forty-two (42) days as opposed to twenty-one (21) days, as indicated on the Writ of Summons; and that leave to serve out of jurisdiction must be sought under Order 10 Rule 16 of the High Court Rules.

Counsel finally prayed that, in view of his submissions, this Court grants an order to strike out the Writ of Summons and Statement of Claim and/or set aside the same.

The second of the applications is that of the 5th Defendant. The relevant Summons is one to set aside Writ of Summons and Statement of Claim for irregularity; and was made pursuant to Order 10, Rule 16 of the High Court Rules, Practice Direction No. 4 of 1977, Section 215 of the Companies Act, Chapter 388 of the Laws of Zambia and the Limitations Act, 1939. The said Summons was filed into court on 15th February, 2017 and the grounds for the application were as follows:

(a) that the action is null and void for want of leave to issue process for service outside the jurisdiction;
(b) that the action is irregular for indicating the wrong time in which to enter appearance;
(c) that the action is statute barred; and
(d) that the action is incompetent for lack of Board Resolution to commence and maintain it.

The Summons is supported by an Affidavit sworn by the 5th Defendant, Clive Newall, who is also the President and Executive Director in the 1st Defendant company. The Affidavit is further augmented by a List of Authorities and Skeleton Arguments, filed into court on 15th February, 2017.

It is the deponent's testimony that the Plaintiff commenced this matter against the Defendants, some of whom are resident outside jurisdiction and that the Plaintiff did not seek leave of court to issue and later to serve the Writ of Summons and Statement of Claim outside the jurisdiction.

The deponent further testified that he was advised by his advocates that the Writ was issued without a Board Resolution as the Plaintiff's Board was, at the time of commencement of the action, dissolved. As evidence, the deponent produced exhibit "CN1", being a copy of a notice in the Times of Zambia Newspaper of 24th January, 2016.

The deponent also deposed that his advocates advised him and that he believes that this action cannot be maintained because the Plaintiff's present Board lacks quorum and thus has no power to ratify instructions in this action to be able to bind the company.

It is also the deponent's testimony that, on his advocates' counsel, this action is irregular for indicating the wrong time within which to enter appearance, being twenty-one (21) days instead of forty-two (42) days.

The deponent finally deposed that he was advised by his advocates that this matter is irregular because the claims are statute-barred.

In the augmenting Skeleton Arguments Counsel for the 5th Defendant cited Order 33, Rules 3 and 7 of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as the "White Book"), to advance his contention that the Court has power to dismiss a matter where a question or issue arising proves such a matter as commenced unnecessary.

Counsel also referred the Court to Practice Direction No. 4 of 1977, in submitting that where a writ or notice is to be served out of jurisdiction under Order 10, Rule 15 of the High Court Rules; the time within which appearance must be entered is forty-two (42) days. It was Counsel's submission, in this regard, that the Plaintiff's Writ of Summons is irregular for providing an appearance period of twenty-one (21) days.

Submitting that leave to serve a writ out of jurisdiction must be obtained before such service, Counsel for the 5th Defendant referred the Court to Order 10, Rule 16 of the High Court Rules. It is Counsel's further contention that, in addition to obtaining leave to serve a writ out of jurisdiction, a party ought to also seek leave of court to issue the Writ of Summons. In this regard, Counsel submitted that while the Plaintiff had sought leave to serve the Writ of Summons and Statement of Claim outside jurisdiction, the said Writ is irregular for failure by the Plaintiff to obtain leave of Court to issue it.

Citing Section 215 of the Companies Act, Chapter 388 of the Laws of Zambia, Counsel for the 5th Defendant submitted that the Plaintiff did not have directors at the time of commencement of this matter and that, therefore, the Writ and the Statement of Claim are a

product of an action taken without authority of the Board of Directors; and are null and void. To augment this contention, Counsel cited the Supreme Court case of *Ituna Partners v. Zambia Open University Limited*[1].

Counsel for the 5th Defendant further submitted that this Court does not have jurisdiction to hear this matter as it is statute-barred, in that the Plaintiff commenced it almost ten (10) years after the cause of action arose. To fortify this contention, Counsel referred the Court to Section 2 of the Limitation Act, 1939 and the cases of *Marren v. Dawson Bentley & Co Limited*[2], *Donovan v. Gwentoys Limited*[3], *B.P. Zambia Plc v. Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited*[4] and *City Express Limited v. Southern Cross Motors Limited*[5].

Citing the case of *Williams v. Central Bank of Nigeria*[6], Counsel for the 5th Defendant also submitted that insofar as the Plaintiff seeks to rely on Section 19(1) of the Limitation Act, the said provision does not apply to dishonest assistants in breach of trust or knowing recipients of trust property. It was Counsel's contention, in this regard, that there is no potential exception to the limitation period provided by Section 19 (2) in terms of the claims made against the 1st, 2nd and 5th Defendants who can only be accessories to any breach of fiduciary liability.

The third of the applications is the 3rd, 4th and 6th Defendants' Summons to Set Aside Writ of Summons and Statement of Claim for irregularity, made pursuant to Order 3, Rule 2 and Order 53, Rule 6(1) of the High Court Rules, as read together with Order 2, Rule 2 of

the White Book. The said Summons was filed into Court on 6th April, 2017. The grounds for the application were as follows:

(a) that the action is null and void for want of leave to issue process for service outside the jurisdiction;
(b) that the Statement of Claim contains reference to criminal liability under the Penal Code Act, Chapter 87 of the Laws of Zambia;
(c) that the action is statute barred; and
(d) that the appointment of external Counsel by the Plaintiff lacks Board of Directors' resolution.

The Summons is supported by the 3rd and 6th; and 4th Defendants' affidavits, sworn by the respective Defendants and filed into court on 6th April, 2017 and 19th May, 2017, respectively; the contents of which are exactly the same. In the said affidavits the deponents have deposed that the facts forming the basis of the Plaintiff's claims were known to the Plaintiffs as at 2007 and that, on their advocates' advice, the deponents believe that the claims are rendered statute-barred.

It is the deponents' further testimony that the Plaintiff was aware of the facts raised by the claim in this matter as at 2007 in that the deposit of excess funds of the 7th Defendant in an account partially utilized by the 2nd Defendant was documented on financial statements of the 7th Defendant and approved by the Board of each year; that the Plaintiff raised a request for information about the deposit during a Board meeting of the 7th Defendant and that detailed information was provided in the course of the meeting.

The deponents also testified that, on their Counsel's advice, they believe that the Plaintiff's Statement of Claim is irregular as it raises claims of a criminal character under the Penal Code.

The deponents also testified that, on their Counsel's advice, they believe that the Plaintiff's external Counsel have no authority to act on its behalf as the Plaintiff has no Board of Directors to appoint external Counsel.

The Skeleton Arguments augmenting the 3rd, 4th and 6th Defendants' application, were filed into court on 3rd May, 2017.

It is Counsel's contention that the action of the Plaintiff to issue the Writ and Statement of Claim without leave, offends Order 10, Rule 16 of the High Court Rules and that consequently, the Originating Process is null and void.

Counsel also contends that the Statement of Claim makes reference to criminal liability under the Penal Code and that in this jurisdiction, no criminal liability can be used in civil matters. It is Counsel's further contention that this Court is not sitting as a criminal court to determine a matter under the Penal Code; and that the burden of proof in criminal matters is higher than that discharged in civil matters. Counsel, in this respect, referred the Court to the cases of *Manfred Kabanda and Kajeema Construction v. Joseph Kasanga*[7] and *Kabwe Transport Company Limited v. Press Transport*[8].

It is also Counsel's submission that this action is statute barred and therefore, offends the provisions of the Limitation Acts of 1939 and 1980. In this regard, Counsel contends that the statements reveal

that the Plaintiff relies on facts that were known to it as far back as 2007, by virtue of disclosure in the 7th Defendant's financial statements.

Counsel's final contention is that the Plaintiff's purported Board lacks authority to originate and maintain this matter as the said Board stood dissolved at the time of commencement of this matter. It is Counsel's submission, in this regard, that the lack of the directors' authority casts doubts over the validity of these proceedings. Counsel, consequently, prayed that the matter be struck out.

At the hearing, on 29th June, 2017, Counsel for the 1st Defendant reiterated the submissions in the Skeleton Arguments and adopted the submissions made by his colleagues.

Counsel for the 1st Defendant also indicated that he would be relying on the documents exhibited in his Client's Affidavit in Support and that he was placing great reliance on the 44th Board of Directors' Meeting of 5th October, 2011, for the 7th Defendant; and the letter relating to the interest on loans, dated 26th October, 2007.

Counsel for the 2nd Defendant endorsed the submissions by Counsel for the 1st Defendant and added that commencement of this matter was an abuse of court process as there was no Board resolution authorising the same.

To augment the 2nd Defendant's submission on the Plaintiff's lack of Board authority, Counsel for the 1st Defendant referred the Court to the case of *Jonathan Alexander Limited v. Procta*[9]. In this respect,

Counsel for the 1st Defendant submitted that a company can only act through its directors and that it is a well-established principle that an agent's authority ceases when he ceases acting.

In response to the 1st Defendant's Affidavit, the Plaintiff filed into court on 21st February, 2017, an Affidavit in Opposition sworn by Yadika Eleanor Mkandawire, Counsel in the employ of the Plaintiff.

It is the deponent's testimony that there is no requirement in the Plaintiff's company's Articles of Association for a board resolution to commence process; and that this notwithstanding, the Board of the Plaintiff considered the matter and passed resolutions to institute process. To this end the deponent exhibited "YEM1" and "YEM2", being copies of extracts of the minutes of the relevant meeting.

It is also the deponent's testimony that leave of court to issue the Writ of Summons was not obtained and that she has been instructed by the Plaintiff to seek leave belatedly.

It is the deponent's further testimony that the time for entering appearance indicated on the Writ of Summons is a clerical omission and that the Plaintiff has not taken any steps by way of default procedure against the Defendants, before the expiry of forty-two (42) days from the date of service.

The deponent also deposed that Defendants have not stated the time by which, it is alleged, the action against them ought to have been commenced and that they have made no reference to any provision whereon they rely.

The deponent finally avers that the Plaintiff's claim not only alleges fraud, but also breach of trust.

In the Skeleton Arguments augmenting the Plaintiff's Affidavit in Opposition, Counsel submitted that the failure or omission to indicate a period of forty-two (42) days for entering appearance is not fatal, but curable by amendment. In this respect, Counsel for the Plaintiff relied on the case of *Leopold Walford (Z) Limited v. Unifreight*[10] and Article 118 (2) (e) of the Constitution of Zambia. Further, Counsel submitted that the Defendants have suffered and stand to suffer no prejudice by the said omission.

Relying on the same authority, Counsel for the Plaintiff also submitted that the Plaintiff's failure to obtain leave to issue the Writ of Summons, which is for service out of jurisdiction, is curable.

Counsel for the Plaintiff submitted further, that there is no requirement either under the articles of the Plaintiff company or the Companies Act, for a board resolution to institute court process. In this regard, Counsel referred the Court to the case of *Ituna Partners v. Zambia Open University.*

Regarding the Defendants' contention that this action is statute-barred, Counsel for the Plaintiff submitted that the Defendants have not disclosed the provisions of the law on which they rely. It is Counsel's contention, in this respect, that in terms of Section 26 of the Limitation Act, the period of limitation in an action concerned with fraud, or concealment of fraud only begins to run when the Plaintiff discovers the fraud or could have done so by reasonable diligence.

Counsel for the Plaintiff referred the Court to Order 3, Rule 2 of the High Court Rules in seeking the Court's discretion in this application.

Counsel for the Plaintiff also filed an Additional List of Authorities and Heads of Arguments to supplement the Plaintiff's opposition to the application to set aside the Writ of Summons and Statement of Claim.

In the said Additional List of Authorities and Heads of Argument, and regarding Mr. Sakwiba Sikota swearing an affidavit in his capacity as Counsel for the 1st Defendant, Counsel for the Plaintiff submitted that the court frowns upon the practice of Counsel swearing affidavits on contentious issues. In this respect Counsel for the Plaintiff referred the Court to the case of *Chikuta v. Chipata District Council*[11].

Counsel for the Plaintiff also submitted that the grounds for the application to set aside the Writ of Summons and Statement of Claim, as outlined on the Summons are not all purely cases of breach of rules, so as to amount to mere irregularities.

Further, Counsel for the Plaintiff also contended that the heading of the Summons is highly misleading in so far as it purports that the application has been brought under the purported orders and provisions. Counsel submitted, thus, that in terms of our rules and practice, applications to set aside for irregularity are brought pursuant to Order 2, Rule 2 of the White Book in general. To fortify this line of contention, Counsel referred the Court to the case of *Bellamano v. Ligure Lombarda Limited*[12].

Regarding the Defendants' argument that this action is statute-barred, Counsel for the Plaintiff supplemented in opposition that although the Defendants have raised the issue, they have not set out any facts in their affidavit to support the said ground. That in particular, the Defendants have not stated which remedies in the claim are barred and the dates on which the claims were barred. Counsel, thus, submitted that there is no evidence for this Court to arrive at the conclusion that the whole matter is barred.

Further, Counsel for the Plaintiff submitted that there are several equitable remedies that have been sought by the Plaintiff that are not subject to the Limitation Act. It was also Counsel's submission that for remedies that are amenable to time bars, the ground cannot be properly raised under Order 2, Rule 2 or Order 12, Rule 8 of the White Book, as the said Orders deal with curable irregularities that arise on account of the non-observance of the rules.

Counsel for the Plaintiff also submitted that a plea that the matter or remedies in the matter are time barred is an issue to be tried and determined in the matter either as a preliminary issue or as a general issue; and that in either case, it must be specifically pleaded before it is relied upon. In this respect, Counsel referred the Court to Order 18, Rule 8 (1) of the White Book.

Counsel for the Plaintiff further submitted that the Plaintiff is within the limitation period as the fraud alleged in the Statement of Claim was only known by the Plaintiff on 4th December, 2014. Counsel in this regard referred the Court to the case of *Sheldon and Others v. RHM Outwaite (Underwriting Agencies)*[13].

The Plaintiff's Affidavit in Opposition to the 5th, 3rd and 6th Defendants' Affidavits, was sworn by Yadika Eleanor Mkandawire and was filed into court on 4th May, 2017.

The deponent deposes that the 3rd Defendant is the co-founder of the 1st Defendant; the Chairman of the Board of Directors and Chief Executive Officer of the 1st Defendant; was a director of the majority shareholder of the 7th Defendant; a proxy from time to time for the 7th Defendant at meetings of shareholders of the 7th Defendant; a director of the 7th Defendant nominated by the 7th Defendant; and one of the key FQM Executives nominated by the 1st Defendant for the purpose of fulfilling its duties under the Management Services Agreement with the 7th Defendant, dated 18th March, 2004.

It is the deponent's testimony that the monies which are the subject matter of this action were remitted from the accounts of the 7th Defendant to the account of the 2nd Defendant from 2007 to 2014, as monies on call. It is the deponent's further testimony in this respect, that while this was the declared use and benefit accruing by such use of the said monies, the monies were diverted from the deposit account for the benefit of the FQM Group of Companies, of which the majority shareholder is a member and to which the 3rd and 5th Defendants are linked.

The deponent avers that at no point was the Plaintiff informed that the 7th Defendant's monies were being applied to and for the betterment of the FQM Group; and that at no time did the Plaintiff minority shareholder agree that the 7th Defendant's monies and the

benefit of said monies' use should be deposited and appropriated by the majority shareholder and its connected persons and companies.

It is the deponent's further testimony that at the 68th Board Meeting, the Plaintiff sought clarity regarding the said transaction, particularly with respect to whether the transaction was a loan or deposit; how the funds were disbursed; what the funds were used for; how the funds were returned to KMP; and whether the rate of interest was arm's length. The deponent further avers, in this respect, that it was recorded at the said meeting that they agreed to disagree. To this end, the deponent produced exhibit "YM1" as proof of the assertion.

It is also the deponent's testimony that the 7th Defendant admitted that no approval was obtained from the Plaintiff and the Plaintiff has, to this effect, produced exhibit "YM2" as proof.

The deponent further deposes that at no time did the FQM Group of Companies or the majority shareholder or its directors and/or any of the Defendants account for the benefits accruing by reason of the use of the 7th Defendant's monies beyond payment of interest.

The deponent avers that attempts to obtain full information concerning the transactions between the 2nd and 7th Defendants were not satisfied despite several requests. Further, it is averred that the Plaintiff, through its nominated directors at the 53rd Board meeting, sought an explanation of the transactions reflected in the financial statements, which explanation the 3rd Defendant endeavoured to give, but without showing that the Plaintiff either had knowledge of or consented to the transactions.

It is, thus, the deponent's testimony that the Defendants are wrong in deposing that the facts which give rise to the claims made by the Plaintiff were known in 2007.

The deponent finally avers that the criminal actions of the Defendants are pleaded as an essential ingredient of the tort of conspiracy to cause injury or damage by unlawful means, the said unlawfulness being the contravention of the Penal Code, among other matters.

In reply to the Plaintiff's opposition, the 2nd 3rd, 4th, 5th and 6th Defendants have adopted the contents of the 1st Defendant's Affidavit in Reply, sworn by Hannes Meyer, the Chief Financial Officer (hereinafter referred to as the "CFO") of the 1st Defendant; and filed into court on 29th May, 2017.

It is the deponent's testimony in the said 1st Defendant's Affidavit that he was advised that the Plaintiff commenced this matter against the Defendants, some of whom are outside jurisdiction, without first seeking leave of court.

The deponent avers that it is not correct that the Plaintiff was not informed about the use of the 7th Defendant's monies; and that the Plaintiff, through its representatives on the Board of the 7th Defendant, had at all times during 2007 and 2014 and thereafter, been provided sufficient disclosure as to the monies deposited with the 2nd Defendant.

The deponent avers that it is correct that the Plaintiff sought clarity regarding the said transaction, at the 68th Board meeting held on 26th September, 2014.

It is also the deponent's testimony that the Plaintiff omitted to recite that the deposits were clearly disclosed in the audited financial statements properly approved without objection by the Board of Directors, on which the Plaintiff was represented.

The deponent further avers that the Plaintiff did not provide the 7th Defendant with a summary of its queries in time for the next Board meeting on 12th December, 2014 and that the minutes of that meeting had recorded that the 7th Defendant had not yet received the Plaintiff's summary of the queries.

It is the deponent's testimony that the interest to be charged on the monies advanced by the 7th Defendant was not a consequence of Mr. Chikolwa's request, but a consequence of the agreement of the Board.

The deponent avers that the Plaintiff, through Mr. Chikolwa, was aware of the financial arrangement; and that a follow up letter detailing the intention to enter the financial arrangement was written to Mr. Chikolwa.

It is the deponent's further testimony that the Plaintiff has failed to show that it objected to the proposal or took issue with the adequacy of the information provided; and that the issue was only raised in 2010, at a time when there were already three rounds of financial statements which referred to the financial arrangement, the terms of which were issued and unanimously approved by the Board.

The 2nd Defendant also filed in an Affidavit in Reply to the Plaintiff's Affidavit in Opposition, on 29th May, 2017. The said Affidavit in Reply was sworn by Anthony David Silvestro, a director in the 2nd Defendant company.

It is the deponent's testimony that he places reliance on the newspaper advert exhibited by Mr. Sakwiba Sikota as "SS1" in his Affidavit in Support of the application.

The deponent averred that the Plaintiff issued the Writ of Summons without a Board Resolution, and that, therefore, the matter cannot be maintained.

The deponent also testified that in the Plaintiff's Affidavit in Opposition, it is acknowledged that the Plaintiff did not obtain the Court's leave to issue the Writ of Summons and that, on his advocates' advice, the deponent believes that such leave cannot be sought belatedly.

It is also the deponent's testimony that the Writ of Summons is irregular for the Plaintiff's failure to indicate the correct time within which to enter appearance.

The deponent's testimony as regards the time at which this matter ought to have commenced is to the same effect as the testimony of the 3rd and 6th; and 4th Defendants in their affidavits in support of their applications to set aside the Writ of Summons and Statement of Claim.

The deponent has traversed in reply that reference was made in the subject summons that reliance would be placed on the Limitation Act.

It is the deponent's further testimony that the Plaintiff was at all material times from 2007 and thereafter, provided with sufficient disclosure as to the monies deposited with the 2nd Defendant as the Plaintiff's representatives were included in the review, discussion and approval of financial statements. To fortify this assertion, the deponent has exhibited "DS1", being the said financial statements and Board approvals for 2007 to 2015 indicating the excess funds of the 7th Defendant.

It is the deponent's testimony that at the 44th Board meeting held on 5th October, 2007, the Board, including the Plaintiff's representative, Mr. Joseph Chikolwa, discussed the financial arrangements and agreed unanimously that interest be charged on the debt with Kansanshi Holdings Limited. To this end, the deponent has exhibited "DS2", being an extract of the said meeting. The deponent further deposes that following the said meeting, the 3rd Defendant wrote to Mr. Chikolwa on 26th October, 2007 as a follow up on the discussion at the Board meeting regarding charging interest rate on the monies deposited with the 2nd Defendant. To support this, the deponent exhibited "DS3", being a copy of the said letter. It is also on the basis of the said exhibit "DS3" that the deponent deposes that the 3rd Defendant informed the Plaintiff's representative of the 7th Defendant's intended financial arrangement.

The deponent has also produced exhibits "DS4" and "DS5", being an extract of the 53rd Board meeting and a memorandum, respectively, intended to speak to the result that the Plaintiff was aware of the financial arrangement and that the disclosure in the memorandum shows that there is no evidence of breach of fiduciary duty in the arrangement of a deposit account that was bearing a higher interest rate than the 7th Defendant could reasonably obtain elsewhere. It is the deponent's further testimony, in this light, that it was the rationale of a global treasury function to provide the best possible finance for the investment entities of the Group, which included the 7th Defendant.

The 4th Defendant, for himself and with the authority of the 3rd and 5th Defendants, also filed in an Affidavit in Reply sworn by himself and filed on 29th May, 2017. The said Affidavit is particularly in reply to the Plaintiff's Affidavit in Opposition filed into Court on 4th May, 2017.

Like the 3rd, 5th and 6th Defendants, the 4th Defendant has also adopted the contents of the 1st Defendant's Affidavit in Reply, sworn by Hannes Meyer, the CFO of the 1st Defendant; and filed into court on 29th May, 2017.

I have carefully considered the parties' affidavits, the Lists of Authorities and the Skeleton Arguments in support of and in opposition to the applications herein. In my opinion, the issues I ought to address my mind to can be summarised as follows:

(i) whether the action is null and void for want of leave to issue process for service outside the jurisdiction;

(ii) whether the action is irregular for indicating the wrong time in which to enter appearance;

(iii) whether the Statement of Claim is irregular for containing a reference to criminal liability under the Penal Code Act;

(iv) whether the action is statute barred; and

(v) whether the appointment of external Counsel by the Plaintiff lacks the Board of Directors' resolution.

It is my considered view that the first and most important question to consider from the onset is whether this action is statute barred. Based on the answer to the same, the other questions may or may not have to be addressed.

Before I proceed to deal with the merits of the grounds of the Defendants' applications herein, it is imperative for me to mention the following for the benefit of all the parties hereto. As earlier stated, the applications being considered in this ruling are ones for orders to set aside the Writ of Summons and Statement of Claim for irregularity. However, I have noticed that in the Skeleton Arguments, Counsel for the 3rd, 4th, 5th and 6th Defendants is praying that the Writ be 'struck out' while the said Skeleton Arguments are titled as being in support of an application to 'set aside'.

For further guidance of Counsel, the two remedies are distinguishable and each have specific ramifications. My understanding, upon consulting Black's Law Dictionary, is that to 'set aside' is to annul or vacate a judgment, order, etc., while to 'strike out' is to remove or expunge a portion of a text/something from the rest. Counsel should thus, be careful and specific on the relief they

seek for their clients, in order to avoid embarrassment on the part of the Court as it addresses matters.

I also, would like to mention that I have noticed a general laxity on the part of Counsel, in terms of precision in the documents on the record. Counsel were mixing up applications and neglecting to specify which party particular documents were relating to. Given the number of parties in this matter, it has proven to be a very tedious exercise to decipher which documents relate to what party. Counsel, in this regard, are guided to be clear in future, so that matters are expeditiously determined.

Upon perusing the record, it appears Counsel for the 3rd, 4th, 5th and 6th Defendants filed in an initial Summons to Set Aside Writ of Summons and Statement of Claim, on 15th February, 2017 and then subsequently filed another Summons to Set Aside Writ of Summons and Statement of Claim, on 6th April, 2017. The orders pursuant to which the said summonses are made are significantly different. It therefore, appears as if Counsel filed in a second summons with respect to the same parties, without seeking leave of court and without formally withdrawing the first summons. However, upon reading the Plaintiff's Heads of Arguments filed into court on 4th May, 2017, it appears the summons of 15th February, 2017 were only in respect of the 5th Defendant, while the summons of 6th April, were in respect of the 3rd, 4th and 6th Defendants.

This Court is clothed with authority, under Order 3, Rule 2 of the High Court Rules, to exercise its discretion in a manner it deems fit, and the said Order provides as follows:

"Subject to any particular rules, the Court or a Judge may, in all causes and 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 my considered view that this is one of the instances that call for this Court to exercise its discretion in pursuit of justice. In light of the foregoing, I shall proceed on the assumption that it was the intention of Counsel for the 3rd, 4th, 5th and 6th Defendants that the summons of 15th February, 2017, relate to the 5th Defendant; and the summons of 6th April, 2017, relate to the 3rd, 4th and 6th Defendants. Since it is the Defendants that are a larger number in this matter, Counsel are guided to be clear which Defendant they are filing a document in respect of.

Another issue that I would like to address before delving into the merits of the applications; which issue has also been raised by Counsel for the Plaintiff, is that the headings of the 1st and 5th Defendants' summonses are highly misleading insofar as they purport that the applications have been brought under the cited orders and provisions therein.

The summonses are with the view to setting aside originating process for irregularity, whereas a perusal of the orders and provisions, pursuant to which they are purported to have been made, reveals that the said orders and provisions do not deal with setting aside. I am therefore, inclined to agree with Counsel for the Plaintiff that the applications are better provided for by Order 2 of the White Book.

Alternatively, Counsel preparing the 1st and 5th Defendants' summonses could have relied on our very own Order 3, Rule 2 of the High Court Rules (cited above). Even better, would have been for Counsel to cite Order 3, Rule 2 of the High Court Rules, as read together with Order 2 of the White Book; as was done for the 3rd, 4th and 6th Defendants.

The Supreme Court case of *Bellamano v. Ligure Lombarda Limited,* is instructive as regards the citation of the law in applications, and it states as follows:

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

It is my considered view that the relief sought by the Defendants' applications is not one for leave to issue and serve the Writ out of jurisdiction (Order 10, Rule 16); or for an order relating to the powers and duties of directors (Section 215 of the Companies Act); or for an order relating to times within which appearance is to be entered on Court Writs (Practice Direction No. 4 of 1977); or for an order to bar the Plaintiff's claim (Limitation Act).

It is clear, therefore, that the Defendants indicated imprecise law on their summons. However, as no penalty has been prescribed for such default, I am inclined to adopt the sentiments of my Learned Bother, Mutuna, J. (as he then was), as stated in the case of *Josia Tembo and Henry Jawa v. Peter Mukuka Chitambala (Sued as Administrator of the Estate of the Late Frank Macharious Chitambala)*[14] that the default

is not fatal and does not in any way prejudice the Plaintiff in the conduct of its opposition to the Defendants' applications to set aside the Writ.

A final issue I would like to address is that of Mr. Sakwiba Sikota SC., swearing an affidavit in his capacity as Counsel for the 1st Defendant. Counsel for the Plaintiff submitted that the court frowns upon the practice of Counsel swearing affidavits on contentious issues.

I have perused the said Affidavit and I have noticed that there are contentious issues raised particularly in paragraphs 5, 6 and 8 thereof. For that reason, I am expunging the same from the Affidavit. Counsel are reminded that, as established in the celebrated case of *Chikuta v. Chipata District Council,* it is not good practice for Counsel to swear affidavits on contentious issues as the client's advocate.

I now turn to address the merits of the applications to Set Aside Writ of Summons and Statement of Claim for Irregularity and I shall begin by addressing the ground that this matter is statute barred.

Counsel for the Defendants, in their respective applications, have submitted that this matter is statute barred in that the facts culminating into the Plaintiff's claim were known to the Plaintiff as far back as 2007. In their Skeleton Arguments, Counsel cited Section 2 of the Limitation Act, 1939 and several other authorities to support their applications. The said section provides as follows:

> *"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-*

(a) actions founded on simple contract or on tort..."

The same section further enacts, under sub-section 7, as follows:

> *"This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed by this Act has heretofore been applied."*

In my view, the provisions above seem to mean that the application of the Limitation Act is not absolute and applied automatically as long as a period of six years is exhausted from the accrual of cause of action. It appears that there are instances of exclusion of the statutory bar, depending on certain circumstances. One such circumstance is the nature of relief sought by the plaintiff. In this respect, therefore, where the Limitation Act is sought to be relied upon by the defendant, regard must be had to the nature of the relief sought in that action.

Sub-section 7 excludes the limitation period from applying to claims for specific performance of a contract, for an injunction or other equitable relief. The said sub-section, however, creates an exception for instances where acquiescence and laches would ordinarily bar a claim to a relief. The doctrine of acquiescence is described, in paragraph 252 of Halsbury's Laws of England, Vol. 47, on 'Equitable Jurisdiction' (hereinafter referred to as Halsbury's Laws of England), as follows:

> *"The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of*

his rights of which he did not know at the time; and in that sense acquiescence is an element in unconscionable delay ('laches')... The term 'acquiescence' is, however, properly used where a person having a right and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act. In that sense, the doctrine of acquiescence may be defined as acquiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct..."

Discussing the defence of laches, the Learned authors of Halsbury's Laws of England state the following, in paragraph 253:

"A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation 'equity aids the vigilant, not the indolent' or 'delay defeats equities'. A court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches')."

From the foregoing, it appears that, in simple terms, acquiescence may be construed as a form of waiver by conduct where one party induces the other party to believe that a wrong is consented to; while laches may be construed as unconscionable or undue delay. I am of the opinion that this doctrine of acquiescence and laches is not an issue in the applications currently being considered and therefore,

takes away nothing from the exclusion of the limitation period stipulated under sub-section 7 of the Limitation Act.

I have perused the Statement of Claim and have observed that as part of the relief sought by the Plaintiff, there are three notable equitable remedies, in particular under paragraph 3, being an account of all money received by the 1st and 2nd Defendants from the 7th Defendant; paragraph 7, being an injunction against the 1st and 2nd Defendants; and paragraph 12, being a claim for equitable compensation for breach of fiduciary duty.

In respect of this aspect, therefore, I am inclined towards opining that this matter is captured under the exception created under sub-section 7 of the Limitation Act.

It is also the contention of Counsel for the Defendants that Section 19(1) of the Limitation Act does not apply to dishonest assistants in breach of trust or knowing recipients of trust property; and that there is no potential exception to the limitation period provided by Section 19 (2). Regarding this submission, I hold the view that addressing this point of contention would amount to determining this matter on the merits; and as conflicting views have been brought out from both the Plaintiff and the Defendants, which would necessitate trial, this question would better be addressed at a full trial. At this stage of proceedings, this Court is not concerned with hearing this matter on its merits.

The Plaintiff in response to the Defendants had submitted that this action is not statute barred as it is concerned with fraud or concealment of fraud. Counsel for the Plaintiff has referred to

authorities under the Limitation Act, that give guidance on when time begins to run, namely, when the fraud has been discovered or could with reasonable diligence be discovered.

Likewise, on this issue and without delving into the merits of this matter, I have examined the evidence of all the parties regarding the alleged fraud and whether the Plaintiff, through its representatives or otherwise, was aware of the facts leading to the said fraud. I am of the view, *prima facie*, that the evidence exhibited in the parties' affidavits reveals absolute divergent views as regards the knowledge, by the Plaintiff, of the transactions forming the basis of the alleged fraud. While the Defendants have alleged that the Plaintiff was aware of the transactions since 2007, the same seems to have been rebutted by the Plaintiff through its evidence that they sought clarity from the Defendants, concerning the said transactions; and through its further evidence that the parties had failed to reach a consensus at the 68th Board meeting held on 26th September, 2014.

The issues raised by the parties in their respective affidavits are, in my view, so contentious that disallowing them to go to trial would not serve justice well.

Based on the foregoing reasons, the Defendants' ground to set aside the Plaintiff's Writ of Summons and Statement of Claim for irregularity by reason of the action being statute barred, fails. I find, therefore, that this Court still has jurisdiction to hear and determine this matter.

Turning to the second ground, being whether the action is null and void for want of leave to issue process for service outside the

jurisdiction, it appears the parties hold the belief that no such leave was sought or granted to the Plaintiff. However, the record shows that the Plaintiff, through its in-house Counsel, did apply for leave for service of writ of summons out of jurisdiction, by way of *Ex-parte* Summons, supported by an Affidavit and Skeleton Arguments. The said application was made on 2nd November, 2016 and the *ex-parte* order was granted on 10th November, 2016.

It seems, to me, that there could have been an administrative glitch in the Plaintiff's Counsel receiving the said order. That, notwithstanding, leave sought by a person of Counsel was accordingly granted and the same can be seen from the record. This being the case, Counsel for the Plaintiff were in order to proceed to serve process out of jurisdiction as the same was properly authorised.

In any event, the Defendants, at this stage are well aware of this matter and have, in fact, filed into court voluminous documents containing details that speak to the merits of the Plaintiff's claims. I do not suppose any prejudice has been suffered by the Defendants thus far.

Given the foregoing, I find no breach of the rules by Counsel for the Plaintiff and see no need for Counsel to seek leave belatedly. I have noticed from the record, however, that twice, the Plaintiff's in-house Counsel had conducted a search, namely, on 6th April, 2017 (which was a date before this Application was heard) and on 26th July, 2017 (which was a date after this Application had been heard). I am of the considered view that in-house Counsel, especially being the one who had made the application for leave to serve process outside the

jurisdiction, should have taken note of the *ex-parte* order on the record and promptly informed external Counsel for the Plaintiff of the same. Had this been done, the parties would have been put on notice and there would have been no need to consume time on an issue in respect of which a court order had already been granted.

In view of the above, this ground also fails.

One issue worth addressing under this ground is the Defendants' Counsel's further contention that, in addition to obtaining leave to serve a writ out of jurisdiction, a party ought to also seek leave of court to issue the writ of summons. In this regard, Counsel submitted that while the Plaintiff had sought leave to serve the Writ of Summons and Statement of Claim outside jurisdiction, the said Writ of Summons is irregular for failure by the Plaintiff to obtain leave of court to issue the Writ of Summons.

Order 10, Rule 16 of the High Court Rules, provides for service outside jurisdiction as follows:

> *"An application for leave to issue for service out of the jurisdiction a writ of summons, originating summons, or originating notice of motion or a concurrent writ of summons, originating summons or originating notice of motion may be made ex parte to the Court or a Judge on deposit of the writ, summons or notice with the Registrar together with an affidavit in support of such application." (emphasis mine).*

It appears that Counsel, in submitting that leave ought to be obtained for issue of the Writ out of jurisdiction, misconstrued the provision above. The provision, in my considered view, is not suggesting that

there in need to seek leave to issue the Writ of Summons out of jurisdiction. The Writs are issued from our courts in the name of the Republican President as witnessed by the Chief Justice. Leave, in this case, would only be with respect to service and not with respect to issuing the Writ of Summons.

Turning now to the third ground that this action is irregular for indicating the wrong time within which to enter appearance (being an issue which has been conceded by Counsel for the Plaintiff), Counsel for the Defendants contend that the Writ should be set aside for failing to indicate the correct time for appearance.

In opposition, Counsel for the Plaintiff argued that the time for appearance indicated on the Writ would only be material if the Plaintiff had taken subsequent steps to give effect to the twenty-one (21) day period, such as making an application for a judgment in default of appearance.

In my view, the question to address under this ground is whether the irregularity of indicating the wrong time within which the Defendants were to enter appearance, makes the Writ liable for setting aside.

To begin with, the Constitution of Zambia, provides as follows, under Article 118 (2) (e):

> *"In exercising judicial authority, the courts shall be guided by the following principles:*
>
> ...
>
> *(a) justice shall be administered without undue regard to procedural technicalities..."*

The case of *Leopold Walford (Z) Limited v. Unifreight* illustrates the spirit of the Constitution in its holding that a breach of procedure is not fatal, but curable.

In the Supreme Court case of *Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture*[15], on the other hand, it was settled as follows:

> *"We do not intend to engage in anything resembling interpretation of the Constitution in this judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."*

While Counsel for the Plaintiff are reminded of their duty to ensure that the rules of procedure are adhered to all the time, I am of the opinion, nevertheless, that the sentiments above by the Supreme Court, cannot be translated to mean procedural irregularities should completely not be tolerated or that the court is stripped of its discretion to overlook procedural irregularities in the pursuit of justice.

Further regarding the effect of non-compliance with procedural rules, Order 2, Rule 1 of the White Book, stipulates as follows:

> *"(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the*

proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

In light of the above, I tend to agree with the submission by Counsel for the Plaintiff that the power lies solely with the Plaintiff to give effect to the penalties that come with the Defendants' non-compliance with the appearance period, if the Plaintiff decides to rely on the twenty-one (21) days. As things stand, there is nothing on the record to show that the Plaintiff applied for the judgment in default.

Further and with the exception of the 7th Defendant (who entered conditional appearance on 14th November, 2016 and later filed a defence), the record shows that the Defendants entered their respective conditional appearance on 3rd and 4th January, 2017, which brings the period to a little over two (2) months, which far exceeds the forty-two (42) days prescribed by the Practice Direction No. 4 of 1977. It appears to me that the irregularity has been overtaken by events.

For these reasons, I am inclined to exercise my discretion, as stipulated under Order 3, Rule 2 of the High Court Rules, in favour

of the Plaintiff so as to allow the various issues of contention revealed herein, to go to full trial.

Further, a perusal of the record shows that the 7th Defendant has since filed in its defence, thereby waiving its right to seek an order to set aside the Plaintiff's Writ of Summons.

In view of the foregoing, this ground too, fails.

The penultimate ground that falls to be considered is that the appointment of external Counsel by the Plaintiff lacks Board of Directors' resolution and on that basis the action cannot be maintained and should be set aside. In this regard, the 1st Defendant placed reliance on the advice of its Counsel, Mr. Sakwiba Sikota SC., which said advice was the same testimony in the portions of his affidavit, that have since been expunged from the record. The 5th Defendant, however, also produced a similar newspaper extract in his affidavit, in his capacity as 5th Defendant and the same, in my view is admissible as evidence.

The contention in the said newspaper extract arises from a sentence constructed as follows:

> *"The said appointments replaced the directors who were retired in July, 2016. Thus, the Company now has a quorate board."*

In response, Counsel for the Plaintiff stated that there is no requirement in the Plaintiff's company's Articles of Association for a Board resolution to commence process. However, the Plaintiff did not produce the said articles in its affidavit, for the Court's examination, although, the Plaintiff did produce in its evidence two Board

resolutions speaking to the same, dated 8th December, 2015 and 18th July, 2016, respectively.

On a balance of probabilities, I am not satisfied that the 5th Defendant's evidence through the newspaper advert produced in his affidavit speaks to the allegation that the Board of the Plaintiff was dissolved at the time of commencement of this matter. I am of the view that better evidence, such as a print out from the Companies Registration Office; articles of the company; or some other document demonstrating the alleged position that the Board was dissolved, would have sufficed.

Further, the general reference to the month of July, 2016, without stating any specific date, in my opinion, only makes the resolutions exhibited by the Plaintiff more substantial in nature, as the said resolutions have given specific dates on which they were passed, both being before commencement of this matter. With respect to the resolution of 18th July, 2016, it is particularly hard to decipher whether the retirement of the directors referred to in the newspaper advert as having occurred in July, 2016 actually occurred before or after 18th July, 2016; so as to even hold an argument that the resolution was passed after the alleged dissolution of the Board.

As the Plaintiff has rebutted the Defendant's allegation with copies of two perceptible resolutions by the Board, I am inclined to find that the commencement of this matter did, indeed, have authority. For the foregoing reasons, this ground also, fails.

Finally, Counsel submitting on behalf of the 3rd, 4th and 6th Defendants contended that in this jurisdiction no criminal liability

can be used in civil matters; and that this Court is not sitting as a criminal court to determine a matter under the Penal Code Act. Further, Counsel contended that the burden of proof in criminal matters is higher than that discharged in civil matters. To support their position, Counsel referred the Court to the cases *Manfred Kabanda and Kajeema Construction v. Joseph Kasanga* and *Kabwe Transport Company Limited v. Press Transport (1975 Limited).*

In rebuttal, Counsel for the Plaintiff submitted that it is not uncommon for criminal offences to also be torts. In this regard, Counsel for the Plaintiff referred the Court to Order 18, Rule 7 of the White Book, to fortify the argument that pleadings must contain material facts.

The material paragraph of the Statement of Claim leading to this ground of irregularity is paragraph 110, and is couched as follows:

> *"Each of the Defendants by their actions took or converted the monies to the use of the 1st Defendant and/or 2nd Defendant and/or FQM Group with the intention of using it within the FQM Group and is deemed to have done so fraudulently by virtue of the Penal Code Act, CAP. 87 of the Laws of Zambia, Section 265."*

I have read both cases cited by Counsel for the 3rd, 4th and 5th Defendants. I tend to agree with Counsel for the Plaintiff that they are not the appropriate authorities to buttress the contention that an allegation of criminal liability in a civil pleading is irregular, for purposes of setting aside that pleading. The authorities, in my view, are clearly addressing situations where a judge before whom a civil

matter is, turns to consider and admit, as part of the evidence, a previous conviction of one of the parties before that court. I opine that this is not the effect of the said paragraph 110 of the Plaintiff's Statement of Claim.

Indeed, no case law or order under the High Court Rules or under the White Book seems to directly provide for the situation created by the Plaintiff by referring to provisions of the Penal Code Act in the Statement of Claim.

The Plaintiff does have the right to claim fraud in tort, provided it is in line with the requirements for fraud in civil matters, namely that it should be sufficiently alleged and its particulars clearly stipulated.

While the Supreme Court, held, in the case of *Sablehand Zambia Limited v. Zambia Revenue Authority*[16], that allegations of fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities, because they are criminal in nature, I am of the considered view that the same is not to suggest that penal provisions can be included in civil pleadings. The two areas of the law are distinct and should not be enmeshed.

Order18, Rule 19 (1) (c) of the White Book, giving wide powers to the court to strike out pleadings wholly or in part, enacts as follows:

> *"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that- ...*

(c) it may prejudice, embarrass or delay the fair trial of the action; or

...and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

While it is obvious that the Plaintiff's case hinges on the allegation of fraud and that numerous issues of contention have arisen regarding the Plaintiff's allegations and the Defendant's responses in rebuttal, I hold the view that the same issues deserve to be put on trial on their merit. In this respect, I order that the words "*by virtue of the Penal Code Act, CAP. 87 of the Laws of Zambia, Section 265*", be and are hereby expunged from the Plaintiff's Statement of Claim so that the relevant paragraph will now read as follows:

"Each of the Defendants by their actions took or converted the monies to the use of the 1st Defendant and/or 2nd Defendant and/or FQM Group with the intention of using it within the FQM Group and is deemed to have done so fraudulently."

In view of the foregoing, the Defendants' Applications to Set Aside Writ and Statement of Claim for Irregularity, are wholly dismissed.

Each party shall bear its own costs.

Dated at Lusaka the 25th day of January, 2018.

W.S. MWENDA (Dr)
HIGH COURT JUDGE