

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0274

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

LIBYAN AFRICAN INVESTMENT COMPANY

ZAMBIA LIMITED

SHUKRI ESIDIEG AHMED ELJAIDI

AHLAM HAMOUD

1ST PLAINTIFF

2ND PLAINTIFF

3RD PLAINTIFF

AND

TAHER AMMAR MOHAMMED KHALIL

CLEMENT WONANI

LIBYAN AFRICAN INVESTMENT COMPANY

1ST DEFENDANT

2ND DEFENDANT

INTENDED INTERVENOR

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

For the Plaintiff:

Mr J. Banda- Messrs A.M. Wood & Company.

For the Defendants:

Mr F. S. Kachamba - Messrs EBM Chambers.

For the Intended Intervener:

*Mrs D. Findlay & Mr C. K. Chingangu – Messrs D.
Findlay & Associations*

RULING

LEGISLATION REFERRED TO:

- 1. The Companies Act, Cap 388 of the Laws of Zambia.**
- 2. Rule 16 (3) of the Legal Practitioners Practice Rules of 2002.**
- 3. Order 14 Rule 5 (1) of the High Court Rules, Cap 27 of the Laws of Zambia.**
- 4. The Rules of the Supreme Court of England 1965 (White Book) 1999 Edition**

CASES REFERRED TO:

1. **Ituna Partners v Zambia Open University Limited Appeal No. 117 of 2008 (SCZ 8/128/2008).**
2. **Re Microsulis Ltd (2008) EWHC 1129 (Ch).**
3. **Attorney General v Aboubacar Tall and Zambia Airways Corporation (1995) S.J (S.C).**
4. **Foss v Harbottle (1842).**
5. **Edwards v Halliwell (1950) 2 All ER 1064.**
6. **Mary Weather (1867) LR 5 EO 464.**
7. **Kelvin Hang'andu & Company (A firm) V Webby Mulubisha (2008) Z.R 82.**
8. **John Paul Mwila Kasengele & Ors V ZANACO**
9. **Gerardus Adrianus Van Boxel V Rosalyn Mary Kearney (1987) ZR 63.**
10. **Bank of Zambia V Chibote Meat Corporation Limited ()**
11. **Associated Chemicals Ltd V Hill & Delamaine & Ellis & Co (1998) ZR 9.**

This is a Ruling on the Plaintiff's Notice of Motion to Raise Preliminary Points of Law pursuant to **Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia, Order 14A Rules 1 and 2 and Order 33/3 of the Rules of the Supreme Court, 1999 Edition** on the following points of law:

1. *Whether or not the application for Joinder of the Intended Intervener is properly before Court in light of the fact that the said Intended Intervener does not wish to intervene herein and had not issued any instructions to that effect.*
2. *Whether or not this action and the matters herein can be determined without the involvement of the Intended Intervener.*

It is supported by an Affidavit filed into Court on 30th March, 2017 and sworn by Abdulhakim Taher Eshwehdi the Chairman of the Intended Intervener.

Mr Eshwehdi deposed that the majority shareholder in the Intended Intervener was the Libya Africa Investment Authority and he was appointed Chairman of the Intended Intervener by virtue of Resolution No. 20 of 2013 issued by the Libya Africa Investment which came into force on 1st January, 2014. He exhibited 'AT1' a copy of the said resolution.

That Resolution No. 20 of 2013 ushered in the following members as the Board of Directors of the Intended intervener:

- Mr Abdulhakim Taher Eshwedi Part- Time Chairman
- Mr NaserMilad Ben- Youssef Part- Time Member
- Mr Elsaddig Omar Elshrkasi Part- Time Member
- Mr Mohammed Ahmed B. Elaradi Part – Time Member
- Mr Ahmed Mohamed B. Elaradi Part - Time Member
- Mr Hassan B F Elghayeb Part – Time Member;
- Mr Nizar Mohamed Elshiref Part – Time Member

He also stated that the application herein is premised on an unlawful resolution, particularly Decision No. 16 of 2015, in which the Intended Intervener purported to appoint a new Board, consisting of the following members:

- Salah K Ibrahim Awad – Chairperson;
- Gamal Firgani Mehdawi – Deputy Chairman;
- Taher Fawzy Siala – Member;
- Abdulslam Mohamed Abdulrahim – Member
- Niza Mohmed Elshiref – Member
- Mautez Ahmed Aloshebi; and Mustafa Ramadan Almozoghi – Member

That the purported new Board proceeded to register Decision No. 16 of 2015 in the Commercial Register, Al- Jabal Al – Akhadar on 12th November, 2015 and subsequently with the Trial Court of South Tripoli.

He further deposed that on the basis of Decision No. 16 of 2015 a series of unlawful resolutions were subsequently passed, which culminated in attempts to unlawfully appoint Almahdi S. Shakuna as General Manager of the Intended Intervener and the 1st Defendant as General Manager and Managing Director of the 1st Plaintiff.

He also deposed that the Intended Intervener presented another petition in the Trial Court of South Tripoli requesting for the reinstatement of Resolution No. 20 of 2013 and the cancellation of Decision No. 16 of 2015.

That on 21st November, 2016 the Trial Court of South Tripoli delivered a Judgment in which it confirmed Jurisdiction Order No. 55 of 2016, cancelled Decision 16 of 2015 and ordered the reinstatement of Resolution No. 20 of 2013. He exhibited “ATE3” copies of the translated Petition, the Judgment and the corresponding Arabic texts.

That from the foregoing the Intending Intervener’s Board consisted of Mr Abdulhakim Taher Eshwedi, Mr NaserMilad Ben- Youssef, Mr Elsaddig Omar Elsaddig Omar Elshrkasi, Mr Mohammed Ahmed Almukhtar, Mr Mohammed B. Elaradi, Mr Hassan B F Elghayeb and Mr Nizar Mohamed Elshiref, which members had been appointed pursuant to Resolution No. 20 of 2013.

It is further deposed that the Intended Intervener confirms that the duly appointed Directors and Company Secretary of the 1st Plaintiff were as follows:

- Jihan Faek ElKrishki – Chairperson
- Shukri Esidieg Ahmed Eljaiedi – Managing Director
- Nabil Sobhi Ibrahim ElMujrabet – Non Executive Director
- Ahlam Hamoud – Non Executive Director
- Abdulaziz Amisi Mzee Goma – Non Executive Director

- Gabriel Lesa Bwalya - Company Secretary

Attached and marked 'ATE3' is correspondence from the Libyan Embassy in the Republic of Zambia confirming the appointment of the 2nd Plaintiff as Managing Director of the 1st Plaintiff.

That as a result of this, Alhamadi S. Shakuna is not the General Manager of the Intended Intervener. Thus he does not have any authority to represent the Intended Intervener, issue any instructions on its behalf or to depose to any affidavit and execute or endorse any document and legal instrument on the Intended Intervener's behalf.

That as a result of the foregoing the 1st Defendant is not the Managing Director in the 1st Plaintiff and does not have any authority to represent the 1st Plaintiff to issue any instructions on its behalf or to depose to any affidavit and execute any document and legal instrument on the 1st Plaintiff's behalf.

He also stated that the Intended Intervener does not intend to intervene or to be added as a Defendant to these proceedings and had not issued any instructions to this effect. That Messrs D. Findlay & Associates being the Intended Intervener's purported Advocates did not have any written, oral instructions and authority to act on behalf of the Intended Intervener.

That they do recognize the Government of National Accord referred to in the Affidavit and clarify that the said Government is based in Tripoli Libya.

Moreover, that he reiterates that the Intended Intervener's registered address is at Zanzur Area, Tripoli, PO Box 81370, Tripoli telephone number +218 21 489 3800, the same territory as the Government of National Accord.

That a cursory call to the Intended Intervener at its registered office would reveal that the Board appointed under Resolution No. 20 of 2013, was operating from the premises, as opposed to the Board referred to in Decision 16 of 2015.

That all the affairs of the Intended Intervener inclusive of the interpretation of its official documents are conducted in Tripoli. That the purported Board appointed under purported resolution Decision 16 of 2015 operates in Malta a Southern European Island country consisting of an archipelago in the Mediterranean Sea and 333km (207mi) North of Libya and approximately 357 Kilometres from Tripoli.

According to the Deponent, a legitimate organ of the Intended Intervener could not operate in a foreign territory and further to this, all documents which had been presented in the Affidavit in Support of Joinder application had been translated in Malta.

That the purported Board, forges the Intended Intervener's stationery which forged stationery has been applied in the application.

The Intended Intervener did not file any Affidavit in Opposition to the Affidavit in Support of Application and/or Notice of Motion to Raise Preliminary Issues.

Counsel for the Plaintiffs filed Skeleton Arguments into Court on 30th March, 2017. He submitted firstly on the issue of Whether or not the application for Joinder of the Intended Intervener was properly before Court.

He stated that it was clear that the Intended Intervener did not wish to be added to these proceedings and had not issued any instructions that called for its addition to the proceedings.

He also submitted that Messrs D. Findlay & Associates did not have instructions to make the application for the Joinder of the Intended Intervener and he relied on Rule 16 (3) of the Legal Practitioners Practice Rules of 2002 which forbid a Lawyer or an Advocate from acting without instructions from a client. The said Rule states that:

“16 (3) A Practitioner shall not offer services without instructions from a client.”

According to Counsel a lawyer was prohibited from taking action on behalf of a client without the client issuing instructions as acting without instructions from a client was tantamount to professional misconduct. It is contended that it is clear from paragraphs 1- 20 of the Affidavit in Support of the Notice of Motion that the Intended Intervener did not issue any instructions to be added to these proceedings. He added that it therefore followed that Messrs D. Findlay & Associates could not act on behalf of the Intended Intervener when it had not authorized them to do so.

Counsel submitted that acting without instructions from a client had serious repercussions for a lawyer/law firm. To support his argument he cited the case of **ITUNA PARTNERS V ZAMBIA OPEN UNIVERSITY LIMITED (1)**, where Messrs. Ituna Partners were condemned in costs for acting without instructions. In the said case it was held that:

“We have considered the submissions on both sides and we have looked at the authorities cited. From the record it is clear that there was no resolution from the board of the Respondent allowing Ituna Partners to commence legal proceedings on behalf of the Respondent. The issue of the Board Resolution is not in dispute. What is in dispute is the costs.

...The Appellant instituted an action on behalf of the Respondent without instructions from the Respondent. The Respondent suffered costs as a result of the Appellants action. We find that it is illogical for any person at law, to suffer loss for an action which they did not authorize. This situation falls under the circumstances envisaged by Order 62/11/8 of the Rules of the Supreme Court 1999. It would be extremely unfair and setting a bad precedence if Counsel would on his own volition commence legal proceedings in a person’s name without the person’s instructions. An Advocate can only institute legal proceedings on behalf of a person after obtaining instructions

from that person. We find that the learned trial judge exercised her discretion justly and fairly when she condemned the appellant to pay the costs of the irregularly commenced proceedings.”

Counsel also cited the case of **RE MICROSULIS LTD (2)** where SMP contended that proceedings had been brought by solicitors, Merriman White, purporting to act on its behalf but without SMP's authority or knowledge. Toulmin J held that this amounted to a breach of warranty of authority to act. Therefore, both SMP and the respondents in the proceedings were entitled to all of the relief which they were seeking, including an order that Merriman White pay all of their costs occasioned by the wrongful institution of the proceedings.

Based on this it was argued that Messrs. D. Findlay & Associates should be condemned in costs for acting without instructions.

Counsel also argued on the preliminary issue of whether or not this action and the matters herein could be determined without the involvement of the Intended Intervener. Counsel contended that a party could only be added to proceedings if the addition of the party is necessary in resolving the dispute and preventing further litigation. He cited **Order 14 Rule 5 (1) of the High Court Rules, Cap 27 of the Laws of Zambia** which provides that:

“If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit...”

Counsel stated that from the aforesaid Order any persons that are entitled to claim or an action or may be affected by any decision in an action can apply to join proceedings before Court or be joined thereto. He submitted that the Court

should only add a party to proceedings if the addition of that party will help the Court to completely resolve the dispute. He cited the case of the **ATTORNEY GENERAL V ABOUBACAR TALL AND ZAMBIA AIRWAYS CORPORATION (3)** in which it was held that:

“In our view, without prejudicing the outcome of the trial court’s judgment, but going by the documentary and oral evidence on record, the joining of the Attorney General in these proceedings would be necessary to ensure that the matter in the cause may be effectually and completely determined and adjudicated upon and end to any further litigation. Both our order 14 and the English Order 15 as well as Section 13 of Cap 50 are intended to avoid a multiplicity of action. Although the learned trial court relied on a wrong provision of the law in joining the Attorney General to these proceedings, the court had still an inherent jurisdiction to make the order in the interest of justice.”

According to Counsel, the addition of the Intended Intervener who is a shareholder was not necessary as the matters herein could be resolved by the Plaintiff which had the right to sue and be sued for any wrong done to it.

That it was a general principle of Company law that an individual shareholder cannot sue for wrongs done to a company or bring an action in the name of the Company as the Company itself is the proper Plaintiff as was stated in the case of **FOSS V HARBOTTLE (4)** where two shareholders commenced a legal action against the promoters and directors of the Company alleging that they had misapplied the company assets and had improperly mortgaged the Company property. The Court rejected the two shareholders’ claim and held that a breach of duty by the directors of the company was a wrong done to the Company for which it alone could sue.

He also stated that it was trite that a Company was a legal person, with its own corporate identity, separate and distinct from the directors or shareholders and

with its own property rights and interests to which it alone was entitled. That if it was defrauded by a wrongdoer, the company itself must take action against the wrong doer.

He also cited the case of **EDWARDS V HALLIWELL (5)** where it was held that the proper Plaintiff in an action in respect of a wrong alleged to be done to a Company is the company itself.

Counsel also stated that a shareholder could only sue on behalf of the Company if it failed to take action after a wrong was occasioned to it based on the case of **MARY WEATHER (6)** where Lord Heatherly LC held that:

“...shareholders themselves could bring an action in their own names (but in truth on behalf of the Company) against the wrong doing directors for the damage done to the Company; provided always that it was impossible to get the company itself to sue them.”

Lastly Counsel prayed that based on these authorities, the Intended Intervener’s application to join these proceedings be dismissed with costs.

In opposing the application Counsel for the Intended Intervener filed Skeleton Arguments on the 8th of January, 2018. In respect of the first preliminary issue she submitted that she had noted from the contents of the Affidavit in Support aforesaid that the Deponent had alleged and raised issues relating to the Board of Directors of the Intended Intervener (LAICO) particularly allegations as to whether the Board of Directors instructing Counsel for the Intended intervener is the legitimate Board of Directors.

Moreover, that she noted that the Affidavit in Support aforesaid at paragraphs 12;13 and 14 exhibited Court Rulings from the South Tripoli Court of First instance, likewise Counsel urged the Court to take note of the Affidavit in Support of Summons to Intervene dated 7th February, 2017 which also at

paragraph 12 likewise referred to the Court Ruling from the Trial Court of South Tripoli Court.

Counsel further argued that the Court will note that the Court decisions exhibited and referred to by both parties related to the Board of Directors of LAICO and the issue of which Board of Directors was the legitimate one of the aforesaid LAICO which was subject of dispute between the parties.

It was therefore Counsel's submission that the issue relating to the legitimacy of the board of Directors of the Libya Africa Investment Company, was an issue that was obviously pending determination before another Court of another Jurisdiction, which cannot simultaneously be determined before this Court.

Counsel went on to cite the case of **KELVIN HANG'ANDU AND COMPANY (A FIRM) VS WEBBY MULUBISHA (7)** where the Supreme Court emphasized that the jurisdiction of the High Court was unlimited but not limitless.

In line with this authority she maintained that the issue raised by the Plaintiff's was not an issue that could be determined by this Court as it was clearly firstly subject to adjudication before another Court and it would be abuse of Court process to seek to determine the same in light of the fact that it was being adjudicated before the Trial Court of South Tripoli.

In respect of Preliminary Issue Number 2, she submitted that the main issue sought to be determined as per Amended Writ of Summons and Statement of Claim filed in the matter herein was a declaration that the appointment of the current Directors and Company Secretary was legitimate and a further declaration that the appointment of the 1st Defendant and 2nd Defendant as General Manager and Finance Manager was null and void.

Counsel cited **Section 206 of the Companies Act, Cap 388 of the laws of Zambia** which specifies that Directors of the Company shall be appointed by way of Ordinary Resolution, which is governed by **Section 156 of the Companies Act, Cap 388 of the Laws of Zambia**.

Counsel submitted that the provisions of the law aforesaid clearly specifies that the appointment of the Directors is done by Members of the Company. A member of the Company is in accordance with **Section 45 of the Companies Act, Cap 388 of the Laws of Zambia**, a Shareholder of the Company.

It is contended that the question sought to be determined by the Court is a declaration relating to the appointment of the current Directors and Company Secretary of the 1st Plaintiff, which ought to have been done in accordance with the provisions of the law, namely by way of Ordinary Resolution by a simple majority of the Members of the Company at a meeting duly convened and held.

That the Court will further note that the majority shareholders of the 1st Plaintiff was LAICO, the Intended Intervener.

The 2nd Preliminary Issue raised was whether the matter could be fully determined without the Intended Intervener's joinder.

It was her submission that the Shareholders of a Company had an overriding authority over a company's affairs and theirs is a controlling voice over the wishes of mere directors and nominees as was stated in the case of **JOHN PAUL MWILA KASENGELE AND ORS V ZANACO (8)**.

She further submitted that it was emphasized in the said case that it was settled law that directors and manager's dance to the Shareholder's tune. It was thus her submission that a disputed appointment of directors sought to be challenged by the Board of Directors of Majority Shareholders was an issue that could not be determined without the intervention and joinder of the majority shareholder of the Company, who enjoyed overriding authority over the affairs of the Company.

Counsel further made reference to the case of **GERARDUS ADRIANUS VAN BOXTEL V ROSALYN MARY KEARNEY (9)** where the Supreme Court once again emphasized the overriding authority of shareholders of the Company, over and above that of the Directors.

The case of **BANK OF ZAMBIA V CHIBOTE MEAT CORPORATION LIMITED (10)**, was also cited in which the Supreme Court highlighted the same principle of the Shareholder's overriding authority and emphasized that the Shareholders have a Superior claim of right and title and their wishes must be followed even over the wishes of the Board of Directors.

According to Counsel it therefore followed that the majority shareholder namely LAICO being the Intended Intervener had overriding authority of the affairs of the company (the 1st Plaintiff) over and above that of the 2nd, 3rd Plaintiff and any of the purported current Directors and Company Secretary, therefore the question sought for determination by the Court would only be effectively determined with the joinder of the Intended Intervener.

It was also her submission that the 2nd Preliminary issue raised related to issues that ought to be properly raised at the time the Intended Intervener's application was being heard and determined and not as a separate preliminary issue.

During the hearing on 11th January, 2018, Counsel for the Plaintiffs as well as Counsel for the Intended Intervener were before Court. Counsel for the Plaintiff relied on the Affidavit in Support of the application as well as the Skeleton Arguments while Counsel for the Intended Intervener relied on their Skeleton Arguments only as no Affidavit in Opposition was filed.

As already stated the Plaintiffs raised the following preliminary issues:

- 1. Whether or not the application for Joinder of the Intended Intervener is properly before Court in light of the fact that the said Intended Intervener does not wish to intervene herein and had not issued any instructions to that effect.*
- 2. Whether or not this action and the matters herein can be determined without the involvement of the Intended Intervener.*

The arguments advanced in support of the first preliminary issue were that it was clear that the Intended intervener did not wish to be added to the proceedings and had not even issued instructions to this effect. Moreover, that Messrs D. Findlay & Associates (the Advocates of the Intended Intervener) did not have the authority to make the application for the Joinder of the Intended Intervener. That the application for Joinder was premised on an unlawful resolution where the Intended Intervener purported to appoint a new board.

In response to this, it was argued by Counsel for the Intended Intervener that the issue relating to the legitimacy of the Board of Directors of the Libya Africa Investment Company was an issue that was pending determination before another Court of another Jurisdiction, which could not simultaneously be determined before this one. That it would be an abuse of Court process to seek to determine the same.

A perusal of exhibit "ATE3" a copy of the translated Petition and the Judgment in the Affidavit in Support of the Notice of Motion to Raise Preliminary Issues shows that the issue of the Legitimate Board of Directors has already been determined by the Trial Court of South Tripoli. It is stated *inter alia* that:

"Date : 21/11/2016

I, Ali Rajab Swessi, Chief Justice of South Tripoli Court of First Instance,

After viewing the request and the annexes thereto, the provisions of Law No. 23 of 2010 regarding commercial activities, and Article 293, 294 and 295 of Civil Pleadings.

After viewing the Jurisdiction Order No. 328/2016 passed by this Court, which obliged the parties against which the petition has been filed (Minister of Economy, Director of the Department of Companies and Commercial Registrations at the Ministry of Economy, and Head of the Commercial Register - Tripoli, in their

capacities) to register the alterations in the formation of the Libyan African Investment Company's Board of Directors pursuant to the Libya - Africa Investment Portfolio's Decision No. 16 of 2015 in the Commercial Register No. 22188.

Whereas this Decision (16/2015) was registered in the Commercial Register - A1 - Jabal Al-Akhdhar on 12/11/2015, and such registration was deleted pursuant to the Jurisdiction Order No. 55 of 2016 passed by the Swani Court of First Instance for violation of the provisions of law.

Whereas the Steering Committee of the Libya- Africa Investment Portfolio, being the owner of the Libyan Investment Company representing the general assembly thereof pursuant to this company's articles of association, emphasised, in its attached letter that the Decision No. 16 of 2015 was baseless and illegal because it had been passed by an authority that had no legal capacity and working at the portfolios official headquarters in Tripoli; and in another letter emphasized that it did not assign Mr Salah Khalifa Awad to be the Chairman of the Company's Board and he had no relation with this Company; on these grounds we may conclude:

The first second and third parties against which the petition had been filed shall re- register the Decision No. 20 of 2013 passed by the Steering Committee of the Libya- Africa Investment portfolio to nominate the Libyan African Investment Company's Board of Directors at the Commercial Register under the Registration No. 22188."

The above decision was made on 21st November 2016 and the same has not been challenged by the Intended Intervener.

There is no evidence that the issue relating to the legitimacy of the Board of Directors of Libya Africa Investment Company, is an issue that is pending determination before the Courts in Libya as asserted by Mrs. D. Findlay learned Counsel for the Intended Intervener. To put it differently, there is no evidence before this Court that the Courts in Libya are yet to decide which of Resolution No. 20 of 2013 or Decision No. 16 of 2015 is valid and has legal force and effect. The evidence on record, namely the Judgment of South Tripoli Court of First Instance dated 21st November, 2016 quoted above, confirmed Jurisdiction Order No. 55 of 2016 passed by the Swami Court of First Instance which cancelled Decision No. 16 of 2015 and ordered the reinstatement of Resolution No. 20 of 2013.

It is to be noted that Decision No. 16 of 2015 was registered in the Commercial Registry – A1 – Jabal A1 – Akhdhar on 21st November, 2015 but such registration was deleted pursuant to the Jurisdiction Order No. 55 of 2016 passed by the Swani Court of First Instance for violation of the provisions of the law on 28th February, 2016.

Based on the evidence on the Record and the Skeleton Arguments of the parties, I find and hold that the legitimate Board of Directors of Libya Africa Investment Company is that appointed by Resolution No. 20 of 2013 consisting of Mr. Abdulhakim Taher Eshwedi, Mr. Naser Milad Ben – Youssef, Mr. Elsaddig Omar Elshrkasi, Mr. Mohammed Ahmed Almukhtar, Mr. Ahmed Mohamed B. Elardi, Mr. Hassan B. F. Elghayeb and Mr. Nizar Mohamed Elshiref.

I am of the considered view that the authority cited by the Intending Intervener's Counsel of **KELVIN HANG'ANDU AND COMPANY (A FIRM) V WEBBY MULUBISHA (7)** which relates to the issue of this Court's jurisdiction to determine an issue being determined before another Court does not apply to this matter. As indicated above the South Tripoli Court of First Instance

already determined the legitimacy of the Board of Directors of Libya Africa Investment Company by its Judgment of 21st November, 2016 and as such this Court has not made any determination regarding that issue.

Having found that the legitimate Board of Directors of Libya Africa Investment Company is that appointed by Resolution No. 20 of 2013 it follows that the Board of Directors appointed by Decision No. 16 of 2015 is illegitimate and had no authority to instruct Messrs D. Findlay & Associates to make the application for Joinder of the Intended Intervener. In any event the assertion by the Plaintiff that the Intended Intervener does not intend to intervene or to be added as a Defendant to these proceedings has not been controverted.

With respect to the submission that Messrs D. Findlay & Associates should be condemned in costs for acting without instructions, I find and hold that Messrs D. Findlay & Associates had instructions from the purported Intended Intervener as is evident from paragraph 10 of the Affidavit in Support of Summons by Non-Party to Intervene and be Joined to the Proceedings as Defendant filed into Court on 17th February, 2017. It is clear from the exhibits to the Affidavit in Support of Application and/or Notice of Motion to Raise Preliminary Issue that by Decision No. 16 of 2015 the Intended Intervener purported to appoint a new Board of Directors. That on the basis of Decision No. 16 of 2015 a series of Resolutions were subsequently passed including one which appointed Mr. Almahdi S. Shakuna as General Manager and Managing Director of the 1st Plaintiff. Decision No. 16 of 2015 was registered on 12th November, 2015 but deregistered on 28th February, 2016.

Although Decision No. 16 of 2015 was deleted or deregistered the purported Board of Directors appointed thereunder has continued to hold itself out as the legitimate Board of Directors of the Intended Intervener. The assertion by the Plaintiff that the purported Board of Directors forges the Intended Intervener's stationery has not been controverted.

Based on the foregoing, I am of the considered view that the purported Board of Directors is likely to have held itself out as the legitimate Board of Directors of the Intending Intervener at the time of giving Messrs D. Findlay & Associates instructions to apply for Joinder of the Intending Intervener. I do not consider that Messrs D. Findlay & Associates should be made to pay for the misdeeds of its client.

On the second preliminary issue of whether or not this action and the matters herein can be determined without the involvement of the Intended Intervener. Counsel for the Plaintiff argued that a Court should only add a party to proceedings if the addition of that party would help it to completely resolve the dispute.

Moreover, that the addition of the Intervener who was a shareholder was not necessary as the matter could be resolved by the Plaintiff which had the capacity to sue and be sued. It was contended that the general principle of Company law was that an individual shareholder could not sue for wrongs done to a Company or bring an action in the name of the Company as the Company itself was the proper Plaintiff.

In response to these arguments Counsel for the Intended Intervener argued that the Intended Intervener was the majority shareholder of the 1st Plaintiff. Thus since Shareholders had overriding authority over a company's affairs they had a controlling voice over the wishes of the directors and nominees.

That in this case the Intended Intervener had overriding authority of the affairs of the Company over and above the 2nd and 3rd Plaintiff.

In settling this issue it is important to acknowledge that it is now a settled principle of Company Law that a Company is a legal person at law with the capacity to sue and be sued. This was stated in the case of **ASSOCIATED CHEMICALS LTD V HILL & DELAMAINE & ELLIS & CO (11)** where it was held that:

A principle of the law which is now too entrenched to require elaboration is the corporate existence of a company as a distinct legal person... Upon the issue of the certificate of incorporation, the company becomes a body corporate... a Company is not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but no physical existence.

I agree with the case cited by Counsel for the Plaintiff of **EDWARDS V HALLIWELL (5)** where it was held that the proper Plaintiff in an action in respect of a wrong alleged to be done to a Company is the company itself.

I also agree with Mr. Banda learned Counsel for the Plaintiff that a Shareholder can only sue on behalf of the Company if the Company has failed to take action after a wrong is occasioned to it. In the instant case the Plaintiff Company has itself taken action against the Defendants and no shareholder is therefore entitled to take legal action on its behalf.

Having found that the legitimate Board of Directors of Libya Africa Investment Company is that appointed by Resolution No. 20 of 2013 the purported Board of Directors appointed pursuant to Decision No. 16 of 2015 has no *locus standi* in this matter.

For the foregoing reasons the Intended Intervener's application to join the proceedings herein are dismissed with costs to the Plaintiffs.

For these reasons I find merit in the Preliminary Issues raised by the Plaintiffs and sustain them accordingly.

For the avoidance of doubt I find and hold as follows:

1. The application for Joinder of the Intended Intervener was not properly before this Court and hence its dismissal.
2. This action and the matters herein can be determined without the involvement of the Intended Intervener.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 5th day of March, 2018.



.....
WILLIAM S. MWEEMBA
HIGH COURT JUDGE